# THE HUMAN LIFE BILL

## HEARINGS

BEFORE THE

## SUBCOMMITTEE ON SEPARATION OF POWERS

OF THE

## COMMITTEE ON THE JUDICIARY

## UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

## S. 158

A BILL TO PROVIDE THAT HUMAN LIFE SHALL BE DEEMED TO EXIST FROM CONCEPTION

APRIL 23, 24; MAY 20, 21; JUNE 1, 10, 12, AND 18

**Serial No. J-97-16**

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
84-881 O WASHINGTON: 1982

S521-14

## COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

| | |
|---|---|
| CHARLES McC. MATHIAS, JR., Maryland | JOSEPH R. BIDEN, JR., Delaware |
| PAUL LAXALT, Nevada | EDWARD M. KENNEDY, Massachusetts |
| ORRIN G. HATCH, Utah | ROBERT C. BYRD, West Virginia |
| ROBERT DOLE, Kansas | HOWARD M. METZENBAUM, Ohio |
| ALAN K. SIMPSON, Wyoming | DENNIS DECONCINI, Arizona |
| JOHN P. EAST, North Carolina | PATRICK J. LEAHY, Vermont |
| CHARLES E. GRASSLEY, Iowa | MAX BAUCUS, Montana |
| JEREMIAH DENTON, Alabama | HOWELL HEFLIN, Alabama |
| ARLEN SPECTER, Pennsylvania | |

VINTON DEVANE LIDE, *Chief Counsel*
QUENTIN CROMMELIN, JR., *Staff Director*

---

### SUBCOMMITTEE ON SEPARATION OF POWERS

JOHN P. EAST, North Carolina, *Chairman*

| | |
|---|---|
| ORRIN G. HATCH, Utah | MAX BAUCUS, Montana |
| JEREMIAH DENTON, Alabama | HOWELL HEFLIN, Alabama |

JAMES MCCLELLAN, *Chief Counsel and Staff Director*
KEN KAY, *Minority Counsel*

# CONTENTS

## PROPOSED LEGISLATION


Page

S. 158, a bill to provide that human life shall be deemed to exist from conception (original form) ..... 1, 1117
S. 158, a bill to provide that human life shall be deemed to exist from conception (revised form) ..... 1120
Hearings held on:
Thursday, April 23, 1981 ..... 1
Friday, April 24, 1981 ..... 37
Wednesday, May 20, 1981 ..... 63
Thursday, May 21, 1981 ..... 153
Monday, June 1, 1981 ..... 307
Wednesday, June 10, 1981 ..... 509
Friday, June 12, 1981 ..... 773
Thursday, June 18, 1981 ..... 913


## STATEMENTS


East, Chairman John P. (Opening) ..... 1, 37, 63, 153, 307, 509, 773, 913
Hatch, Orrin G ..... 4
Dole, Robert ..... 6
Baucus, Max ..... 64, 154, 307
Heflin, Howell ..... 430
Denton, Jeremiah ..... 511


## CHRONOLOGICAL LIST OF WITNESSES

### THURSDAY, APRIL 23, 1981


Nickles, Hon. Don, a U.S. Senator from the State of Oklahoma ..... 6
Lejeune, Dr. Jerome, professor of fundamental genetics, Medical College of Paris, France ..... 7
Gordon, Prof. Hymie, professor and chairman, Department of Medical Genetics, Mayo Clinic, Rochester, Minn ..... 7
Mathews-Roth, Dr. Micheline M., principal research associate, Harvard University Medical School ..... 7
Bowes, Dr. Watson A., Jr., division of perinatal medicine, University of Colorado, Denver; and Dr. McCarthy DeMere, law professor, Memphis State University, Memphis, Tenn ..... 24


### FRIDAY, APRIL 24, 1981


Bongiovanni, Dr. Alfred M., professor, University of Pennsylvania medical faculty ..... 39
Williams, Dr. Jasper, Williams Clinic, Chicago, Ill ..... 46
Rosenberg, Dr. Leon, professor and chairman, Department of Human Genetics, Yale University Medical School ..... 48


### WEDNESDAY, MAY, 20, 1981


Thomas, Dr. Lewis, chancellor, Memorial Sloan-Kettering Cancer Center, New York, N.Y ..... 73

Page

Grobstein, Dr. Clifford, professor of biological science and public policy, University of California, San Diego ..... 75
Neel, Dr. James, chairman, Department of Human Genetics, University of Michigan Medical School, Ann Arbor, Mich ..... 77
Avery, Dr. Mary Ellen, Thomas Morgan Rotch Professor of Pediatrics and physician-in-chief, Children's Hospital Medical Center, Boston, Mass ..... 78
Callahan, Dr. Daniel, director, Hastings Center, Hastings-on-Hudson, N.Y ..... 102
Tyler, Dr. Carl, Assistant Director for Science, Center for Health Promotion and Education, Centers for Disease Control, Atlanta, Ga ..... 104
Davis, Dr. Jessica G., director, child development center, chief, division of genetics, North Shore University Hospital, Manhasset, N.Y ..... 106
Ryan, Dr. George, professor of obstetrics and gynecology and community medicine, University of Tennessee Center for the Health Sciences, Memphis, Tenn ..... 109
Jefferson, Dr. Mildred F., assistant clinical professor of surgery, Boston University School of Medicine, Boston, Mass ..... 112

THURSDAY, MAY 21, 1981

Packwood, Hon. Bob, a U.S. Senator from the State of Oregon ..... 155
Moynihan, Hon. Daniel Patrick, a U.S. Senator from the State of New York ..... 158
Dougherty, Hon. Charles F., a U.S. Representative from the State of Pennsylvania ..... 163
Mazzoli, Hon. Romano L., a U.S. Representative from the State of Kentucky ..... 165
Fenwick, Hon. Millicent, a U.S. Representative from the State of New Jersey ..... 178
Galebach, Stephen H., attorney, Covington & Burling, Washington, D.C ..... 197
Tribe, Laurence H., professor of law, Harvard University, Cambridge, Mass ..... 242
Noonan, John T., professor, California School of Law, Berkeley, Calif ..... 256
Van Alstyne, William, professor, Duke University School of Law, Durham N.C ..... 275

MONDAY, JUNE 1, 1981

Bork, Prof. Robert, Yale Law School, New Haven, Conn ..... 308
Nagel, Prof. Robert, Cornell University Law School, Ithaca, N.Y ..... 317
Cox, Prof. Archibald, Harvard University Law School, Cambridge, Mass ..... 328
Uddo, Prof. Basile, Loyola University Law School, New Orleans, La ..... 351
Degler, Dr. Carl, Margaret Byrne Professor of American History, Stanford University, Stanford, Calif ..... 433
Mohr, Prof. James, University of Maryland, Baltimore County, Md ..... 439
Marshner, Prof. William, Christendom College, Front Royal, Va ..... 449
Rosenblum, Prof. Victor, Northwestern University, Chicago, Ill ..... 464

WEDNESDAY, JUNE 10, 1981

Dorsen, Norman, professor, New York University School of Law, New York, N.Y ..... 515
Eisenberg, Theodore, professor, UCLA School of Law, Los Angeles, Calif ..... 576
Rice, Prof. Charles, Notre Dame University, Notre Dame, Ind ..... 609
Witherspoon, Prof. Joseph P., University of Texas School of Law, Austin, Tex ..... 628
Baker, John, professor, Louisiana State University Law Center, Baton Rouge, La ..... 730
Bellamy, Carol, city council president, New York City Council ..... 758

FRIDAY, JUNE 12, 1981

Wilkinson, David, attorney general, State of Utah ..... 774
Thompson, William P., stated clerk, general assembly, United Presbyterian Church, New York, N.Y ..... 793
Siegman, Rabbi Henry, executive director, American Jewish Congress, New York, N.Y ..... 804
Siegel, Rabbi Seymour, Ralph Simon Professor of Ethics and Theology, Jewish Theological Seminary of America, Washington, D.C ..... 818
Ruether, Rosemary Radford, Georgia Harkness Professor of Applied Theology, Garrett-Evangelical Theological Seminary, Evanston, Ill ..... 825
Simmons, Rev. Paul D., associate professor of Christian ethics, Southern Baptist Theological Seminary, Louisville, Ky ..... 843

Page

Destro, Robert A., general counsel, Catholic League for Religious and Civil Rights, Milwaukee, Wis ..... 870

THURSDAY, JUNE 18, 1981

Hyde, Hon. Henry, a U.S. Representative from the State of Illinois ..... 914
Weddington, Sarah, Washington, D.C ..... 944
Gerster, Dr. Carolyn, Scottsdale, Ariz ..... 962
Collins, Judy, New York, N.Y ..... 974
Meehan, Mary, Washington, D.C ..... 1014
Boyle, Joseph, M.D., American Medical Association, accompanied by Harry N. Peterson, director, division of legislative activities ..... 1035
Nathanson, Bernard H., M.D., cofounder of National Abortion Rights Action League, New York, N.Y ..... 1045
Goldstein, Naomi, M.D., American Psychiatric Association ..... 1051
Willke, John C., M.D., National Right to Life Committee, Washington, D.C ..... 1065
Ashcroft, John, attorney general of the State of Missouri ..... 1105

ALPHABETICAL LISTING AND SUBMITTED MATERIAL

Ashcroft, John:
Testimony ..... 1105
Addendum:
Letter, June 16, 1981, from David L. Wilkinson, attorney general, State of Utah, to Senator John P. East ..... 1110
Article, "Wilkinson Challenged on Abortion Stance," from Salt Lake Tribune, June 13, 1981 ..... 1112
Avery, Dr. Mary Ellen:
Testimony ..... 78
Prepared statement ..... 99
Baker, Prof. John:
Testimony ..... 730
Prepared statement ..... 739
Baucus, Senator Max: [1]
Letters from:
Dr. James D. Ebert, president, Carnegie Institute of Washington, April 21, 1981 ..... 67
Dr. Robert H. Ebert, president, Milbank Memorial Fund, April 22, 1981 ..... 68
Dr. Sherman M. Mellinkoff, dean, UCLA School of Medicine, Los Angeles, May 7, 1981 ..... 69
Dr. Arno G. Motulsky, director, Center for Inherited Diseases, University of Washington School of Medicine, April 24, 1981 ..... 71
Dr. Frederick C. Robbins, president, Institute of Medicine, National Academy of Sciences, April 23, 1981 ..... 72
Erwin N. Griswold, former Solicitor General, May 5, 1981 ..... 192
Philip B. Kurland, professor of law, University of Chicago, April 17, 1981 ..... 193
Charles Alan Wright, William B. Bates Professor, University of Texas Law School, April 28, 1981 ..... 195
Memorandum of United States Catholic Conference, from Wilfred R. Caron, re Human Life Bills, S. 158 and H.R. 900 ..... 897
Bellamy, Carol:
Testimony ..... 758
Prepared statement ..... 767
Bongiovanni, Dr. Alfred M.:
Testimony ..... 39
Prepared statement ..... 42
Bork, Prof. Robert:
Testimony ..... 308
Prepared statement ..... 312
Bowes, Dr. Watson A., Jr., testimony ..... 24
Boyle, Dr. Joseph:
Testimony ..... 1035
Prepared statement ..... 1038

[1] Numerous other letters, statements, and other submissions, presented for the record by Senator Baucus, appear in the appendix volume—vol. 2.

Boyle, Dr. Joseph—Continued
Articles:
Page
"Human Life Bill Arouses More Opposition," from Science, vol. 212, June 19, 1981 ..... 1043
"Can Congress, by Law, Establish When Life Begins?" from the Congressional Record—House, June 8, 1981 ..... 1043
Callahan, Dr. Daniel:
Testimony ..... 102
Prepared statement ..... 127
Collins, Judy:
Testimony ..... 974
Prepared statement ..... 979
Letter, May 22, 1981, from Florette R. Koffler to Senator Max Baucus ..... 996
Prepared statement of Andrea Marks, M.D. ..... 997
Letter, May 11, 1981, from Andrea Marks, M.D., to Senator Max Baucus ..... 1000
Prepared statement of Sanford Roberts ..... 1001
Prepared statement of Vicki Smith Savageau ..... 1004
Prepared statement of Paula Span ..... 1011
Article, "A Father and Senator Helms," by Tom Braden, from the Washington Post, June 5, 1981 ..... 1014
Cox, Prof. Archibald:
Testimony ..... 328
Prepared statement ..... 331
Davis, Dr. Jessica G.:
Testimony ..... 106
Prepared statement ..... 135
Degler, Dr. Carl, testimony ..... 433
DeMere, Dr. McCarthy:
Testimony ..... 24
Prepared statement ..... 32
Destro, Robert A.:
Testimony ..... 870
Prepared statement ..... 875
Dorsen, Dr. Norman:
Testimony ..... 515
Prepared statement ..... 520
Memorandum on the Power of Congress to Curtail the Authority of the Federal Courts, by Craig J. Blakely, et al ..... 527
Dougherty, Representative Charles F.:
Testimony ..... 163
Prepared statement, jointly prepared with Representative Romano L. Mazzoli ..... 167
"Legal Rationale for Human Life Bill," from the Congressional Record, April 9, 1981 ..... 171
East, Senator John P.:
Letters and mailgrams from:
Association of American Physicians and Surgeons, Inc., June 15, 1981, from Curtis W. Caine, president ..... 1084
Missouri Doctors for Life, June 15, 1981, from Anne E. Bannon, chairman ..... 1084
American Association of Pro-Life Pediatricians, June 10, 1981, from Eugene F. Diamond, secretary ..... 1086
Joseph P. Drozda, Jr., M.D. ..... 1087
Edwin Ryan ..... 1087
Richard M. Beaven, M.D. ..... 1088
Northwest Ohio Plastic Surgeons, Inc., June 24, 1981, to James H. Sammons, executive vice president, AMA, from George J. Babiak, M.D. ..... 1089
Joseph R. Stanton, M.D., F.A.C.P. ..... 1090
Panel of constitutional law professors, June 18, 1981 ..... 1092
"Report on Criminal Abortion," Resolution 1859, by the American Medical Association ..... 1097
Eisenberg, Prof. Theodore:
Testimony ..... 576
Prepared statement ..... 580

| | Page |
|---|---|
| Eisenberg, Prof. Theodore—Continued | |
| Memorandum on the Constitutionality of Section 2 of S. 158 | 585 |
| Letter to Senator Max Baucus, April 28, 1981 | 606 |
| Fenwick, Representative Millicent: | |
| Testimony | 178 |
| Prepared statement | 181 |
| Galebach, Stephen H.: | |
| Testimony | 197 |
| Articles: | |
| "A Human Life Statute," from the Human Life Review, Winter, 1981 | 203 |
| "Breakthrough," by William F. Buckley, Jr., reprinted with permission | 234 |
| Statement, "The Constitutionality of Withdrawal of Lower Federal Court Jurisdiction in the Human Life Bill" | 235 |
| Gerster, Dr. Carolyn: | |
| Testimony | 962 |
| Prepared statement | 967 |
| Article, "Why Not Keep Legalized Abortion for Rape and Incest?" | 969 |
| Goldstein, Dr. Naomi: | |
| Testimony | 1051 |
| Prepared statement | 1057 |
| Position Statement of American Psychiatric Association | 1064 |
| Gordon, Prof. Hymie, testimony | 7 |
| Grobstein, Dr. Clifford: | |
| Testimony | 75 |
| Prepared statement | 94 |
| Hyde, Representative Henry: | |
| Testimony | 914 |
| Prepared statement | 923 |
| Articles: | |
| "Plan Your Children—For Health and Happiness" | 931 |
| Booklet from Planned Parenthood Association | 932 |
| Jefferson, Dr. Mildred F.: | |
| Testimony | 112 |
| Prepared statement | 149 |
| Lejeune, Dr. Jerome, testimony | 7 |
| Marshner, Prof. William: | |
| Testimony | 449 |
| Prepared statement | 454 |
| Mathews-Roth, Dr. Micheline M., testimony | 7 |
| Mazzoli, Representative Romano L.: | |
| Testimony | 165 |
| Prepared statement, jointly prepared with Representative Charles F. Dougherty | 167 |
| Meehan, Mary: | |
| Testimony | 1014 |
| Prepared statement | 1018 |
| Mohr, Prof. James: | |
| Testimony | 439 |
| Prepared statement | 443 |
| Moynihan, Senator Daniel Patrick: | |
| Testimony | 158 |
| Prepared statement | 160 |
| Nagel, Prof. Robert: | |
| Testimony | 317 |
| Prepared statement | 321 |
| Nathanson, Dr. Bernard H.: | |
| Testimony | 1045 |
| Prepared statement | 1048 |
| Neel, Dr. James, testimony | 77 |
| Nickles, Senator Don, testimony | 6 |
| Noonan, Prof. John T.: | |
| Testimony | 256 |
| Prepared statement | 261 |
| Packwood, Senator Bob, testimony | 155 |
| Rice, Prof. Charles: | |
| Testimony | 609 |
| Prepared statement | 612 |

Page

Rosenberg, Dr. Leon, testimony ..... 48
Rosenblum, Prof. Victor:
Testimony ..... 464
Prepared statement ..... 469
Bibliography ..... 490
Article, "Abortion and Midwifery: A Footnote in Legal History," by Dennis J. Horan and Thomas J. Marzen, from New Perspectives on Human Abortion ..... 492
Ruether, Rosemary Radford:
Testimony ..... 825
Prepared statement ..... 831
Ryan, Dr. George M.:
Testimony ..... 109
Prepared statement ..... 144
Siegel, Rabbi Seymour:
Testimony ..... 818
Prepared statement ..... 822
Siegman, Rabbi Henry:
Testimony ..... 804
Prepared statement ..... 808
Simmons, Rev. Paul D.:
Testimony ..... 843
Prepared statement ..... 849
Article, "The 'Human' as a Problem in Bioethics," from the Review and Expositor, Winter, 1981 ..... 853
Thomas, Dr. Lewis, testimony ..... 73
Thompson, William P.:
Testimony ..... 793
Prepared statement ..... 798
Tribe, Prof. Laurence H.:
Testimony ..... 242
Prepared statement ..... 248
Tyler, Dr. Carl:
Testimony ..... 104
Prepared statement ..... 132
Uddo, Prof. Basile:
Testimony ..... 351
Article, "A Wink From the Bench: The Federal Courts and Abortion," from the Tulane Law Review ..... 356
Van Alstyne, Prof. William:
Testimony ..... 275
Letters to:
Senator Max Baucus, May 14, 1981 ..... 279
Representative Don Edwards, March 31, 1981 ..... 280
Senator Orrin G. Hatch, May 5, 1981 ..... 283
Weddington, Sarah:
Testimony ..... 944
Prepared statement ..... 949
List of statements from organizations submitted by Ms. Weddington [2] ..... 960
Wilkinson, David:
Testimony ..... 774
Prepared statement ..... 778
Williams, Dr. Jasper, testimony ..... 46
Willke, Dr. John C.:
Testimony ..... 1065
Prepared statement ..... 1070
Witherspoon, Prof. Joseph P.:
Testimony ..... 628
Prepared statement ..... 639

[2] Statements of organizations submitted by Ms. Weddington appear in the appendix—vol. 2.

# THE HUMAN LIFE BILL

THURSDAY, APRIL 23, 1981

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10 a.m., in room 1202, Dirksen Senate Office Building, Senator John East (chairman of the subcommittee) presiding.

Present: Senator Hatch.

Also present: Senators Dole and Nickles.

Staff present: James McClellan, chief counsel and staff director; Grover Rees, Craig Stern, and Jim Sullivan, counsels.

## OPENING STATEMENT OF CHAIRMAN JOHN P. EAST

Senator EAST. I wish to convene this first session of the Subcommittee on Separation of Powers. I would like to welcome each and every one of you here to our session.

I would like to make a brief statement as to where I feel generally this committee is going in terms of its general mission and then to focus in particular upon the bill that is currently before us, S. 158.

The Separation of Powers Subcommittee was once chaired by a distinguished North Carolinian, Senator Sam Ervin of North Carolina. The subcommittee, under the chairmanship of Senator Kennedy, had been laid aside and was revived under the chairmanship of Senator Strom Thurmond, the chairman of our committee, and I have the honor—for which I am deeply grateful—to pick up in the tradition of that great North Carolinian.

I would like to say that, in my judgment, I have the best job in the U.S. Senate because the Separation of Powers Subcommittee allows us to go into the two most fundamental concepts of American National Government, namely, the concept of separation of powers and federalism, and those two concepts, again, are the essence of the American system and will allow us a broad scope in which to examine critical matters, including such matters as S. 158.

I would like to briefly read this bill to state what at least I, as the chairman, think is the effect of it, the import of it, and then we shall turn to this matter of our testimony.

This bill states:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 42 of the United States Code shall be amended at the end thereof by adding the following new chapter:

CHAPTER 101

SECTION 1. The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception.

The Congress further finds that the fourteenth amendment to the Constitution of the United States was intended to protect all human beings.

Upon the basis of these findings, and in the exercise of the powers of the Congress, including its power under section 5 of the fourteenth amendment to the Constitution of the United States, the Congress hereby declares that for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, human life shall be deemed to exist from conception, without regard to race, sex, age, health, defect, or condition of dependency; and for this purpose "person" shall include all human life as defined herein.

SEC. 2. Notwithstanding any other provision of law, no inferior Federal court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in any case involving or arising from any State law or municipal ordinance that (1) protects the rights of human persons between conception and birth, or (2) prohibits, limits, or regulates (a) the performance of abortions or (b) the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions.

SEC. 3. If any provision of this Act or the application thereof to any person or circumstance is judicially determined to be invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected by such determination.

[Printed copies of S. 158 in original form and a subsequent revised form appear immediately following hearing on page 1117.]

Senator EAST. I would like to attempt to summarize what, in my estimation, the purpose of this act is. I will happily stand corrected if testimony, either of a medical or legal constitutional nature, would cause us to reach another conclusion. Again, I speak only for myself. I am only summarizing for myself as chairman of this subcommittee, and my views here are not to be imputed to anyone else present here this morning or likely to be gathered with us in the future.

As I understand this bill, we would attempt to define this question of life and whether it begins at the time of conception. If the determination would be that, yes, life does commence at the time of conception, then the effect of this bill would mean that the unborn child—the fetus—is protected as a person within the meaning of the due process clause of the 14th amendment, as are all other persons under the U.S. Constitution. That is the first basic thrust of this proposed legislation.

What would I think the practical effect of it would be? I would presume it would be this: The *Roe* v. *Wade* decision of 1973 would be vitiated—negated—because in the majority opinion of that case it was indicated that if person included the unborn, that their decision would no longer be operative, and hence, if person is so defined, by the view of the Court in its own majority opinion, *Roe* v. *Wade* would be vitiated.

The issue would revert to the States. The States would then have the power to deal with the issue of abortion, as they had the power to do prior to *Roe* v. *Wade*.

In dealing with the issue of abortion, they of course would be constrained by the requirements of the 14th amendment in terms of treating any persons—in this case, the unborn, or the fetus.

I do not wish to imply or to suggest that the answers are easy here, either of a medical nature or of a legal or constitutional nature, but it did occur to me that there is an obligation—a man-

date—on the part of the chairman of the subcommittee at least to try to give some conception of where he thinks it is that we are going.

In my judgment, at this point, without having heard all the evidence, that would be my assessment of where we are headed.

Let me comment, if I might, please, as chairman, on the nature of the hearings that we will be conducting. The hearings today and tomorrow will deal with the medical question—the scientific question—as to when life commences. Does it commence with conception? If so, what is the nature of that life? And so forth.

Again, our testimony today and tomorrow will be on the medical and scientific question, and I would like, as chairman, to make sure that our comments, either by the witnesses or by those interrogating, might be reasonably related to that issue.

We will subsequently have hearings on the legal and constitutional implications, at which time we would like to then keep our focus on those matters, and they are fundamental and important.

We shall also want to consider the possibility of additional hearings if we need them. I want to assure each and every person here, either on this panel or in this audience or in the country as a whole, that I am fully aware of the infinite importance of this issue. It is a prime issue in terms of the implications of this legislation and what it would do or what it would not do.

I intend to honor my responsibility, as chairman of this subcommittee, to see that the issues are examined thoroughly and exhaustively, and that when we have completed this process every person can say, whatever side they came down on on this issue, the hearings were fair, extensive, and exhaustive, be it on the question of the medical or scientific question, or be it on the issue of the constitutional or statutory implications, or other matters that might be germane or pertinent and worthy of our consideration.

I would like, then, as we turn to this first session this morning on the question of the scientific and medical dimensions of the problem, that we focus upon that issue. I would like to encourage the witnesses, please, to make their remarks as concise and as brief and to the point as they can, consistent with making their point. We are not trying to gloss it over. We are simply trying to make sure that we operate on a premise of conciseness, and brevity, and germaneness.

I will try to adhere to my own rule. I would like to implore my colleagues on the panel to adhere to that rule.

Again, this is not to be understood as any effort to limit the scope or the extent of debate over time. I am only asking that in a given session we hold to the time frame, that it not run away from us, that finally we become so exhausted and deadened we do not even know what others are saying, let alone care what they are saying.

I have been in the college teaching profession, and I have found 50 minutes is enough to wear somebody out, and I find in the Senate it is not uncommon to go 2, 3, and 4 hours. I submit, nobody—nobody—can follow a serious discussion in that kind of time frame.

So, what I would like to do is to keep these hearings on track and keep them germane, but I assure everyone that we will do in

this subcommittee whatever is necessary over a period of time to assure that the issue is thoroughly and exhaustively considered.

Senator Hatch, I welcome you this morning; Senator Dole; Senator Nickles.

Senator Hatch, I would like to yield to you so that you may make a statement.

## STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. Thank you, Senator East.

I think there have been some misconceptions and misunderstandings about my attitude toward these hearings.

The Constitution Subcommittee recently discontinued its joint participation in these hearings, not because of any personal difficulties between the chairman, Senator East, and me, but because of the inherent difficulties in joint congressional hearings.

There are differing perspectives between our subcommittees on a number of matters, including (a) the scope of these hearings—that is, limitation to medical testimony—and (b) specific witness lists. These are the types of difficulties that are inherent in this process.

Senator East, in my opinion, has exercised his soundest judgment, and I have come to respect that judgment. I have chosen to allow him to develop these hearings—at least from my perspective—in the full discretion of that judgment.

Frankly, I am not yet entirely comfortable with the measures being considered here, particularly with respect to their constitutionality.

I am second to no one in my opposition to abortion, but I am equally committed to sound constitutional principles, and although I disbelieve in indiscriminate abortion in this country, I believe that the Constitution is the most important political document in the world.

I saw too many of my colleagues throw aside what both they and I know are sometimes sound constitutional principles in supporting some other matters through the years here. I want to make sure that these constitutional principles are considered and not ignored.

Thus, I will keep an open mind on these measures as well as the possibility of hearings later in my own subcommittee.

I want to compliment Senator East for his comments here today—that, in addition to the testimony given here today, he intends to hold broad and embracing hearings with regard to these issues that are of monumental importance, where both sides really do need to be heard. And he is starting today with some very interesting witnesses whom I wish we could all sit and listen to.

I have two other committee problems this morning, both of which are also equally impelling to me.

One of the things that I have difficulties with is, of course, the conflict that this type of a bill creates. S. 158 would make the congressional finding that human life shall be deemed to exist from the point of conception without regard to race, age, health, defect, or condition of dependency. It would make the further finding that person for purposes of the due guarantees of the 14th amendment would include all human life.

Does Congress have this authority under the 14th amendment? That is one of the major questions.

I emphasize that I believe in an extremely narrow conception of congressional authority under the 14th amendment. If I believed, however, in a more expansive interpretation of that authority, I would easily rely on such cases as *Katzenbach* v. *Morgan, South Carolina* v. *Katzenbach, Jones* v. *Mayer,* and *Fullilove* v. *Klutznick.* I choose not to do so because I believe that these cases were far too broad in their definition of congressional authority.

The majority of these cases argued that Congress, so long as it had a "slight rational" basis for doing so, could legislate with respect to the 14th amendment.

In *Katzenbach*, the Court allowed Congress to outlaw literacy tests in New York under the 14th amendment's authority, despite an earlier decision by the Court that literacy tests were not necessarily violative of the amendment.

The better reasoned dissent in *Katzenbach* by Harlan, in my opinion, even though it interpreted Congress 14th amendment authority much more narrowly, nevertheless concluded that the judicial branch must make its constitutional interpretations under the 14th amendment with appropriate deference for Congress legislative findings.

It requires a far more rigorous standard than the majority's "slight rational basis" standard because the findings must actually influence the Court to alter its decision, but it nevertheless requires that the Court pay them substantial heed.

Thus, under either view of the enforcement authority—and we choose, or at least I choose, the narrower view—Congress has a role in amplifying upon the terms of the 14th amendment.

Congress itself is not subject to the same kind of institutional limitations in defining when life begins as is the Court. This is the kind of decision that it routinely makes as part of the legislative process.

Congress may, in this instance—if a case can be made—be simply providing legislative facts to the Court to better enable it to make its constitutional decision.

Some of us find it ironic that some of the liberals—who so applauded decisions like *Katzenbach* and *Fullilove* when they were handed down because they granted such extensive powers to Congress—now that they see that these decisions could cut both ways, are up in arms about the quote constitutionality unquote of Congress powers to enforce the 14th amendment.

At least I am trying to be consistent. I opposed *Katzenbach* and *Fullilove* when they were decided and will refuse to rely on them, although I could, since they are the law of the land, as a basis for S. 158 or anything else.

So, what it comes down to is this. This is one of the major issues in our country today. It is an important issue. I am reserving judgment on it because I believe that we must keep the Constitution viable and we must keep the Constitution working in the best possible way.

But, on the other hand, we have broadened the 14th amendment in many ways pleasing to a number of people in our society, and perhaps there should be no lack of justification for broadening the 14th amendment in this way.

I have not made up my mind. I am very interested in these hearings, Mr. Chairman. You have some distinguished witnesses. They deserve to be listened to. Again, I am very pleased that you are going to hold extensive hearings on this matter, where we can listen to witnesses with alternative viewpoints as well, and I think that stands well for you, for this committee, and for all of us, and I am very grateful to you for that.

Senator EAST. Thank you, Senator Hatch. I deeply appreciate your remarks and your being with us this morning.

As I understand it, Senator Dole and Senator Nickles are not to be enticed into making any remarks.

## STATEMENT OF SENATOR ROBERT DOLE

Senator DOLE. I would just say, Mr. Chairman, I appreciate—as a member of the full committee, not the subcommittee—being present to hear some of the testimony.

I applaud the chairman for conducting the hearings and for also indicating very specifically that there will be further hearings and that everyone will be heard. I think that is a matter of concern to some who understood that there would be only 2 days of hearings. Maybe that will clarify that question.

I know of no more delicate issue. There is no middle ground, where politicians generally like to be. So, I am here.

Senator EAST. Thank you, Senator Dole.

Senator Nickles?

## STATEMENT OF HON. DON NICKLES, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator NICKLES. I apologize for having to leave, but I am very interested in this subject and your bill. I compliment you for bringing it forward. I have looked at your witness list. I think you have very qualified and knowledgeable people testifying.

I appreciate and respect Senator Hatch's opinion as far as the constitutionality is concerned. I wish you well in this regard and hope to be active and review this legislation as you proceed, through your subcommittee.

Senator EAST. Thank you, Senator. I appreciate your coming.

We will, then, proceed—unless I hear objection to the contrary—with our first three witnesses: Dr. Jerome Lejeune, Prof. Hymie Gordon, and Dr. Micheline Mathews-Roth.

Would you please come forward to the witness chairs?

If we could have order, please—we will commence here with our testimony.

Again, I would like to welcome Dr. Jerome Lejeune, Prof. Hymie Gordon, and Dr. Micheline Mathews-Roth.

Dr. Lejeune is professor of fundamental genetics at the Medical College of Paris, France, and is a world-renowned human geneticist.

Prof. Hymie Gordon is professor and chairman of the department of medical genetics at Mayo Clinic in Rochester, Minn.

Dr. Micheline Mathews-Roth is a principal research associate at the Harvard University Medical School and is a member of the American Society for Clinical Investigation, and has done pioneering work in photobiology.

I would like to welcome the three of you here this morning. I would like—if that is suitable to the three of you—to let each of you present your testimony, and then we could open up for questions after the three of you have spoken.

Again, I would remind those here that the purpose of this testimony from people with diverse medical and scientific backgrounds is to bring their expertise to bear on this question as to precisely what is conception, and having defined that, or tried to understand it, is that the point at which life begins? And to that point we are now directing our attention.

Dr. Lejeune, I would appreciate your commencing, please.

**STATEMENTS OF DR. JEROME LEJEUNE, PROFESSOR OF FUNDAMENTAL GENETICS, MEDICAL COLLEGE OF PARIS, FRANCE; PROF. HYMIE GORDON, PROFESSOR AND CHAIRMAN, DEPARTMENT OF MEDICAL GENETICS, MAYO CLINIC, ROCHESTER, MINN.; AND DR. MICHELINE M. MATHEWS-ROTH, PRINCIPAL RESEARCH ASSOCIATE, HARVARD UNIVERSITY MEDICAL SCHOOL**

Dr. LEJEUNE. Mr. Chairman and members, my name is Jerome Lejeune. I am a doctor in medicine and in science, and I am in charge of the mentally defective outpatients in the Hopital des Enfants Malades—Sick Children's Hospital of Paris.

After spending 10 years in full-time research, I am professor of fundamental genetics at the University Rene Descartes.

Some 23 years ago, I described the first chromosomal disease in our species, the extra chromosome number 21 typical of mongolism. For this work, I had the privilege of receiving the Kennedy Award from the late President and the William Allen Memorial Medal from the American Society of Human Genetics, and I am a member of the American Academy of Arts and Sciences.

With my colleagues at the Institut de Progenese of Paris, we are involved in the description of basic facts of human heredity. By a comparative study of mammalian species, including the great apes, we are studying the chromosomal changes which occurred during evolution. In our own species, we analyze more precisely the deleterious effects of some chromosomal aberrations.

This very year, we have demonstrated for the first time that a particular disease—the so-called fragile *x* syndrome—associating a fragility of the *x* chromosome with severe mental retardation is amenable to therapy. That we have proved by curing the chromosomal disease in vitro, and if appropriate supply of the chemicals used to cure the chromosome in vitro—that is, monocarbons and their carrier molecules—is given to children, that does improve their mental abilities.

Thus, we know that from the most fundamental research on mechanisms of life, we can go to direct protection of endangered human lives.

But when does a person begin? I will try to give the most precise answer to that question actually available to science. Modern biology teaches us that ancestors are united to their progeny by a continuous material link, for it is from the fertilization of the female cell—the ovum—by the male cell—the spermatazoa—that a new member of the species will emerge.

Life has a very, very long history, but each individual has a very neat beginning—the moment of its conception.

The material link I was speaking about is the molecular thread of DNA. In each reproductive cell, this ribbon, roughly one meter long, is cut into pieces—23 in our species—and each segment is so carefully coiled and packaged—like a magnetic tape in a minicassette—that under the microscope it appears like a little rod, a chromosome.

As soon as the 23 paternally derived chromosomes are united through fertilization to the 23 maternally derived chromosomes, the full genetic information necessary and sufficient to express all the inborn qualities of the new individual is gathered. Exactly as the introduction of a minicassette into a tape recorder will allow the restitution of the symphony, the new being begins to express himself as soon as he has been conceived.

Natural science and the sciences of the law speak the same language. Of an individual enjoying a robust health, a biologist would say he has a good constitution. Of a society developing itself harmoniously to the benefit of all its members, a legislator would say it has an equitable constitution.

A legislator could not conceive what a given law is before all its terms have been clearly and fully spelled out. But when this full information has been given, and when the law has been voted for, then it can help defining the terms of the constitution.

Nature works the same way. The chromosomes are the tables of the law of life, and when they have been gathered in the new being—the voting process is fertilization, itself—they fully spell out his personal constitution.

What is bewildering is the minuteness of the scripture. It is hard to believe, although beyond any possible doubt, that the whole genetic information necessary and sufficient to build our body and even our brain, the most powerful problem-solving device, even able to analyze the laws of the universe, could be epitomized so that its material substratum could fit neatly on the point of a needle.

Even more impressive, during the maturation of the reproductive cells, the genetic information is reshuffled in so many ways that each conceptus receives an entirely original combination which has never occurred before and will never again. Each conceptus is unique and thus irreplaceable.

Identical twins and true hermaphrodites are exceptions to that general rule: One man, one genetic makeup. But, interestingly enough, these exceptions have to take place at the time of conception. Later accidents could not lead to harmonious development.

All these facts were known long ago, and everybody was agreeing that test tube babies, if produced, would demonstrate the autonomy of the conceptus over which the test tube has no title of property. Test tube babies now do exist.

If the ovum of a cow is fertilized by a bull's sperm, the tiny conceptus, floating freely in the liquid, starts immediately its cattle's career. Normally, it would travel for a week through the fallopian tube and reach the uterus. But thanks to modern technology, it can travel much farther, even across the ocean.

The best shipping equipment for such a 2-milligram cattle being is to introduce it inside the fallopian tube of a female rabbit. Air freight is much less for a rabbit than for a pregnant cow.

At destination, the miniscule animal is carefully removed and delicately settled inside the uterus of a recipient cow. Months after, the calf exhibits all the genetic endowment he received from its true parents—the donors of the ovum and of the sperm—but none of the qualities of its temporary container—the rabbit—and nor of its uterine foster mother.

How many cells are needed to build an individual? Very recent experiments spell out the answer. If very early conceptuses of mice are artificially disassembled, by a peculiar enzymatic system, their cells come apart. By mixing such suspensions of cells, coming from different embryos, one sees them reassembling again. If the tiny mass is then implanted into a recipient female, some little mice—very few indeed—manage to develop to term, completely normal.

As it was theoretically expected by Beatrice Mintz and demonstrated by Market and Peter, a chimeric mouse can derive from two or even three embryos, but no more. The maximum number of cells cooperating to the elaboration of an individual is three.

In full accordance with this empirical demonstration, which was available to science last year, the fertilized egg normally cleaves itself in two cells, one of them dividing again, thus forming the surprising odd number of three cells, encapsulated inside their protective bag, the zona pellucida.

### INDIVIDUATION FOLLOWS SOON AFTER CONCEPTION

To the best of our actual knowledge, the prerequisite for individuation—that is, a stage containing three fundamental cells—is the next step following conception, minutes after it.

All this explains why Drs. Edwards and Steptoe in England could witness in vitro the fertilization of a ripe ovum from Mrs. Brown by a spermatozoa from her husband, Mr. Brown. The tiny conceptus they were implanting days later in the womb of Mrs. Brown could not be a tumor or an animal. It was, in fact, the incredibly young Louise Brown, now 3 years old.

The viability of a conceptus is extraordinary. Experimentally, a mouse conceptus can be deep frozen—even down to −269 degrees—and after careful thawing implanted successfully.

For further growth, only a recipient uterine mucosa can supply to the embryonic placenta—which is made by the embryo—the appropriate nutriments.

In his life capsule, the amniotic bag, the early being is just as viable as an astronaut on the Moon in his space suit. Refueling with vital fluids is required from the mother ship. This nurture is indispensable for survival, but it does not make the baby, no more than the most sophisticated space shuttle could produce an astronaut. Such a comparison becomes even more cogent when the fetus moves.

Thanks to a refined sonar-like imagery, Dr. Ian Donald from England a year ago succeeded in producing a movie featuring the youngest star of the world, an 11-weeks-old baby dancing in utero. The baby plays, so to speak, on a trampoline. He bends his knees, pushes on the wall, soars up, and falls down again. Because his

body has the same buoyancy as the amniotic fluid, he does not feel gravity and performs his dance in a very slow, graceful, and elegant way, impossible in any other place on the Earth. Only astronauts in their gravity-free state can achieve such gentleness of motion.

By the way, for the first walk in space, technologists had to decide where to adapt the tubes carrying the fluids. They finally chose the belt buckle of the suit, reinventing the umbilical cord.

Mr. Chairman and members, when I had the honor of testifying previously before the Senate, I took the liberty of referring to the universal fairy tale of the man smaller than one thumb.

At 2 months of age, the human being is less than one thumb's length from the head to the rump. He would fit at ease in a nutshell, but everything is there—hands, feet, head, organs, brain—all are in place. His heart has been beating for a month already. Looking closely, you would see the palm creases, and a fortune teller would read the good adventure of that tiny person. With a good magnifier, the finger prints could be detected. Every document is available for a national identity card.

With the extreme sophistication of our present technology, we have invaded his privacy. Special hydrophones reveal the most primitive music—a deep, profound, reassuring hammering at some 60 to 70 per minute—the maternal heart—and a rapid, high-pitched cadence at some 150 to 170—the heart of the fetus—and these two mixed tempos mimic those of the counterbass and those of the maracas, which are the basic rhythms of any pop or primitive music. Indeed, this is the most primitive music any human ear has ever heard.

We know now what the fetus feels. We have listened to what he hears, we have smelled what he tastes, and we have really seen him dancing full of grace and youth. Science has turned the fairy tale of Tom Thumb into a true story—the one each of us has lived in the womb of his mother.

And to let you measure how precise the detection can be—if, at the very beginning, just after conception, days before implantation, a single cell was removed from that little berry-looking individual, we could cultivate that cell and examine its chromosomes. If a student, looking at it under the microscope, could not recognize the number, the shape, and the banding pattern of those chromosomes, if he was not able to tell safely whether it comes from a chimpanzee being or from a human being, he would fail in his examination.

To accept the fact that after fertilization has taken place a new human has come into being is no longer a matter of taste or of opinion. The human nature of the human being from conception to old age is not a metaphysical contention, it is plain experimental evidence.

Thank you.

Senator EAST. Thank you, Doctor.

As I had indicated, Senator Dole, I thought if all three might comment then we could return to questions. Is that satisfactory with you?

Senator DOLE. Yes.

Senator EAST. Dr. Hymie Gordon, we would appreciate it if you would give us your testimony.

Professor GORDON. Mr. Chairman and Senator Dole, my name is Hymie Gordon. I am a professor of medical genetics. I have been a medical practitioner for 30 years, and I have specialized in medical genetics for the past 20 years. I teach genetics, and I do research in genetics, but most of my time is spent in the clinical practice of genetics with patients who have genetic diseases and with their families.

## ANCIENT IDEAS ABOUT WHEN LIFE BEGINS

The question of when life begins has been debated by theologians, philosophers, and scientists for more than 2,000 years. One of the first written records is that of Rabbi Judah, the Prince of Talmudical scholars, who lived in about the year 200. He said that life began at the moment of conception, and he gave credit for that opinion to a discussion which he had had with one of the Roman emperors, whom he refers to as Antonius but may well have been Marcus Aurelius.[1]

A similar opinion was expressed at about the same time by Tertullian, one of the early fathers of the Christian Church.[2]

These early statements were based on philosophical reasoning rather than on scientific observation. It was not until the early part of the 17th century that the English physician, William Harvey, applied what we now regard as the scientific method to the study of biology. He investigated the development of fertilized hens' eggs, and from his observations he came to the conclusion that life begins when the heart can first be seen to be beating.[3] In the developing human, that would correspond to about the fourth week after conception.

But by present-day standards, Harvey's capability of studying the early stages of life was very limited. At best, he may have had a simple magnifying glass. Modern methods of investigation permit life's processes to be studied even beyond the limits of the most elaborate electron microscopes—not merely at the level of microscopically visible tissues and cells, but at the level of submicroscopic molecules of nucleic acids and proteins which are the physical components of the living process.

## PRESENT-DAY BIOCHEMICAL CRITERIA OF LIVING MATTER

Modern textbooks of biology and biochemistry often begin by describing the identifying characteristics of living matter. I have selected as an example the highly regarded textbook of biochemistry by Albert L. Lehninger of the Johns Hopkins University School of Medicine.[4]

I prefer to use Dr. Lehninger's definition rather than any of my own simply because I wanted to be as objective as possible and also—a little more modestly—because I do not think I can emulate Dr. Lehninger's clarity and precision.

---

[1] Babylonian Talmud: Sanhedrin 91 b.

[2] Tertullian: Apolgeticus, IX.

[3] Harvey, W. (1628): An Anatomical Disputation Concerning the Movement of the Heart and Blood in Living Creatures. Translated by Gweneth Whitteridge (1976): Blackwell Scientific Publications, Oxford, p. 47.

[4] Lehninger, A. L. (1970): Biochemistry: The Molecular Basis of Cell Structure and Function. Worth Publishers, New York, pp. 3-4

I have abstracted the following from Lehninger's account of this subject:

> Perhaps the most conspicuous attribute of living organisms is that they are complicated and highly organized. They possess intricate internal structures, containing many kinds of complex molecules * * *.
>
> [Living organisms] have the capacity to extract and transform energy from their environment, which they use to build and maintain their own intricate structures from simple raw materials * * *.
>
> But the most extraordinary attribute of living organisms is their capacity for precise self-replication, a property which can be regarded as the very quintessence of the living state.

By all these criteria the zygote—the first cell which results from fertilization of the egg by the sperm—is a living organism. It is certainly complicated and highly organized, and it contains numerous complex molecules including nucleic acids and proteins. Its most important nucleic acid is deoxyribose nucleic acid—DNA—the product of the father's and mother's contributions to the individual's conception.

### THE INDIVIDUALITY OF THE NEWLY CONCEIVED BABY

The individuality of the unborn baby is established at the very first second of its conception. It is genetically related to its parents, but it is also genetically very different. Its genetic endowment is derived from the parents, but the 23 chromosomes which each parent contributes to the baby can be rearranged in 8,388,608 different ways to produce the 46-chromosome complement of the new individual—more than 8 million ways in which the baby might differ from its parents.

Over and above that, the combinations and permutations of the new human's more than 100,000 genes confer even more individuality—almost infinite in variability—on the newly conceived baby.

The highly individual structural pattern of DNA which has been regarded as the individual's——

[Interruption from audience.]

Senator EAST. Can we have order, please?

[Interruption continues.]

Senator EAST. We will stand in recess for a minute. If the officers would restore order.

[Recess taken for police officers to restore order.]

Senator EAST. We shall now be back in session.

Professor GORDON. Thank you, sir.

I was saying that the highly individual structural pattern of the DNA—the individual's personal genetic code—is determined in that very first cell at the very moment of its conception.

Then, in accordance with its code, and by interacting with its environment, the DNA controls every phase of development of the individual from conception to death. It does this by sending to the outlying parts of the cell transcripts of segments of its genetic code in the form of smaller molecules of nucleic acid, known as messenger ribose nucleic acids—mRNA.

### THE EARLIEST BIOCHEMICAL SIGNS OF LIFE

These messengers carry instructions from the DNA for the synthesis of specific proteins which are essential for the growth and

vital processes of the cell. The amount of messenger RNA in the cell is an index of the activity of the cell, especially its ability to synthesize protein.

Almost from the moment of conception great quantities of these biochemical messengers appear in the cell, indicating that, at the direction of the DNA, the vital processes of the new organism have swung into action.[5]

Very quickly, this is reflected in the developing individuality of the newly conceived organism. Even when this organism consists of only one cell researchers have been able to demonstrate the presence already of two new proteins—complex molecules which were not present in the unfertilized egg.

Then, very quickly, the single-cell organism divides into two cells, then into four, and so on. By the two-cell stage, there already are 10 new kinds of proteins which can be identified, and more continue to appear even at that very early stage of life—before the newly conceived individual has completed his or her passage from the fallopian tube to the uterus.[6]

Thus, from the very moment of conception, the organism contains many complex molecules; it synthesizes new, intricate structures from simple raw materials; it replicates itself. By all the criteria of modern molecular biology, life is present from the moment of conception.

### WHEN LIFE BEGINS IS NO LONGER A MATTER FOR DISPUTE

I began by referring to some of the early philosophical and theological ideas about conception. Of course, one can only be respectfully amazed at how the notions of those ancient philosophers have been vindicated by the modern discoveries in medicine and biology.

But now we can say, unequivocally, that the question of when life begins—is no longer a question for theological or philosophical dispute. It is an established scientific fact. Theologians and philosophers may go on to debate the meaning of life or the purpose of life, but it is an established fact that all life, including human life, begins at the moment of conception.

Thank you, sir.

Senator EAST. Thank you, Doctor.

We shall now have the statement from Dr. Micheline Mathews-Roth.

Dr. Mathews-Roth, we welcome you here this morning.

Dr. MATHEWS-ROTH. Thank you, Mr. Chairman and members.

My name is Micheline Mathews-Roth. I am a physician, a graduate of the New York University School of Medicine, and I am a principal research associate in the department of medicine at the Harvard Medical School in Boston. But, as Harvard asks us to say, I am not testifying here as a representative of either the university or the medical school but as an individual.

---

[5] Slater, D. W., Slater, I. and Gillespie, D. (1972): Post-fertilization synthesis of polyadenilic acid in sea urchin embryos. Nature, 240, 333-337.

[6] Levinson, J., Goodfellow, P., Vadeboncoeur M. and McDevitt, H. (1978): Identification of stage-specific polypeptides synthesized during murine preimplantation development. Proc. Natl. Acad. Sci. USA, 75, 3332-3336

In biology and in medicine, it is an accepted fact that the life of any individual organism reproducing by sexual reproduction begins at conception, or fertilization—the time when the egg cell from the female and the sperm cell from the male join to form a single new cell, the zygote. This zygote is the starting cell of the new organism.

Most textbooks of embryology have chapters describing the history of embryology and the experiments done to show that multicellular organisms develop from this single cell, the zygote. You have heard some of these from Dr. Lejeune and Dr. Gordon.

Because these kinds of experiments on embryological development have been repeated so many different times on so many different species and have always led to the same result—that is, that organisms reproducing by sexual reproduction always arise from a single cell and that they are always of the same biological species as their parents—this fact—that a life begins at fertilization—is universally accepted and taught at all levels of biological education.

It is the continuous repetition, duplication, and confirmation of experimental results that proves in science that a fact is, indeed, true.

For example, in the textbook on embryology by Bradley Patten—third edition, 1968—we find, on page 43:

> It is the penetration of the ovum by a spermatozoan and the resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of fertilization and marks the initiation of the life of a new individual.

And, again, on page 8:

> In the process of fertilization, a male and a female gamete unite to form a single cell, the zygote, from which a new individual develops.

In another embryology text, "Developmental Anatomy" by Leslie Arey—seventh edition, 1974—there is found on page 55:

> The formation, maturation and meeting of a male and female sex cell are all preliminary to their actual union into a combined cell, or zygote, which definitely marks the beginning of a new individual.

And again, in "Human Embryology" by Hamilton, Boyd, and Mossman—fourth edition, 1972—it is stated, on page 1:

> The zygote, which has been formed by the fusion of a male and female gamete is a single-celled organism. After a longer or shorter period this unicellular organism will become progressively transformed by the processes of cell division, cell migration, growth and differentiation into a multicellular mature member of its species.

Also, on page 14:

> Bisexual reproduction is characteristic of all vertebrates—

and man is a vertebrate—

> And gametogenesis (the production of germ cells) is its first phase. The next phase, the beginning of the development of a new individual, is the fusion of two germ cells (gametes) of different nature; one, the spermatozoan from the male parent; the other, the ovum from the female parent. The result of this fusion is the formation of the first cell of the new individual, the zygote.

In Moore's "The Developing Human"—second edition, 1977—which is a text written for students in the health sciences, such as medical students and others—he defines the term zygote on page 1:

> Zygote. This cell results from fertilization of an oocyte by a sperm and is the beginning of a human being.

Again, on page 12:

Development begins at fertilization, when a sperm unites with an oocyte to form a zygote * * * Each of us started life as a cell called a zygote.

And again, on page 24:

Embryonic life commences from fertilization; hence the beginning of fertilization may be taken as start of Stage 1 of development.

The authors of textbooks of obstetrics presume that the student has a prior knowledge of embryology, so it is really not necessary for them to emphasize the fact that the beginning of a human life is at fertilization. However, acknowledgment of this fact does occur.

In the book, "Human Reproduction, Conception and Contraception" edited by Hafez—second edition, 1980—it is stated in the section on "Culmination of Fertilization," on page 461:

The first cleavage, which follows immediately, is the initial step of human embryonic development.

Again, in the book, "Biological Principles and Modern Practice of Obstetrics" by Greenhill and Friedman—1974—it is stated, on page 17:

The term conception refers to the union of the male and female pronuclear elements of procreation from which a new living being develops. It is synonymous with the terms fecundation, impregnation and fertilization.

Again, on page 23, in a section discussing the formation of the zygote, they say:

The zygote thus formed represents the beginning of a new life.

In the book, "Principles and Management of Human Reproduction" by Reed, Ryan, and Benirschke—1972—in the section on fertilization, on page 176, it says:

With fusion of the two pronuclei (synkaryon) fertilization is completed and marked changes occur in the organelles preparatory to the ensuing rapid cleavage division (mitotic divisions of the early zygote).

In this statement, it points out that the zygote—which is, as you know from what I said before, the name given to the first cell of the new individual—begins its development immediately at the completion of fertilization.

The fact that life begins at conception is not just taught to specialized students of embryology or medicine, but it is also taught to biology students at the high school and college level. Let me just give you some random examples.

James Watson, in his book, "Molecular Biology of the Gene"—third edition, 1976—states, on page 7:

The cell theory thus tells us that all cells come from preexisting cells. All the cells in adult plants and animals are derived from the division and growth of a fertilized egg, itself formed by the union of two other cells, the sperm and the egg.

And then again, on page 8:

Thus, although a complicated organism like man contains a large number of cells (up to 5 x 10 to the power of 12), all these cells arise initially from a single cell. The fertilized egg contains all the information necessary for the growth and development of an adult plant or animal.

Salvador Luria, in his book, "36 Lectures in Biology"—1975—says, on page 146:

The zygote is the starting cell of the new individual.

And again, on page 215:

A fertilized egg generates a baby in 9 months, an adult in 15 years.
A fertilized human egg containing a diploid number of chromosomes divided repeatedly to produce 10 to the 13 cells.

That is 1 with 13 zeros after it. That is a lot of cells.

The high school text, "Modern Biology" by Otto and Towle—1969—states on page 19—they were talking pretty generally about biology, and they had a picture of a mountain lion on the page. They said:

The mountain lion [shown in figure 2-1] began its life as a fertilized egg. From this tiny mass of living substance no larger than a pinhead, it grew into a completely new, complex organism.

Again, on page 30:

A human being develops from a mass of living material no larger than a pinhead, material contributed by both parents and capable of living and growing for a lifetime.

And again, on page 144:

This genetic makeup was established at the beginning of your life, when a haploid egg and a haploid sperm combined to produce a diploid zygote, your first somatic cell.

Even publications written for lay people state this fact. The Time Magazine-Rand McNally Atlas of the Body—1980—states, on page 139:

In fusing together, the male and female gametes produce a fertilized single cell, the zygote, which is the start of a new individual.

On page 144, the section entitled, "Fertilization, the beginning of life," it says:

Through the fusion of genetic material from the father and the mother a new individual is formed who is genetically different from either of them.

Even the new Encyclopedia Britannica states—15th edition, Macropedia, volume 14—in its article on pregnancy, page 968:

A new individual is created when the elements of a potent sperm merge with those of a fertile ovum, or egg.

Thus, we can see that it is widely accepted and widely taught that human beings as well as other organisms reproducing by sexual reproduction—this is nothing unique to humans; this is a general biological principle—start their existence at the time of conception or fertilization, as a single cell, the zygote.

It is important to also remember, as mentioned in some of the quotations, that like begets like. In other words, the zygote is always a member of the biological species of its parents from the time of fertilization throughout all of its life, before as well as after birth. No study or experiment has ever refuted these scientific facts, and no competent scientist denies them. Thus, one is being scientifically accurate if one says that an individual human life begins at fertilization or conception.

You will notice that I have been using the terms fertilization and conception interchangeably. It is very important that in drafting the statute the word conception be specifically defined as meaning the time of the fusion of the egg cell and the sperm cell.

This is important because there seems to be a tendency in some medical circles to define conception as being the time of the im-

plantation of the developing embryo in the wall of the uterus rather than at the time of fertilization of the egg by the sperm.

It is crucial to remember, since implantation occurs about 6 to 10 days after fertilization, that the zygote is already well on its way in the process of development by the time implantation occurs. Dr. Lejeune has already pointed this out.

Although with present technology we cannot demonstrate that a new individual is present until it has implanted, the indisputable fact is that if a zygote has been formed the new individual is very much in existence by the time that it implants. Thus, for your bill to be scientifically accurate, conception must be carefully defined.

So, in summary, it is incorrect to say that biological data cannot be decisive. In biology, as in any other branch of science, experiments repeated and confirmed by many different workers using many different species of organisms do, indeed, prove that a particular biological finding is true.

And so it is with the biological finding that an organism reproducing by sexual reproduction starts its life as one cell—the zygote—and throughout its existence belongs to the species of its parents. No experiments have disproved this finding.

So, therefore, it is scientifically correct to say that an individual human life begins at conception, when egg and sperm join to form the zygote, and that this developing human always is a member of our species in all stages of its life.

Thank you.

Senator EAST. Thank you, Doctor. We appreciate that.

Without objection, the references in your testimony will be included at this point.

[The references referred to above follow:]

REFERENCES

Patten, B. M., "Human Embryology," 3d ed., Blakiston Div., McGraw-Hill, New York, 1968, pp. 8 and 43.

Arey, L., "Developmental Anatomy," 7th ed., W. B. Saunders, Philadelphia, 1974, p. 55.

Hamilton, W. J., and Mossman, H. W., "Human Embryology," 4th ed., Williams & Wilkins, Baltimore, 1972, pp. 1 and 14.

Moore, K. L., "The Developing Human: Clinically Oriented Embryology," 2d ed., W. B. Saunders, Philadelphia, 1977, pp. 1, 12, and 24.

Watson, J. D., "Molecular Biology of the Gene," 3d ed., W. A. Benjamin, Menlo Park, 1976, pp. 7 and 8.

Luria, S. E., "36 Lectures in Biology," MIT Press, Cambridge, 1975, pp. 146 and 215.

Otto, J. H. and Towle, A., "Modern Biology," Holt, Rinehart & Winston, New York, 1969, pp. 19, 30, and 144.

TIME Magazine-Rand McNally "Atlas of the Body," Rand-McNally, New York, 1980, pp. 139 and 144.

The New Encyclopedia Britannica, "Article on Pregnancy," 15th ed., Encyclopaedia Britannica, Inc., Chicago, 1974, Macropaedia, vol. 14, p. 968.

Hafez, E. S. E., "Human Reproduction—Conception & Contraception," Harper & Row, New York, 1980, 2d ed., p. 461.

Greenhill, J. P., and Friedman, E. A., "Biological Principles and Modern Practise of Obstetrics," W. B. Saunders & Co., Philadelphia, 1974, pp. 17 and 23.

Reid, D. E., Ryan, K. J., and Benirschke, K., "Principles and Management of Human Reproduction," W. B. Saunders, Philadelphia, 1972, p. 176.

Senator EAST. I thought it might be appropriate, before we turn to questions, if any one of you would like to comment upon the others' testimony or comments, or whether any of you would like to take just a minute or so to draw any final conclusions from your

testimony. I do not want you to have to speak and testify in splendid isolation here. Perhaps, having heard each other, you might have additional comments to make.

Dr. Lejeune, we might start with you. Would you care to add anything further?

Dr. LEJEUNE. Mr. Chairman, I can add very little to what has been said because we have just said in front of this committee of the Senate what we teach to the students.

There is nothing new. There is no revelation that we have done in front of you—just telling you what is taught in every genetic course in every country. It has nothing to do with France or with the United States. It is the same teaching as in China. It is the same teaching as everywhere.

We are in front of a fact—that if, at the beginning, after fecundation the thing which is developing was not a member of that very species to which belonged its parents no evolution would have been possible, no species would exist on the surface of the Earth, and no biology would be met on any ground.

So we are obliged to recognize the fact—that is, the progeny is defined by the species to which the two parents do belong. So we are entirely sure, beyond any discussion, that the individual which is splitting itself in many cells at the very beginning is a human being.

When people say that this has metaphysical connotations, they are perfectly correct, if they wish, but the scientific fact that it is a human being cannot be disputed.

Senator EAST. Fine. Thank you.

Dr. Gordon?

Professor GORDON. I have nothing to add, Mr. Senator.

Senator EAST. Doctor?

Dr. MATHEWS-ROTH. I think Dr. LeJeune said essentially what I wanted to say. It is a scientific fact, and we have to live with it.

Senator EAST. All right. Thank you.

Senator Dole, if it is all right with you, I will proceed with a few questions, and then anything you would like to ask or to inquire about—we would, of course, be delighted to have you do that.

First, Senator Hatch and Senator Denton both wanted me to indicate that one practical complication we have this morning is that the three of us happen to serve on two different subcommittees, and both of those subcommittees are meeting this morning. This is not a very impressive job of scheduling, I will concede.

So Senator Denton is now chairing the Subcommittee on Terrorism and Internal Security, which could conceivably be more interesting than this one, although I will leave that up to your own judgment. So they are both there at this time taking care of terrorism and internal security, so you can rest secure on that point.

Hence, they are not able to be here with us for the duration of this hearing, but they did want me to express that their absence is not to be interpreted as a lack of interest in the importance of the subject matter, regardless of what their individual opinions might ultimately be on the entire matter. They are deeply interested in this and will follow the proceedings with great care and attention.

I certainly know that, of course, is also true of the minority, who are not here this morning. I know of their great, intense interest in

this issue--Senator Baucus, our very distinguished ranking minority member, and Senator Heflin, a very great and distinguished colleague from Alabama. So their interest in the hearings, of course, is intense and high, and they will be following all of this over the course of time with great concern and great interest.

The entire subcommittee understands the great importance of this issue, and understands the great importance, as I have already indicated, of going into this with great care and great attention because of the profound significance of what we are undertaking here.

Let me, if I might, as a layman, pursue where I gather we are, at least on the basis of what the three of you are saying, appreciating—and we can look at this at later times—that there could be other points of view, obviously.

As has already been suggested abortion is one of those issues over which well-intentioned, fair-minded, reasonable minds can differ. I concede that from the very outset here. It is an issue on which there are strong convictions. To me, that is all the more responsibility that we have here to try to conduct this inquiry in a very responsible, open way and to the full extent that we need in terms of devoting time to it to make sure that everyone has had an opportunity to state their case on whatever dimensions of this they feel are pertinent and germane.

I consider it my responsibility, as subcommittee chairman, to continue in that vein, not only today but right on through until we have finally exhausted the subject and we say we are ready to decide it, yea or nay.

So let me try to clarify my own thinking on this matter of conception. Conception, of course, as I noted, is the key word in S. 158. It is our—I do not like to make a pun—but it is our point of departure here, and we have to know whether this is a meaningful concept at all.

You are saying—and I speak totally as a layman, but let me tell you what I gather we are saying here—first, of all, that conception is a definable concept——

[Interruption from audience.]

Senator EAST. We will be in recess until the police restore order.

[Recess taken to permit police officers to restore order.]

Senator EAST. I would like to make it clear in order to do this in the long run in a fashion which will be becoming to the democratic process and to the deliberative process, we intend to have order in here from whatever point of view.

That kind of outburst, as well as applause for it, I find unfitting for the proper decorum and forum in which to discuss this issue.

If I do nothing else in here throughout the course of these hearings, we will have elementary order and civility so that fair-minded and reasonable people can discuss the issue, and appreciating again the deep differences—profound differences—of opinion over it.

I think it is a great test of American democracy, and I think it is a great test of the deliberative process of the U.S. Senate—which supposedly is the greatest deliberative body in the world—that we be able to conduct these hearings in that spirit. I stress it again, having just suffered through our second outburst.

To return to my understanding as a layman as to what you were saying—that conception is a definable concept, the point at which life begins—what form does it take?

It, in effect, is synonymous, I gather, with the word fertilization, meaning that the sperm and the ovum come together, and at that point you have a cell—I suppose, more precisely, a living cell or, perhaps from your standpoint, a cell, unless killed, is, by definition, a living cell—and in that single cell there are the components needed for the subsequent development of personhood.

Hence, as you see it, at least, as a scientific point, conception can be defined, and it is fertilization, and it is at that point that personhood begins.

Let me ask you this question. Are you totally confident that there is no arbitrariness in this? That is, we can take something as significant as conception/fertilization as the point of departure, then, in life—that life begins here. That is, you are saying that human life begins with the first cell—that is how you define it.

I realize that even science is not free of a bit of the problem of judgment, but what I am getting at is—are you totally assured that there is not any degree of arbitrariness in here? That is, you simply say, as a personal judgment, that life begins at that point because there is a cell and it is capable of evolving into personhood? You are totally comfortable that we are not reading our own personal judgment into it—that we are not, in short, being arbitrary or judgmental?

Doctor?

Dr. LEJEUNE. Mr. Chairman, it is very important that you have raised this very connection of nature between the intellectual action of understanding, of defining something that we call a concept and with the natural definition of a new being that we call a conception.

It is not by chance that the common language is using the same root to define something which is a real, intellectual information, which is a concept, and to define something which is a true biological information, which is a conceptus. It is because it allows us to define something we are talking about, either intellectually or biologically.

Now, to your precise question, whether we know for sure, with no personal judgment, that life does begin at conception. We have, again, to use the correct concept. It is not the life which begins at conception, it is the life of the new being. That is, each individual in the chain of the generation has a very precise beginning. Life, itself, is a general process. We are not talking about the beginning of the life on the Earth, we are talking of the beginning of the life of this individual we will call later Peter, Margaret, or anyone.

For this particular individual we will recognize later, speaking like we are speaking, we are sure its own life has begun when it has been conceived. There is no scientific escape to that.

The only escape could be a theological one, believing that the soul coming from outside suddenly is injected in the body at some time. But this is no science. We have no indication whatsoever in science of that. Only genetic information is building the difference between species.

So we are sure that for this particular new being, if he has been conceived from chimpanzee ovum and from chimpanzee sperm, he is a chimpanzee being. And if he has been conceived from female human ovum and from male human sperm, he is a human being. It is no matter of my own opinion, it is a matter of the experiments.

Dr. MATHEWS-ROTH. I think it would be better to say, "a life begins," rather than just, "life begins." We are talking about individuals. As Dr. Lejeune said, life is the continuum. The cells are alive—they have life—as Dr. Gordon pointed out. But what we are talking about is an individual.

You began as a zygote, I began as a zygote, and that is the important question. As the doctors have said, this is scientific fact. It is true for people, as well as monkeys, as well as rats, frogs, fish, or whatever. It is a biological fact.

Senator EAST. All right.

Professor GORDON. I was careful, sir, in selecting my definitions and criteria for life, to avoid any text in which it was discussed in connection with abortion or similar issues. I was very careful to refer to the standard textbooks of biochemistry to compare opinions of other scientists with my own.

Lehninger, when he described his criteria for life, I am almost certain—I have not asked him—did not have abortion or related issue in mind when he was defining in ordinary, conventional, scientific terms, the criteria of life as we teach them to students. I do not think these criteria have ever been argued against.

I have had two unique experiences this morning, sir. It is the first time in 50 years that anyone has ever dared to interrupt me while I am speaking; and, second, it is the first I have found myself having to argue the unarguable.

I have never encountered in my reading of the scientific literature—long before I became concerned with abortion, euthanasia, and so on—anyone who has argued that life did not begin at the moment of conception or that it was not a human conception if it resulted from the fertilization of a human egg by a human sperm. As far as I know, there has been no argument about these matters.

Senator EAST. So on the basis of what the three of you are saying, you are all agreed that it is a meaningful concept—conception. It is a matter of fertilization—the first cell commences, and in that first cell there are the components to develop into mature personhood. Hence, that is the point at which life commences. As I understand you, as a layman, that is what you are saying?

Professor GORDON. If I may just qualify that, in the sense that, provided it is clearly understood that the development of the person begins at conception and continues until at least the death of that individual.

Senator EAST. Yes.

Professor GORDON. There is no time before death when the development of the person stops.

Senator EAST. So there is the continuum from the point of conception to the time of death. From your standpoint, as scientists and medical people, that continuum is unbroken?

Dr. MATHEWS-ROTH. And I think we are using the definition of "person" that you find in Webster's Dictionary which reads: "an

individual, a human being." It does not say anything about personality, it is just another term for "an individual."

Senator EAST. Let me just shift the focus to another point, if I might. This is probably a difficult question, perhaps, for you to answer. But do you feel that what we are undertaking to do here as a legislative body, as far as defining life—not talking now about the ultimate implications of it, but just trying to define it—is a frivolous thing for us to try to do, unbecoming for a legislative body to attempt to do?

I gather that you feel that putting that word in a statute and trying to establish a precise meaning and definition for it is the kind of thing a legislative body can do, appreciating you are not political scientists. But at least it strikes you, from a scientific, medical standpoint, that it is a reasonable thing to do—it is not frivolous?

Professor GORDON. I might have thought it frivolous, sir, if it were not that I have been told that the Supreme Court has stated they do not know when life begins. I understand that has happened?

Senator EAST. Yes.

Professor GORDON. If that is the case, then I think it is the duty of the legislature to put the Supreme Court right on this matter.

Dr. MATHEWS-ROTH. As I said in the last few sentences of my written testimony—which I did not read to save time—I think a function of law is to help preserve the lives of our people, and I think you want to base the laws on scientific fact.

I feel we are here to educate—transmit scientific knowledge to you.

Senator EAST. Doctor?

Dr. LEJEUNE. Mr. Chairman, the question whether science should be used to make law is a very fundamental law, and it is not for a biologist to tell you that lawyers, or a legislator, should use actual stages of science to make up their own minds.

But it seems to me difficult, in a time in which we can send a man to the Moon—that was the greatest achievement of this century—and have him back—that we have demonstrated how this extraordinary structure of the human brain is really what allowed that performance—not to use what actual science tells us about what is a human being, how it begins, and not to use it to make reasonable assumptions on what should be constitutional or protection of constitutional rights of individuals.

I really consider that, if we were dealing with cattle, this discussion we have this morning would be unbearable for everyone. Never have I heard about the "cattleness" of cattle, or discussing whether this cattle has achieved "cattleness." I have never heard about the "cattlization" of a cattle inside the uterus of a cow.

Now, when we are dealing with facts, we have to recognize that the basic biology is the same for us as for animals. The only difference is that our genetic makeup is a kind of miracle which really produces from a tiny individual of 1½ millimeters in diameter entirely a human being with this fantastic brain which understands even the law of the motion of the skies. That is the mystery. On that mystery, we know nothing. But on the beginning of each of—we know by every evidence when we have begun.

And I will repeat, if we were dealing with any other living form on this Earth, this discussion would not be raised at all.

Senator EAST. Thank you.

Let me ask just one final question, just to clarify my own thinking on it as a layman. It occurs to me that any person, regardless of how they stand on this overall issue, would concede that at some point life begins. We are quarreling, perhaps, over when; but at some point life begins.

Are the three of you saying that to pick a point other than the point of conception is arbitrary?

Dr. LEJEUNE. Yes.

Dr. MATHEWS-ROTH. Yes.

Professor GORDON. Yes.

Senator EAST. I do not speak for all people, but it seems to me, even reasonable minds who differ over this whole issue would agree that at some point with the unborn—with the fetus—there is life—maybe minutes before birth, but at some point—that all persons would have to agree that life is there, whether they define it in terms of viability, or quickening, or whatever it might be.

So, obviously, the point of our focus is in that period prior to birth, as to when life begins. That is what we are really grappling with.

I gather what the three of you are saying is, to pick any point other than the time of conception is purely arbitrary and would be indefensible as a matter of a scientific premise or conclusion. Am I making an accurate statement there?

Dr. MATHEWS-ROTH. Yes.

Professor GORDON. Yes.

Dr. LEJEUNE. That is the statement, Mr. Chairman.

Senator EAST. Fine. Thank you.

I appreciate the three of you appearing this morning and allowing me to ask you questions. I would like to ask if you would be willing—which I am certainly hoping you will be—to respond to written questions that will be submitted to you by subcommittee members—both the majority and, of course, our distinguished minority members.

That would be very helpful to our overall building of the record, and I would at least like, publicly here, to get your willingness to do that for us, if you will, please—at your convenience, to respond to written questions that would subsequently be submitted to you on this particular issue.

Dr. LEJEUNE. Yes.

Dr. MATHEWS-ROTH. Sure.

Professor GORDON. Yes.

Senator EAST. Without objection, they will be included in the record.

We have two additional witnesses this morning. I would like to excuse the three of you. Again, thank you for coming.

It would be nice to have a break at this point, but I would like, since we have two witnesses here, to press on, if we could. So, if the three of you would, please, give up your seats, I would like to ask our next two witnesses to come forward—Dr. Watson Bowes and Dr. McCarthy DeMere.

Dr. Bowes and Dr. DeMere, I would like to welcome you here this morning and thank you for taking the time to come.

Dr. Bowes is with the division of perinatal medicine at the University of Colorado in Boulder, Colo. Dr. DeMere is a lawyer and practicing physician and law professor at the University of Tennessee in Memphis.

In the order of our witness presentation, Dr. Bowes, if you would please give us your statement as concisely as you can, consistent, of course, with making your point, we shall proceed. I would like to continue on this basis—if the two of you would make your statements, and then I will ask questions, and perhaps some of our other members by then will have been able to return.

Dr. Bowes?

**STATEMENTS OF DR. WATSON A. BOWES, JR., DIVISION OF PERINATAL MEDICINE, UNIVERSITY OF COLORADO, DENVER; DR. McCARTHY DeMERE, LAW PROFESSOR, MEMPHIS STATE UNIVERSITY, MEMPHIS, TENN.**

Dr. BOWES. Thank you, Senator East.

For the record, I would like to mention that the medical school is in Denver, Colo., rather than in Boulder, although the main campus of the university is in Boulder.

Senator EAST. Our apologies.

Dr. BOWES. It is quite all right.

Senator East and distinguished members of the committee, my name is Watson A. Bowes, Jr. I am a professor of obstetrics and gynecology at the University of Colorado School of Medicine.

It is a privilege to have been asked to testify before this committee. My professional background is in obstetrics, with a special interest in fetal-maternal medicine, a subspecialty of obstetrics and gynecology in which I am board certified by the American College of Obstetricians and Gynecologists.

The letter from Dr. McClellan, your chief counsel and staff director, instructing me about the purpose of these hearings, indicated that, the committee's task simply "is to define the word 'person' in biological terms." I was asked to focus my testimony on the question of, "when does human life begin?" The first problem we face here is one of a clear understanding of the terms and words we are being asked to define.

I presume the committee is interested in learning about the beginning of an individual human life rather than human life in the generic sense, which is a matter that stretches back several hundred thousand years and is of professional interest to anthropologists but not to an obstetrician.

If we are talking, then, about the biological beginning of a human life or lives, as distinct from other human lives, the answer is most assuredly that it is at the time of conception—that is to say, the time at which a human ovum is fertilized by a human sperm.

Parenthetically, I believe we have heard elegant testimony this morning from my three distinguished colleagues who preceded me.

The sperm and the ovum each bear one-half of the genetic information needed for the definitive blueprint of the new life. Conception marks the onset of a series of events which, if undisturbed by

biological or iatrogenic catastrophes, will continue until death some 70 or 80 years later.

If not involved in conception, sperm and ova, though distinct living cells, will by themselves live on to be nothing more than just that and to eventually die respectively as sperm and ova. But at the time of fertilization a qualitatively and radically different series of biological events is begun, the genetic plans for a distinct and unique human being are formed, and the biological construction crews begin their work.

Many of the mysteries of the early days of human life after conception are still being unraveled by the embryologists and cellular biologists. But one thing is clear. Following fertilization, there is an inexorable series of events that unfolds with cells dividing, moving, pausing, differentiating, and aggregating with a baffling precision and purpose.

In the early hours, days, and weeks of this development, a hypothetical observer, if able to witness this microscopic drama, would find it impossible to identify precisely when major qualitative changes had occurred, just as parents observing daily their child's growth and development cannot say precisely when he or she stopped being a child and became an adult.

A variety of embryological landmarks and the approximate time of their development have been identified, and these are the material of which textbooks of human embryology are made. You have heard many examples in statements from these texts in the testimony that preceded this.

For example, the pulsations in the primitive heart can be noted at roughly 24 days after conception. The precursors of the central nervous system are apparent at about 20 days of age, and the cerebral cortex is generally visible microscopically by the 33 day. The structure and function of some organs, such as the adrenal gland, become relatively complete and mature when the fetus is still in utero, while the development and maturation of other organs, such as the lungs and gonads, require years after birth. Yet, at each of these developmental landmarks, it is still biologically a human being.

Even the terms used to describe the human being at these early stages of development are not helpful in a qualitative way. "Embryo," the term used until the 8th to 10th week of development, is derived from the Greek meaning "in growing," while "fetus" is from the Latin meaning "progeny." Thus, the beginning of a single human life is, from a biological point of view, a simple and straightforward matter—the beginning is conception.

The definition of "the word 'person' in biological terms"—and that is a quotation from Dr. McClellan's instructions—is, on the other hand, a far more difficult and imprecise task. Here we are dealing with a word which, according to the 1971 edition of the Random House Dictionary of the English Language, has 14 different meanings, varying from the biological to the philosophical, sociological, and theological.

If we are using the first listed definition which is, "a human being, whether man, woman, or child," or even the second definition which is, "a human being as distinguished from an animal or

thing," then, clearly, we are talking about a human being which biologically begins at conception and ends at death.

On the other hand, if we are to use the philosophical definition which is, "a self-conscious or rational being," then a human being, biologically speaking, may not become a person for months, perhaps even years after birth.

Surely, then, it matters a great deal how the term "person" is defined and in what sense it is to be used. This seems to me to be not as much a matter of biological or scientific inquiry as it is a matter of consensus and compromise.

The multiple meanings of the word "person" have become, perhaps, our real problem. If we are willing to face the issue squarely, we must admit that, biologically, a human life begins at conception. I think there is no doubt about that. We must also admit that if we use the term "person" in the strict biological sense—as I believe we should in this context—it raises very serious issues and problems regarding birth and pregnancy control, induced abortion, and the medical care of women.

In conclusion, the beginning of a human life from a biological point of view is at the time of conception. This straightforward biological fact should not be distorted to serve sociological, political, or economic goals.

Thank you very much.

Senator EAST. Thank you very much.

Dr. DeMere?

Dr. DEMERE. Mr. Chairman and members of the committee, I am Dr. McCarthy DeMere of Memphis, Tenn. I am in the full-time practice of plastic surgery. I do have a law degree, but I do not practice law. I teach legal matters at Memphis State. I think it is listed as the University of Tennessee, but that is in Knoxville. So I have to put a plug in for Memphis.

I will be brief because I know we all had two cups of coffee and were looking to a break. I do not know why I am here, frankly. I have enjoyed it.

Senator EAST. That is good.

Dr. DEMERE. It is a lot like when I was a little fellow. I was invited to a birthday party, and halfway through the party I found out they had invited the wrong person. But I stayed for the ice cream anyhow, so I am staying for this. It has been delightful.

I guess I am, maybe, a little nervous. If I had a sign like that little girl that interrupted your program, it would probably be upside-down, too.

I am not egotistical. I have not done any research on fetology, and I would quote all of these people that have been here. They are overwhelming to me. I have five children, and nobody with five children has any ego, frankly.

My 16-year-old—he disputes me on everything I say—everything, and I am used to it. I was a little sarcastic the other day on the way to our farm. I said: "Michael, why is it I am wrong on everything I say?" And he waited a long time. He said: "I don't know why that is." [Laughter.]

You can tell that I am hesitant to go into this subject. I would rather talk about my farm.

I am glad Dr. Lejeune mentioned "cattleness" because I have got cattle, and that is a real thing—"cattleness." Michael and I—we spent all day Easter trying to get a cow out of a deep ditch that the rain had dug in our farm, and we got her out.

OK, I will try to talk about this a little bit.

Actually, as a lawyer, I did have to go into the definition of "death." I did not want to. I had no desire to or anything else, but I was chairman of the law and medicine committee of the American Bar Association, and President Jimmy Fellers told us to come up with the legal definition of "death."

I thought it would be easy, but it was one of the most difficult things that we have ever tried to do. And I sympathize with your position. I had 200 of the finest lawyers in the country, and it took us 2 years to come up with this definition of "death." So if you think you are going to solve this easily, you are wrong.

What I have done has all been on the other end of the spectrum. I have not done any research on this. But just as a practicing physician for the past 30 years, I have my ideas and have looked back into the history of this problem.

They told me not to talk about any of the legal things, and that is what my little summary was written on. So all these reporters that left—they have missed it.

There was a gradual evolution in thought about what the relationship between the father—the head of the family—and the children was. In the Roman Empire—the Roman Republic—the father, as head of the family, had the literal power of life and death over his children. Now, I do not think we ought to be that strong, but a little bit of that would be nice to have now. As one commentator pointed out, within the family, the pater familias enjoyed a lifetime despotism.

Over a period of about 2,000 years, the State has built up a defense in behalf of children, born and unborn, against the aggressive and proprietary instincts of their progenitors. The problem of the battered child today is evidence—if evidence is needed—that the State must still, by law, restrain the freedom of conduct of parents toward their children.

Prior to the 17th century, the prevailing doctrine had been that of the Aristotelian school. Aristotle taught that 40 days after conception the fetus underwent a transformation which made it human. This notion was successfully attacked in 1621 as medical nonsense by Dr. Zacchi.

Thereafter, the medical profession gradually accepted the view that there was no valid line to be drawn within the room, and the law slowly but surely followed the medical lead.

Today, there can scarcely be a return to the Roman law theory that a parent has absolute dominion over his offspring or a return to the ancient notion that a fetus is part of the mother.

We do not have any difficulty with this in medicine. In medicine, it does not mean anything to us about person or citizenship or individual. As Dr. Bowes has so well stated, that is the problem, truly. We found that to be in the law and medicine committee.

The position about abortion—and they told me not to use that word, but you have been using it, so I am going to mention it—is simply that fundamental and was adequately stated by the Su-

preme Court of Pennsylvania in 1850, "and by the well and settled"—this is what the court said—"and established doctrine of the common law, the civil rights of the infant en ventra sa mere"—that is, in the mother—"are fully protected at all periods after the conception." That cite is *Mills* v. *The Commonwealth of Pennsylvania.*

Civil rights includes more than just property rights and, indeed, as we argue the civil right to life, was stated as recently as 1970 when a three-judge Federal court held: "Once human life has commenced, the constitutional protection found in the 5th and 14th amendments imposes upon the State the duty of safeguarding it." That cite is *Steinberg* v. *Rhodes.*

By the way, I have got 150 cites, and I will not give them to you, but I would like, at this time, to strongly suggest that in your legal debate you ask Denis Horan. He is an attorney of Chicago. He worked with me very closely in the law and medicine committee. I cannot come back, and I will not, even if you invite me.

I like it up here, frankly. And I am not like Dr. Gordon. He must not have any children at all. I am interrupted every few minutes at home.

As a lawyer, the definition of "person"—we had no difficulty with Blackstone. He wrote the bible for lawyers. In 1765, he said and taught that a person was one, like us, who had been formed by God in the womb. And this I still believe. We do not mention God much, but Blackstone did, and we in the medical profession hold to it.

Hippocrates realized the difficulties that we are going through now, and that is why we had the Hippocratic oath. There are individuals who would like to make executioners of physicians. This we have to resist.

I am not going to add anything else. I agree and have enjoyed thoroughly the testimony of all of these outstanding, eminent people. There is no other way. I have quizzed hundreds of doctors: "When do you think the actual human life begins?" There is no other answer except: "At the minute of conception."

Five years ago, I did not believe that a little piece that looked like dandruff they call a chip could have 60,000 programs on it—enough to be capable of flying a plane. I did not believe that. Manmade. So it was hard for us, as physicians, to believe that a tiny thing we could hardly see with a microscope, fertilized, could have all the potentialities of a human. I believe it, I now believe the chip, and I firmly believe that human life—personhood—begins at the point of conception.

Thank you.

Senator EAST. Thank you, Doctor.

Without objection, your prepared text will be included in the record.

Let me ask you both, if I might, this question. And I would like to ask Dr. DeMere for just an additional comment based upon his legal background, which I think to be of value to us.

I apologize if we have unduly constrained you here in terms of your desire to comment upon the legal dimensions of it, but I would like to ask you a question pertinent to that, if I might.

You are both saying—and, again, you tell me if this is not what you are saying—that you agree with at least the final result of what the preceding witnesses were saying. And, having already stated how I interpreted that as a layman, you are not strongly at odds, or are at least in basic agreement, with how I am defining it as a layman.

Correct me, please, Dr. DeMere, if I am wrong. I detect in your testimony a great deal of reservation about it. As I would understand Dr. Bowes, he would seem to be agreeing with the previous witnesses. He would seem to be agreeing—again, correct me if I am wrong—with my understanding of it as a layman. I gather you are doing the same thing, Dr. DeMere, except that I detect in your testimony a greater degree of reservation about it. You seem to say, "Yes, life begins with conception," but you have some reservations about it.

Am I correct there? And, if so, are you troubled with it from a lawyer's standpoint—that we are getting into something that we ought not to be getting into? I want you to certainly feel free to comment upon that from a legal standpoint. You have the unique advantage of the medical and the legal, and I would not want that to go untapped.

Perhaps first I might ask Dr. Bowes—do I understand your position correctly?

Dr. BOWES. I believe you do, Senator East. I would agree with your layman's interpretation of the scientific evidence.

Senator EAST. And you are comfortable with that, as an expert, yourself?

Dr. BOWES. Yes.

Senator EAST. Fine. Thank you.

Dr. DeMere, if you would please correct any misinterpretations I might have of your testimony. Am I correct in saying I detect some reservation about it, and does it relate to your being a lawyer and wondering whether we might be attempting something that is beyond the scope of our abilities as lawmakers, as legislators?

Dr. DEMERE. As a physician, I have no difficulty with it.

Senator EAST. With the definition?

Dr. DEMERE. That is right. As a lawyer, I have trouble with everything—you know that.

Senator EAST. Well, I know that. I am a lawyer, myself. [Laughter.]

And as a parent—that is right.

But is there anything you would like to say along that line? You talked about the problem of death—at what point does that occur? And, of course, we are dealing with the point at which life begins. But perhaps if you could just take a minute or two, I think that would be a valuable part of the record. If you could, just comment briefly on that.

Dr. DEMERE. Actually, in all of our discussions and seminars, the thing that bothered most people was the word "person." Some felt that you are not a person until you are 6 years old. Some felt that you remained a person after you died. My grandmother—my Irish grandmother—believed that you remained a person for 3 weeks after you died.

Now, I believe that, grandma—I do. [Laughter.]

So we had to get rid of the word "person." We could not define "death of a person." It was impossible. So we defined "death of a human body." Our definition was, for all legal purposes, a human body, and the definition was: "with irreversible cessation of total brain function."

We tried to go back and say, well, then, life would be the beginning of the human body when the brain was formed. This is difficult for us. The brain is formed, as an organ, at approximately 2 months. I have been told by some that this is all the brain cells you are ever going to get.

Today, I talked to Dr. LeJeune. He feels that you may get a few more before you are born. I do not know. I do not know anybody who has ever counted them. I know that we lose them every day, and we do not get any more.

The word "person" is going to be difficult to you. There is a philosopher named Hans Kelsen of Austria. He believes that the State has the right to say who is a person and who is not. This, at first, sounds like a very good thing. But when that is applied to various aspects of our life, you can see what happens.

This was applied at the time of the ship, *Antelope,* when there were almost 200 black slaves on there when it was captured. A lawsuit came up that these were not persons. Nobody has mentioned the Dred Scott—I guess it will be mentioned a lot next week—the *Dred Scott* decision, where the Supreme Court said that a black slave was not a person. The 14th amendment had to overcome that.

So you can see the great difficulty that is going to be had with "personhood." This could lead to the same thing that happened in Germany. The Nazi government decided who would be a person and decided at one time that the mentally deficient would not be persons. Therefore, when you eliminated them, it was not murder, it was not homicide, it was just eliminating someone—something—that was of no use to himself or to society. Later on, they decided the Jews were not persons.

So the State—if you go by this philosophy of Hans Kelsen, you are in bad trouble. The natural personhood is what Blackstone adhered to, and if we had only "cattleness" to decide on today there would not be much problem—there would not be any problem.

It is this issue that we are skirting the abortion issue that is the reason for all the controversy, because there is no question at all about it. It is what will happen to that. And I think you expressed it very clearly.

We, as physicians, may not have adhered to everything about the State laws in 1970, and that is where we would go back. There is nothing really bad about that. That is exactly where we would go back, and that is where it belongs. Is that my reservation?

Senator EAST. Yes.

Getting back to this fundamental question we face of when life commences, I gather that—again, correct me if I am wrong—you are making a distinction. On the one hand there is when life begins, which you say is conception—that you are comfortable with, as a scientific, medical premise. And then there is the legal problem, the constitutional problem of defining the person. You are

moving from the idea of life—yes, that begins at conception—to so-called personhood—which is probably a very awkward and poor thing. Just call it a person. You are suggesting that is a different proposition. Hence, you have some reservations about where that line, then, might be drawn as it pertains ultimately to the issue of protecting the unborn. Am I correct there?

Dr. DEMERE. No. If you are drawing that as a conclusion, it is entirely wrong. Maybe I am being too—here, I got to the birthday party, and they are making me play the games.

Senator EAST. Yes. [Laughter.]

Dr. DEMERE. You know, the formers of the Constitution in 1789—they did not have any trouble with Blackstone's definition. They did not have any problem with that. We are the ones that are creating the problem. And it is semantics.

You would be surprised—we had so much trouble with saying that a human body is legally dead. They would jump up and say: "Well, if you are legally dead, how can you be illegally dead?" You see? You have semantics there. And another one would say: "Well, we shall be physically dead." And then they would jump up and say: "Well, you can be physically dead but not spiritually dead."

One night, everybody was exhausted, about 2 a.m. I said: "To heck with it—shall be considered dead." And they said: "That's it." So semantics is your problem. We stuck to "human body." I believe that you are going to have to face the issue of personhood.

I would go back to Blackstone. I would go back to the great preponderance of court decisions which you will hear about personhood. The great preponderance of evidence is certainly in favor of the point of conception, and drawing a line is ridiculous—40 days, 8 days, or anything else—that is ridiculous.

You will agree with that, will you not—that it is completely ridiculous?

Dr. BOWES. Yes.

Dr. DEMERE. So I do not have reservations about the conclusions. I tried to give you a little bit of the difficulty. You are opening a can of worms, and as long as it is open you are going to have to deal with them. That is why I suggested this attorney who has written on this subject. I relied on him very heavily—Dennis Horan of Chicago.

Senator EAST. I thank you both for your comments and testimony. Again, I am assuming that, in spite of the reservations you have indicated, Dr. DeMere, you are in substantive agreement with this question of when life begins and on this matter of conception.

Dr. DEMERE. Yes—complete agreement.

Senator EAST. I would like to thank you both again for coming.

[The prepared statement of Dr. DeMere follows:]

## PREPARED STATEMENT OF DR. MCCARTHY DEMERE

Since I am a licensed physician, practicing plastic surgery in the state of Tennessee and also a licensed attorney in the state of Tennessee, and licensed to practice in the United States Supreme Court, my testimony will concern both the legal and the medical aspects of the unborn child.

The legal aspect will cover two points: 1) Property Rights of the Unborn; 2) Tort Law Rights of the Unborn.

The medical apsect will cover medical opinions dating back to the early beginnings of the medical profession and leading up to the latest advancement in genetics and genetic engineering.

### PROPERTY RIGHTS OF THE UNBORN

For hundreds of years, the common law of England has recognized the unborn child as an autonomous human being. In 1795, a court in England found the ordinary meaning of the word "children" to include a child in its mother's womb. (Doe vs. Clark)

Later a court in England in 1798 stated, "Why should my children en ventre sa mere be considered generally in existence? They are entitled to all of the privileges of other persons." (Thelluson vs. Woodford) In answering the argument that such a child was a non-entity, the court said, "Let us see what this non-entity can do: He may be vouched in a recovery, he may be an executor, he may take under the Statute of Distributions, and he may take by devise. He may be entitled under your charge for raising portions, he may have an injunction, and he may have a guardian."

These English Property rules regarding the unborn were adopted in this country. In Massachusetts, in 1854, the court said, "The principle reason I go upon is that a child en ventre sa mere is a person in rerum natura, so that both in the rules of the civil and the common law he is to all intents and purposes a child, as if born in the father's lifetime. (Hall vs. Hancock)

TORT LAW RIGHTS OF THE UNBORN

In tort law a great change has happened since the case of Dietrich vs. Northampton, 1884, when Justice Holmes denied the cause of action for a child injured by the negligence of another and was born prematurely and only able to live a short time outside the mother's womb.

In a 1900 case, (Allaire vs. St. Luke's Hospital) Justice Boggs felt that it was only natural justice that an action be maintained. In 1946, a federal district court held that there was a right of action for an infant to sustain injuries during delivery who was subsequently born alive. (Bonbrest vs. Kotz) The Bonbrest court established the almost universally acepted rule that an infant who is born alive may have a cause of action for prenatal injuries it sustained while in the mother's womb. Other courts followed this trend even further to the extent that the viability requirement has been expressly done away with.

protective mechanism to prevent maternal immunilogic responses from harming it.

At fertilization, a new and unique individual is created. Although receiving half its chromosomes from each parent, this individual's DNA is five times more than that contained in the Encyclopedia Britannica. Dr. Liley said, "From the start the embryo has human potential and no other."

Dr. Hyman Gordon, while chief geneticist of Mayo Clinic states, "From the moment of fertilization the pattern of the individual constitutional development is irrevocably determined. Even at that early stage the complexity of the living cell is so great that it is beyond our comprehension. It is a privilege to be allowed to protect and nurture it."

By a natural continuous process, the single fertilized ovum will over approximately nine months develop into the trillions of cells of the newborn. Before eight weeks of pregnancy, every organ is present that is found in the full-term baby. Even meaningful brainwaves can be plotted.

For my work with the American Bar Association for the past several years in developing a "definition of death," and writing a "definition of death" law for several states, our work has concentrated on the activity of the brain. Death of the human body is "irreversible cessation of total brain function." It is

amazing to us that the human body has all of the brain cells it will ever have before it is two months in the mother's womb, this means that before the mother is even aware that she is pregnant. In actuality, the neutral tube is developed much before this and in 1956, the Supreme Court of Georgia, (Hornbuckle vs. Plantation Pipeline) allowed that a cause of action for a child who was injured prior to birth by the negligent operation of an automobile by another causing the child to be born with a deformed right foot.

There is even a case in 1977, (Renslow vs. Mennonite Hospital) in which the cause of action was so complicated that it actually allowed a cause of action before conception. This involved a woman who had Rh negative blood and was given a transfusion thus sensitizing her to her own later to be conceived child.

I would like to give two short hypothetical questions:
1) In a monarchy line of succession the crown was to go to the male direct heir. If there was no direct male heir then to the nearest eldest living male relative. If the queen was proven to be two weeks pregnant at the time of the king's death later delivered a son, would the son inherit the crown or the brother of the king?
2) In a will, if a grandfather decided to leave his estate to be divided evenly among the natural living grandchildren at the time of his death and his daughter was proven to be one week pregnant at the time of his death, would that child have a cause of action or be denied because he was not born at the time of the grandfather's death?

MEDICAL TESTIMONY

From the medical standpoint there are mountains of documents to show that the human embryo is a separate person, biologically distinct from the mother. Genetically, hormonely, and in all organic respects, except the source of nourishment, the embryo is separate from the woman carrying it. The fetus sets up electrical activity can be detected after the first few days from the conception.

To my finite mind it is almost incomprehensible today that an electronic chip being no bigger than the head of a point of a pencil can have thousands of programs made into it by mechanical means. If this is possible then our finite minds can now

comprehend that the fertilized ovum at the instant of fertilization is programmed for the trillions of cells that will be present including all of it features. No one can deny that this fertilized egg is a human entity programmed whether to be blue-eyed or brown-eyed, right or left handed, even the degree of accomplishment and intelligence probably is programmed.

We are just at the threshold of genetic experimentation and research. A great mass of evidenceshows truly personalized patterns in the unborn brain from at least forty-five days after conception and research at Case Western Reserve University shows that EEG activity in the unborn's brain does not change abruptly at birth. The fetus is obviously an independent, self-initiating, biological entity from the union of sperm and egg. If this is not a person with life, what is it?

In the two hypothetical questions I posed, if the unborn child is going to be king then he definitely was a person at the time of his father's death. The second ypothetical question was actually an early Massachusetts case and was decided that the unborn child was a person.

From both the legal and medical standpoint, there is absolutely no question in my mind and I feel in the minds of most individuals who have given serious thought to this question, the exact moment of the beginning personhood and of the human body is at the moment of conception.

LEGAL REFERENCES


Doe v. Clark, 2 H. Bl. 399, 126 Eng. Rep. 617 (1795).

Thelluson v. Woodford, 4 Ves. 227, 31 Eng. Rep. 117 (1798).

Hall v. Hancock, 15 Pick. 225 (Mass. 1834).

Ill. Rev. Stat. Ch. 3 §13 (1969).

Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. R. 242 (1884).

Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638 (1900).

Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).

W. Prosser, The Law of Torts, 336-37 (4th ed. 1971).

Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2nd 727 (1956)

Renslow v. Mennonite Hospital, 46 U. S. L. W. 2116 (Ill. Sup. Ct. (1977).

Senator EAST. I would like to make it clear that the subcommittee record will be kept open, and additional testimony from witnesses who are not able to be here today can, of course, be submitted.

We expect to continue with our hearings tomorrow in this room at 10 o'clock in the morning.

We do have a film, that we think is pertinent to this issue, that we had planned to show this morning, but which because of the pressures of time I am proposing that we will show tomorrow, dealing with this question of the commencement of life and conception.

I thank you for your attention. We will stand adjourned.

[Whereupon, at 11:55 a.m., the hearing was adjourned, to reconvene the following day at 10 a.m.]

# THE HUMAN LIFE BILL

FRIDAY, APRIL 24, 1981

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to notice at 10:03 a.m., in room 1202, Dirksen Senate Office Building, Senator John P. East (chairman of the subcommittee) presiding.

Staff present: James McClellan, chief counsel and staff director; Grover Rees, Craig Stern, and Jim Sullivan, counsels.

## OPENING STATEMENT OF CHAIRMAN JOHN P. EAST

Senator EAST. If I could have your attention please, we shall begin our second session of the Subcommittee on Separation of Powers dealing with S. 158.

I would like to take just a minute or two, if I might, to inform you as to what our general long-term plans are on these hearings to make sure that we have communicated that point as fully and capably as we can.

We would anticipate probably resuming hearings on this bill somewhere around the 20th of May and extending into June. To the extent that we need time to exhaust this issue thoroughly, we shall take it.

I want to reassure everybody, however they stand on this issue, pro or con, that we intend to have extensive and exhaustive hearings so that all points of view ultimately and finally will have been heard. I would ask only that every person judge us by the final result, not by a given day of hearings.

I am sure you understand we cannot do it all in one day. We cannot get all the subjects involved in one day, whether it be the medical question, the constitutional question, or the policy change question.

If I might again repair to my college teaching days, I found in teaching a course you cannot do it all the first day. First of all, if you do, you are out of a job because you have nothing else to tell them. However, more importantly, in developing any subject matter you have to take it topic by topic, subject by subject.

I am only asking that the public and those who are interested reserve judgment on the nature, the quality, and the extensiveness of these hearings, the exhaustiveness of them, until the end.

I intend to insure—and it is my responsibility as subcommittee chairman to insure—that at that point we can say with confidence and accuracy we did do it fairly, openly, extensively, exhaustively, and, however one felt on the issue, that was done.

I will be candid with you. However this issue comes out on S. 158, it will not end the debate over abortion or related matters in this country. It is a major policy question that will be with us for an indefinite period of time, however we resolve it in this subcommittee.

SENSITIVE SOCIAL, MORAL, POLITICAL ISSUE

Maybe it gives us a sense of patience, perspective, and understanding that we are not at Armageddon here; we are a part of an ongoing public debate on a very sensitive social, moral, and political issue. I am going to chair the hearings in that spirit.

I would hope that all participants, regardless of points of view, would join with me in that spirit. I think it will do great credit to the democratic process. It will do credit, I would hope, to this subcommittee, credit to the U.S. Senate, and credit to the United States.

If we cannot discuss an issue of this kind rationally, fairly, and openly, then it would reflect adversely on the democratic process. As a former teacher of political science, I would be, above all people, most disturbed and troubled that we had misfired on that particular matter.

We intend to pick up the issue again around the 20th of May, more or less, and run on into June at least. What will we be taking up next? We will be taking up next the statutory and constitutional implications of this. If this bill went through, what would it do in terms of the statutory and constitutional provisions on the matter of abortion?

After that series of discussions, where would I anticipate we would be going? I would anticipate at that point we might move on into the subject of the overall change in abortion policy in this country: Is this a good way to go?

Of course, there is no question about it, this goes beyond a narrow question of medicine. It goes beyond a narrow question of constitutional law. It ultimately affects—you know it and I know it—the whole abortion policy in the United States, and people are intensely interested in that.

Then you get into all the questions—the moral, ethical, policy, political, economic, sociological questions. Don't misunderstand anyone here on this subcommittee, including your chairman. Frankly, by background and training and vocation, I am fully sensitive to the enormous complexity and infinite variety of problems we encounter here. It is in that spirit that I undertake this chairmanship and I will continue to pursue it.

That will give you some idea of where we plan to go, the spirit in which we plan to do it, and the subject matter we plan to cover.

I appreciate your forbearance in hearing that again.

This morning we have three witnesses. I would appreciate it if they would come up to the witness table. They are Dr. Alfred Bongiovanni, Dr. Jasper Williams, and Dr. Leon Rosenberg.

According to my data, we should have an interesting dialog here this morning on this subject. We are going to have some differences of opinion. Some days it will appear that more things lean one way and other days they will lean another way. It will be the whole process we want ultimately to review, as I have already indicated.

I would like to proceed this morning by letting each of these gentlemen, as concisely as he can, state his position on this medical question of when life begins and what that means. Each one can make his statement, again as concisely as he can, consistent of course with making his point. Then when they are finished, I would like to engage in some discussion with them on the matter and let them reflect on each other's comments, and again contribute to the dialog on this important matter.

After the discussion this morning, we do have a movie of a scientific nature on this matter of conception, when life begins. Again, this is designed to be informative and a part of the record. We invite you to see that movie. We feel at least it puts this question in some sort of visual descriptive form.

Dr. Alfred Bongiovanni is from the University of Pennsylvania Medical Faculty and is former physician in chief at Children's Hospital in Philadelphia. He was former chairman of pediatrics at the University of Ife in Nigeria.

Dr. Jasper Williams is from the Williams Clinic in Chicago, Ill. He is past president of the National Medical Association and a practicing physician, with a large welfare patient practice, on the south side of Chicago.

Finally, Dr. Leon Rosenberg is professor and chairman, department of human genetics, Yale University Medical School. He is a biochemical geneticist and physician who has worked for 25 years on scientific matters related to human life, health, and disease.

Gentlemen, I welcome you this morning. I appreciate your taking the time from your very demanding and busy schedules to be with us. We appreciate what contribution you can make to this ongoing discussion.

If it is satisfactory with the three of you, Dr. Bongiovanni, if you will begin the discussion, then we will hear from Dr. Williams and then Dr. Rosenberg.

Thank you.

## STATEMENT OF DR. ALFRED M. BONGIOVANNI, PROFESSOR, UNIVERSITY OF PENNSYLVANIA MEDICAL FACULTY

Dr. BONGIOVANNI. Thank you, Senator.

I received my medical education at the University of Pennsylvania, which is a nonsectarian school.

I learned in my earliest education that human life begins at the time of conception. The standard texts which we used when I was a student, and which are still in use today, include "Human Embryology" by Bradley Patten, in which there is a quotation from the famous American biologist F. R. Lillie. This pertains to the union of the sperm and ovum:

> The elements that unite are single cells, each on the point of death; but by their union a rejuvenated individual is formed, which constitutes a link in the early procession of life.

In "Developmental Anatomy" by L. B. Arey, also a widely used book, it is stated that the union of the male and female sex cell "definitely marks the beginning of a new individual."

In the "Essentials of Human Embryology" by G. D. Dodds it is stated that "the fertilization of the egg marks the beginning of a new individual."

There are many other authorities and other books which I will not necessarily include at this point.

Shettles of Columbia University has stated that "a new composite individual is started at the moment of fertilization. However, to survive this individual needs a very special environment for 9 months. There is under normal development a living, definite going concern. To interrupt pregnancy at any stage is like cutting the link of a chain; the chain is broken no matter where the link is cut."

I will omit quotations from Dr. Gordon because I understand that he testified before this committee yesterday.

Based on my education and background, therefore, I believe that from the moment of the union of the sperm and the egg in the human species there is present a new living human being. This fertilized egg has the entire genetic code which, if not interrupted, will develop into a human being which is recognizable to the eye. This single cell divides rapidly and within a few weeks has the recognizable features of man. The heart beats between the 18th to the 25th day after fertilization and the electroencephalogram records brain waves as early as 40 days. It is breathing in the uterus by 11 weeks. During these weeks, of course, it is dependent upon the special life support systems mainly through the umbilical cord, which is a part of the baby, but which is attached to the mother.

Within a couple of years after the termination of the first decade of life after birth there are some other very dramatic events which occur by way of sudden secretion of hormones from the central nervous system, the pituitary glands, and the sex glands. This is really what brings on the final and very rapid development of the full human being. These events have their inception within a few days after the egg is fertilized because the information is contained early, but my point here is related to personhood, which I find difficult, but I also find that personhood is not achieved until well into puberty as a result of these further dramatic events which must occur.

Going back to the ovum in terms of hormones, there are certain hormones that the fertilized egg begins to make very early, even before implantation into the uterus. The particular hormone called chorionic gonadotropin has been found by Saxena in the blastocyst before implantation, and shortly after implantation it leaks into the bloodstream of the mother.

This hormone in the bloodstream of the mother is indeed used as a test for pregnancy. This is detectable in the bloodstream of the mother 10 days after ovulation, 2 or 3 days after implantation. It heralds the presence of a new human being, and its level in the mother is employed widely in the practice of medicine. It remains the announcement of a new human being expressing itself in specific biochemical terms.

Coming back once more to puberty, over the years my own special areas of interest in medical research have been concerned with diseases due to improper manufacture of certain of these hormones. Some of the diseases which I have studied begin during fetal life and some of them lead to minor malformations which today are readily and easily correctable. They are fully compatible

with a normal life and less of a burden than diabetes, which is one of the most common diseases of mankind.

In certain other disorders these same hormones raise problems later in life because their secretion may fail entirely at around the 12th or 13th year. Human beings exhibiting this failure are often not given medical attention until 15 or 20 years. In one biological sense they are not completely formed but they are unquestionably living human beings, and we might make the mistake of thinking they have no personhood.

But the human life is there from the moment of fertilization, and its very essence starts early but is not completed until the second decade of life. I submit that human life is present throughout this entire sequence from conception to adulthood and that interruption at any point constitutes termination of human life.

I subscribe to the conclusions of the First International Congress on Abortion held here in Washington in 1967 where it was stated, "The majority of our group"—there were many scientists in this group—"find no point in time between the union of sperm and egg, or at least the blastocyst stage and the birth of an infant at which point we could say that this is not human life."

Thank you, Senator East.

Senator EAST. Thank you, Doctor.

[The prepared statement of Dr. Bongiovanni follows:]

## Prepared Statement of Dr. Alfred M. Bongiovanni

I am Dr. Alfred M. Bongiovanni from Philadelphia. I am currently Professor of Pediatrics and of Obstetrics and Gynecology at the University of Pennsylvania. I have also been Professor of Pediatrics at the University of Ife in Nigeria, at the University of Puerto Rico and Dean of the Ponce School of Medicine in Puerto Rico.

I received my medical education at the University of Pennsylvania which is a non-sectarian private school. I have learned since my earliest medical education that human life begins at the time of conception. The standard textbooks which were used in the courses I took, many of them in continuous use until today, so state it. In "Human Embryology" by Bradley Patten there is contained a quotation from the famous American biologist F.R. Lillie. This pertains to the union of the sperm and the ovum. "The elements that unite are single cells, each on the point of death; but by their union a rejuvenated individual is formed, which constitutes a link in the early procession of life". And in the book Developmental Anatomy by L.B. Arey it is stated that the union of the male and the female sex cell "definitely marks the beginning of a new individual". In the Essentials of Human Embryology by G.D. Dodds it is stated that "the fertilization of the egg marks the beginning of a new individual". There are many other authoritative texts which express the same opinion but I cite these because they are the ones which have been widely used throughout the United States in most of our schools of medicine.

And Shettles of Columbia University has stated that "a new composite individual is started at the moment of fertilization. However, to survive this individual needs a very special environment for nine months .... there is under normal development a living, definite going concern. To interrupt a pregnancy at any stage is like cutting the link of a chain; the chain is broken no matter where the link is cut". Gordon of the Mayo Clinic has written that, "from the moment of fertilization when the deoxyribose nucleic acids from the spermatozoan and the ovum come together to form the zygote, the pattern of the individual's constitutional development is

irrevocably determined; .... True, environmental influences both during the intrauterine period and after birth modify the individual's constitution and continue to do so right up until his death, but it is at the moment of conception that the individual's capacity to respond to these exogenous influences is established. Even at that early stage the complexity of the living cell is so great that it is beyond our comprehension". And listen to Hamilton: "there are no essential differences between prenatal and postnatal development; the former is more rapid and results in more striking changes in shape and proportions but in both the basic mechanisms are very similar if not identical". So too Langman "the development of a human being begins with fertilization". I know of no new biologic evidence which would alter these realizations. It is true that in recent years we better understand the details of the genetic code but if in the minds of some this greater knowledge contradicts these biologists, then I can only conclude that familiarity breeds contempt and nothing more.

From the moment of the union of the sperm and egg in human species there is present in this single cell 46 chromosomes. These have the entire genetic code which if not interrupted will make a human being. This single cell begins to divide rapidly and within a few weeks assumes the recognizable features of man. The heart begins to beat between the 18-25th day and the electroencephalogram which records brain waves shows activity by 40 days. This activity is very much the same meausre that we employ as a means of determining the end of human life in adults. The little human being is breathing within the uterus by 11-12 weeks. During these early weeks it is of course dependent upon special life support systems mainly through the umbilical cord, which is a part of the baby, but which is attached to the mother.

By the end of the third month all of the major organs are completely developed and during the latter two-thirds of its life within the womb there is mostly a process of further growth. It is really not capable of independent existence throughout these early months nor after birth at the usual time. Independent existence would be extremely difficult in any human subject before at least the age of school attendance. And the question of viability is an ever changing one. While in 1950 such a human being born

before time rarely survived at an age younger than 30 weeks more recently this has gradually decreased through the introduction of sophisticated technical external support systems widely employed in all major medical centers. But dependence continues well after birth and there has been much written in recent years about parental bonding in the early months after the birth of a baby and its importance on the future development. This too is an important support system.

I do not fully comprehend the current concept of personhood as used in some circles. In the notorious Dred Scott decision it was a matter of color. If the issue is primarily one of personhood then I submit that this is not fully achieved until late adolescence. The dramatic changes and the outpouring of "new" chemical signals at the time of puberty is just as amazing as the multiplication and differentiation of the cells from the single fertilized ovum. The complete man or complete woman from the physical as well as intellectual and emotional point of view is not achieved until the second decade of life. The public realization of this incompleteness prior to these events reflects itself in many ways in our society such as the legal age at which one may vote or engage in a certain number of other activities.

Within a couple of years after the termination of the first decade of life certain dramatic events occur by way of the sudden secretion of hormones from the central nervous system, the pituitary gland and the sex glands that bring about the final and very rapid rate of growth of the body together with the secondary sexual characteristics which denote the complete formation of the man or woman. But these very events in fact have their inception within a few days after the egg is fertilized when it implants itself into the uterus of the mother. A few humdred cells at that point manufacture a number of hormones one of which is so high as to constitute a reliable test for pregnancy. The fertilized egg produces, even before implantation into the uterus, a large hormone called chorionic gonadotropin (F. Haour & B.B. Saxena, Science: 185: 444, 1974). This substance plays an important role in assuring continued survival of the conceptus within the uterus. This it does by maintaining the corpus luteum of the mother which secretes progesterone during the first few weeks of pregnancy. Progesterone in turn maintains the uterus in a receptive

state so that the fertilized ovum is not rejected. In addition, this hormone seems to have immunosuppressive actions which prevents the maternal system from manufacturing antibodies which would destroy it. Furthermore, although this same hormone is made by the early fertilized ovum of other mammals, the human hormone is a special structure peculiar to our species and indicates that the very early human embryo is manufacturing a special chemical peculiar to mankind in order to protect itself. Indeed this hormone then finds its way from the embryo into the mother's bloodstream and can be detected there by the 9th or 10th day after ovulation - about 6-8 days after fertilization (Mishell, D.R. et al. AM. J. Obstet. Gynecol. 118: 990, 1974; Catt, K.J. et al. J. Clin. Endocrinol. Metab. 40: 537, 1975).

It heralds the presence of a new human being and its level in the mother is employed in the practice of medicine to make the diagnosis of pregnancy in instances where the mother with problems of fertility, has submitted to special procedures to bring about pregnancy. It is also used to make an early diagnosis of pregnancy by those desirous of terminating the new life at an early stage. But it remains an announcement of the new being expressing itself in specific biochemical terms. Admittedly, to the eye at this early stage the congregation of cells does not yet resemble a human being. But it is all there, the essence of human life. And the very genetic code which identifies this as a new human life is present from the moment of conception. I am no more prepared to say that these early stages represent an incomplete human being than I would be to say that the child prior to the dramatic events of puberty which I have outline is not a human being. This is human life at every stage albeit incomplete until late adolescence.

Over the years my own special areas of interest in medical research have been concerned with diseases due to improper manufacture of certain of these hormones. Some of the diseases which I have studied begin during fetal life and some of them lead to minor malformations which today are readily and easily correctable. They are fully compatible with a normal life and less of a burden than diabetes, one of the most common diseases of mankind. And in certain other disorders of the hormones the problem arises later in life and may result in the failure of the final and rapid physical growth together

with the failure of sexual development which does not begin until well after the tenth year of life. Individuals exhibiting this failure are often not given medical attention until fifteen or twenty years of life. In one biologic sense they are not completely formed but they are unquestionably living human beings just as is the fertilized ovum which has before it a certain number of tasks to accomplish in order to assume the full physical form of human life as we recognize it within the restricted sense of grossly identifiable full developed body structure. But the human life is there at all times in its very essence, despite the enormity of the problems for the individual who at this late stage after birth is without the manifestations of complete manhood or womanhood. Each stage then from fertilization, through embryonic differentiation, infancy, childhood and on into adolescence is human life "on the march". Anything before this final stage might represent an incomplete human being. But I submit that human life is present throughout this entire sequence from conception to adulthood and that any interruption at any point throughout this time constitutes a termination of human life. I therefore subscribe to the conclusions of the First International Conference on Abortion held in Washington, D.C., in 1967 wherein it was stated "the majority of our group find no point in time between the union of sperm and egg, or at least the blastocyst stage and the birth of an infant at which point we could say that this is not human life ... the changes occuring between implantation, a six weeks embryo, a six months fetus, a one week old child or a mature adult are merely stages of development and maturation".

Senator EAST. Dr. Williams, please give us your thoughts on this matter.

## STATEMENT OF DR. JASPER WILLIAMS, WILLIAMS CLINIC, CHICAGO, ILL.

Dr. WILLIAMS. Mr. Chairman, honorable Members of the Senate, ladies and gentlemen: In 1975 when I was president of the National Medical Association I received several complaints that major organ transplant donors were frequently minority members of society and may not have been dead when the vital organ was removed—that the recipient was frequently not a minority member of our society. These were serious charges and, if true, were an indictment of our professional ethics as practitioners of the healing arts.

I then appointed a panel of eight of our leading scientists and charged them with the responsibility of defining death in order to provide the groundwork for establishing some acceptable guidelines for those who would take a man's heart and give it to another. Six months later these scientists were unable to agree on a definition

of death. Perhaps it was because they may have failed to define life.

What is life? What is human life? When does human life begin?

I was informed that these were the questions I must answer, not in 6 months, but in 15 minutes. That assignment flatters me no end and indicates this Senate committee has powers of comprehension which dwarf the ability of the entire Senate of 1975. Let's give it a try.

Life is that characteristic of a cell or a group of cells which permits it to assimilate gases, fluids, or other matter, convert it to a useful component of its environment or of itself, and to derive therefrom energy which it uses to grow, to move, to reproduce, to repair or to replace wornout parts of itself.

The terms "animate" and "inanimate" are used. Animate refers to the living. Inanimate refers to the nonliving. Much that is nonliving never lived, such as rocks or water. Probably another term should be used to describe that group of nonorganic matter. Inanimate then could be used only to refer to what once lived.

In the reverse transition from nonliving to living, from cellular aggregates which the chemist can synthesize, one finds a group of cells called viruses which when placed inside a living cell take on the properties described above, which characterize life. The disposal of waste and response to external stimuli are added properties. Some living organisms lack some of these properties. The mule, for example, cannot reproduce its kind.

The more systems added to the cellular aggregate, the higher the form of life. Therefore, when we have all these characteristics and growth and reproduction, and higher mental activity and movement, combined in the form we recognize as man, we have a cellular aggregate called a human being. Mental activity and reproduction are qualities which set man aside from machines in most instances. One wonders if some of our machines don't out think some of our human beings, and, of course, some of us have lost our reproductive powers. Yet we remain human beings despite these shortcomings. Mutations and heredity and assimilation of diverse hereditary characteristics are properties peculiar to living matter.

Repeat precision of cellular organization, no matter how complex—and this is awe inspiring in the human or in a tree—means there is a perpetuating code species specific. That code is relatively simple and is in the animal kingdom transmitted by genetic material for all—microbes to man. It is known as DNA, a long polymeric molecule called deoxyribonucleic acid. There are four components of this acid which change sequence for various species.

Then there are proteins, which are also long polymeric molecules, and about 20 amino acids which comprise them. They vary in number and in sequence, but the same 20 are in all living creatures. There are compounds which compose all cell walls, bones, blood, fat, cartilage, brains, et cetera. These number only about 100. Some contain more than a million atoms precisely organized.

It is noted that optical activity of amino acids are usually levo forms. Optical activity of DNA sugars are usually dextro forms. We know life does exist in various forms and it can survive from $-11°$

F to 219° F or from 24° C to 90° C. We know that seeds will grow after being frozen for 10,000 years in ice. Bacteria live 36,000 feet below the ocean surface and they are also found by the astronauts at 65,000 feet in the atmosphere.

The chemical basis of life—carbon, nitrogen, hydrogen, and oxygen—compose 99 percent of a human being and 12 elements, such as phosphorus, potassium, sodium, chloride, et cetera, make up the other 1 percent.

There are several theories as to when life began. The Russian writer Ivanovich Opari in his book "The Origin of Life" suggested the organic compound pool theory. The British scientist Haldone supported that theory.

We believe the Earth is about 4.5 billion years old. Four and a half billion years ago our atmosphere was methane, carbon monoxide, and ammonia. It is now nitrogen, oxygen, and carbon dioxide. Under divine guidance, or other guidance, if you would, unicellular life began about 3.2 billion years ago on Earth. It combined and mutated and became the complex world of living things we know today. Human life became the highest form represented.

Human life's singular characteristic is mental behavior associated with development of genetically influenced bodily characteristics which when fully developed have the appearance and behavior of a human being who is capable of reproducing its kind. This process begins when the sperm fertilizes the ovum. Once that happens, if the environment is appropriate, supplying nutrition and protection, the cellular aggregate divides and subdivides and develops into a man. It will not become a dog nor a snake nor a monkey, its actions excepted.

It at that moment is a potential human being possessed of human life with a human genetic blueprint to become a Thurmond, a Mathias, an East, a Kennedy, or a Jasper F. Williams, Sr., M.D., in a test tube or in an incubator or in a surrogate uterus or in its ovum donor.

The work of Edwards and his associates in England with test tube babies has repeatedly proved that human life begins when after the ovum is fertilized and the new combined cell mass begins to divide. It begins to look like a human being about 7 weeks later and reaches maturity about 18 years later. From that point on it is all down hill with slow decay of all except brain function and then death.

I hope this essay proves helpful, and I wish it was as easy to define precisely when human life ends.

Thank you.

Senator EAST. Thank you, Doctor.

Dr. Rosenberg, please give us your thoughts on the matter.

## STATEMENT OF DR. LEON ROSENBERG, PROFESSOR AND CHAIRMAN, DEPARTMENT OF HUMAN GENETICS, YALE UNIVERSITY MEDICAL SCHOOL

Dr. ROSENBERG. Mr. Chairman, I am pleased to have the opportunity to testify before you concerning bill S. 158.

I am a professor of human genetics, of pediatrics, and of internal medicine and chairman of the department of human genetics at the Yale University School of Medicine. Nearly 25 years ago I

completed my formal education as a physician at the University of Wisconsin, after which I undertook residency training in internal medicine at Columbia University and at Yale. My research training was obtained subsequently at the National Institutes of Health. For the past 20 years I have worked as a researcher and clinician and teacher.

I have been elected to membership in such professional societies as the Association of American Physicians, the American Pediatric Society, the American Society of Biological Chemists, and the American Academy of Arts and Sciences. I am a past president of the American Society of Human Genetics and have served the National Institutes of Health, first as a member of the metabolism study section and currently as a member of the advisory council of the National Institute of Arthritis, Diabetes and Digestive and Kidney Diseases.

Today, however, I represent none of these institutions or organizations. Rather, I speak as a concerned scientist, husband, and father of three children, who, by the great good fortune of living in this free country, has been provided the opportunity to devote my career to the care of the sick, the pursuit of scientific truth, and the dissemination of knowledge.

The crux—or, if you will, the heart—of the bill before you is the statement in section 1 which states "that present-day scientific evidence indicates a significant likelihood that actual human life exists from conception."

I must respectfully but firmly disagree with this statement for two reasons: First, because I know of no scientific evidence which bears on the question of when actual human life exists; second, because I believe that the notion embodied in the phrase "actual human life" is not a scientific one, but rather a philosophic and religious one.

### NO SCIENTIFIC EVIDENCE REGARDING ACTUAL HUMAN LIFE

I base my opposition to this bill on a third reason as well; namely, that I am convinced that the clinical implications of this bill are fundamentally counter to the best interest of the people of the United States.

With your permission, I would like to examine each of these conclusions in turn. There is no reason to debate or to doubt the scientific evidence indicating that conception is a critical event in human reproduction. When the egg is fertilized by the sperm, a new cell is formed that contains all of the genetic information needed to develop ultimately into a human being. This cell, like all living cells, has several fundamental properties: It is organized and complex; it can take energy from its environment; it can grow and develop, and it can divide.

The presence of these properties proves incontrovertibly that the fertilized human egg is a living cell with the potential for human life. But, in my view, there is an enormous difference between the potential for human life and, to repeat the critical phrase in section 1 of this bill, "actual human life."

To fulfill this potential, the fertilized egg must travel to the uterus, be implanted in the uterine wall, and undergo millions and millions of cell divisions leading to the development of its head,

skeletal system, limbs, and vital organs. To be sure, this sequence of events depends on the genetic program present in each cell of the developing embryo and fetus. As surely, however, the sequence depends on the environment offered by the mother. Without the genetic blueprint of the fetal cells, human development cannot be initiated; without the protection and nutrition provided by the mother's tissues, the genetic blueprint cannot be followed to completion. This absolute dependence of fetus on mother lasts normally for 9 months, after which the birth process abruptly separates mother from child.

When does this potential for human life become actual? As a scientist I must answer I do not know. Moreover, I have not been able to find a single piece of scientific evidence which helps me with that question.

Not surprisingly, a great deal has been spoken and written on the subject. Some people argue, as you have heard, that life begins at conception; but others say that life begins when brain function appears, or when the heart beats, or when a recognizable human form exists in miniature, or when the fetus can survive outside the uterus, or when natural birth occurs.

In 1967, Dr. Joshua Lederberg, a Nobel laureate in genetics, wrote the following:

> Modern man knows too much to pretend that life is merely the beating of the heart or the tide of breathing. Nevertheless, he would like to ask biology to draw an absolute line that might relieve his confusion. The plea is in vain. There is no single, simple answer to "When does life begin?". . . In contemporary experience, life in fact never begins—it is a continuum from generation to generation.

I have no quarrel with anyone's ideas on this matter so long as it is clearly understood that they are personal beliefs based on personal judgments and not scientific truths.

### ACTUAL HUMAN LIFE IS PHILOSOPHIC—NOT SCIENTIFIC—MATTER

If such beliefs are not scientific, you might ask, just why can't they be made scientific? My answer is that science, per se, doesn't deal with the complex quality called humanness any more than it does with such equally complex concepts as love, faith, or trust.

The scientific method depends on two essential things—a thesis or idea and a means of testing that idea. Scientists have been able to determine, for instance, that the Earth is round or that genes are composed of DNA because, and only because, experiments could be performed to test these ideas. Without experiments there is no science, no way to prove or disprove any idea. I maintain that concepts such as humanness are beyond the purview of science because no idea about them can be tested experimentally.

In discussing this matter with a number of scientific colleagues, I found similar views. Let me quote from two distinguished people.

Dr. Lewis Thomas, a leading medical scientist, philosopher, and author, observed that:

> Whether the very first single cell that comes into existence after fertilization of an ovum represents, in itself, a human life, is not in any real sense a scientific question and cannot be answered by scientists. Whatever the answer, it can neither be verified nor proven false using today's scientific knowledge. It is therefore in the domain of metaphysics: it can be argued by philosophers and theologians, but it lies beyond the reach of science.

Dr. Frederick Robbins, pediatrician, virologist, and Nobel laureate in medicine, responded as follows:

> The question of when life begins is not, in essence, a scientific matter. Rather, it is one that evolves complicated ethical and value judgments. In fact, I doubt whether the health sciences can shed much light on such moral questions.

Even Professor LeJeune, whom you heard from yesterday, in his Allen Award address in 1969 allowed that "scientific arguments are of little help in ethical issues."

If I am correct in asserting that the question of when actual life begins is not a scientific matter, then, you may ask, why have so many scientists come here to say that it is? My answer is that scientists, like all other people, have deeply held religious feelings to which they are surely entitled. In their remarks at these hearings, however, I believe that those who have preceded me have failed to distinguish between their moral or religious positions and their professional scientific judgments.

### ADVERSE CLINICAL IMPLICATIONS

Some minutes ago I said I had three reasons for opposing this bill. Thus far I have discussed only those dealing with scientific evidence and the scientific method. My third reason is based on my clinical experience and judgment.

I believe that this bill has implications both far reaching and counter to the health interests of our people. This bill, if enacted into law, will prohibit the use of such commonly employed contraceptives as certain birth control pills and intrauterine devices because these forms of birth control prevent implantation into the uterus of the fertilized ovum that has, by legal decree, been made a person.

Moreover, this bill will protect the conceptus that has no possibility of realizing its human potential. Occasionally, a fertilized ovum degenerates into something called a hydatid mole, a grape-like cluster of potentially malignant cells which must be removed surgically before it becomes invasive. But such surgery would likely be prohibited by this law because the mole begins as a fertilized human ovum.

Finally, this bill would almost certainly stop all amniocentesis used for prenatal diagnosis of a growing list of genetic disorders, such as anencephaly or Tay-Sachs disease for which no successful treatment is at hand. Although amniocentesis for prenatal diagnosis has been available only for the past decade, more than 100,000 American women who realized they faced a heightened chance of bearing a child with a severe birth defect have requested and used this diagnostic procedure. More than 40,000 such genetic amniocenteses were performed in 1980 alone.

These statistics reveal the magnitude of the anxiety and fear that many American couples feel about having a child with a severe, often fatal congenital disorder. In common with all of us, these couples pray that any future child added to their family will be normal and healthy. Amniocentesis has made this prayer a reality for almost all couples who have used this procedure. It has given them the courage to undertake and complete a pregnancy despite increased risks.

Since amniocentesis carries a small, but finite, risk of causing a miscarriage, however, physicians would not be willing to carry out such a procedure under the terms of bill S. 158 and risk in turn being charged with manslaughter or murder.

### CONCLUDING REMARKS

Senator East, let me conclude my remarks by divesting myself of all scientific or clinical credentials and speak to you simply as an American.

I believe we all know that this bill is about abortion, and about nothing but abortion. If this matter is so compelling that our society cannot continue to accept a pluralistic view which makes women and couples responsible for their own reproductive decisions, then I say pass a constitutional amendment that bans abortion and overturns the Supreme Court decision in *Roe* v. *Wade*. But, don't ask science and medicine to help justify that course because they cannot. Ask your conscience, your minister, your priest, your rabbi, or even your God, because it is in their domain that this matter resides.

Thank you. [Applause from audience.]

Senator EAST. I would like to note that the standing rules of hearings prohibit applause. I did not want to interrupt it, but I am sure you can appreciate that both sides can do that. At some point we lose the decorum that we need to continue this discussion over the long run. Therefore, with all due respect to everyone and their various points of view on this, I would appreciate your leaving the cheering and the applause until you leave the hearing room and then congratulating the witnesses of your choice. Again, I think it will enable us to proceed more appropriately and expeditiously.

Gentlemen, I wish to thank the three of you. I would like to suggest in beginning our dialog here, perhaps as we did yesterday with the panelists, if any one of you three would like to comment upon what the other has said, lest I have unduly restrained you as far as your particular statement went, you may do so. I am not forcing you to do that, but I am simply saying if you would be so disposed, we might proceed in that manner.

Dr. Bongiovanni, would you care to add a thought? We will again move from you over to Dr. Williams and then to Dr. Rosenberg.

Dr. BONGIOVANNI. I agree with Dr. Rosenberg's comments about the scientific method and our inability to apply it in precisely defining human life. On the other hand, I submit that the practice of medicine is not pure science. We like to think it is.

I, too, have worked in the laboratory most of my life. I have been a consultant to the National Institutes of Health. I am rather proud of some of my scientific accomplishments, but I must say I am a physician in the traditional sense of the word, and we cannot match the pure scientist. We do not come anywhere near the physicist and the exact sciences.

Medicine is not an exact science. Therefore, I must concern myself with the humanities in addressing my own life to the problems of man. It is along those lines that I arrived at my own personal conclusions which I have presented to you.

They stem from my teachings and my inclinations as a practitioner of medicine, albeit I have done a lot of work in the laboratory. They are not narrowly based on religious views.

Thank you Senator.

Senator EAST. Thank you.

Dr. Williams, would you care to make an additional statement?

Dr. WILLIAMS. I do not know if a little obstetrician from Chicago has the right to debate a distinguished scientist from Yale, but I take grave issue with most of the things that Dr. Rosenberg said.

I think he assumes a role of unbelievable pessimism when he says that although we can put men on the moon, although we can transplant hearts and do a lot of other things, that we cannot define when human life begins and cannot determine when a human being begins. I think he makes the grave mistake in the very beginning of presuming that the two are synonymous.

He admits that he knows to a certain extent when human life begins. Yet, he concludes by saying that it is not a beginning but a continuing. Yet, he described a situation in which the sperm and the ovum meet and a new organism is begun, according to his genetic background.

I could debate him and it would take me perhaps an hour to go point by point and refute the things he has said because of the way he puts things together. He puts it all in a confusing posture rather than remaining strictly scientific.

Someone said once, "I came not to praise Caesar but to bury him" or "I came not to bury Caesar but to praise him"—I have forgotten how it went. This is his technique. He very subtly and cleverly all the way through says that we Americans are not able to handle a simple problem which relates to science.

He accuses me of being biased, all of us of being biased, by saying we cannot talk science, that we have to talk religion. I give him credit for being a bigger man than that.

Potential human life was one of the statements he made. He says that you cannot tell when this potential starts. I wish that he could separate in his mind that a human being is different from human life. A human being may be possessed of the quality which is human life, but that is a characteristic. As I tried to define in my paper, life is a quality which may be possessed by human life itself, by anything, that is cells—trees, animals—or a human being may possess human life. However, you may be a human being and be dead and yet you are still human. He has to separate these two things: Human life and the human being.

He says he does not know when this group of cells becomes a human being, so he is a little bit on the right track. If he will just follow that down a little bit, I think he will find out when, with a little help from some other people.

I don't know. I cannot answer that question. I know when human life begins, but I do not know when that group of cells becomes a human being, whether it is alive or not.

He attaches a great deal of importance to amniocentesis as if this is an infallible procedure which has saved a whole lot of people a whole lot of grief. I know if he has ever done one or looked at them that he knows that they make many mistakes. As many of them as have been performed, if they saved 100,000 people some grief, at

least 100,000 mistakes have been made. Many times people have aborted normal children because of errors in interpretation of the amniocentesis. They ought to tell the people that when they are performing them, not have them believing that this is a great gift of man to solve all the problems of mental incompetence, et cetera.

Many people have lesser intelligence than others. Many people are born with deformities. Yet, they function well. If you ask them should they have been aborted, they will say no.

I know several who were born blind. One of them works in the hospital where I work. He works in the darkroom. He develops film every day. He gets up and down the hall and rides back and forth to work. He is a fine man making a real contribution to society.

Most of the defects that children are born with our present-day knowledge is able to correct. Anencephaly, which he mentioned, is a rare thing. I have delivered three in the 27 years I have been practicing. Only one of those went to term, and that was less than 2 or 3 weeks ago. That one would not have been diagnosed if I had thought of amniocentesis. I did not because it was a young woman, 21 years of age, and there were no problems. There was no illness, nothing. If we are going to do amnios on everybody, then we might pick it up, but we don't. I think that amniocentesis has been markedly overplayed as to its value.

With reference to birth control, he says this law would stop you from using the pill and contraceptives, that it would stop everything; you would just have to stop sex. Surely none of us would want that to happen.

I disagree. I am not on morals. I am not a theologian. I am not a priest. I do not know a lot about theology, but I know this: There is a theory that is called unwanted aggressor or something like that. If someone enters your house, you have a right to shoot them if you want to do so if they have no business in there.

If the act of conception has occurred but if no direct attack is made upon that ovum, but the mother decides "I don't want that in my uterus," and she has placed in her uterus a contraceptive device or she has taken some pills that make the endometrium nonreceptive, I don't know but it just seems to me that is not a direct attack upon the ovum and that it would be acceptable and could be used, no matter if the person is a Catholic, atheist or a Jew or a Methodist.

The reason is that in spite of this contraceptive device being there, the patient may still deliver. I deliver at least five babies a year with the contraceptive devices coming out behind them. They help, I guess, keep people from getting pregnant, but they do not stop people from getting pregnant and they do not make them abort.

I would disagree with his gloomy picture of what is going to happen to moonlight rendezvous if you pass this bill.

He made another comment saying when life begins is not scientific, but Dr. Bongiovanni already disagreed with that. The evidence I presented is clear scientific evidence. It has nothing to do with sociology, psychology, or anything else.

He quoted someone by saying, "Modern knowledge"—I do not write too well when I am trying to write in a hurry, but it looks

like I have written—"Modern knowledge is too much to think that life is only a beating heart or a respiration."

I alluded to that earlier when I said that it is very difficult to define death. But, it is not difficult to define life.

I wish I had time to take his paper and to sit down and go step by step through it because the last three pages of it are zero.

Thank you.

Senator EAST. Thank you, Dr. Williams.

Dr. Rosenberg, would you like to comment?

Dr. ROSENBERG. I am sorry that Dr. Williams found me so pessimistic about life and about this country. I do not believe that people who know me would consider me a pessimist about anything—about advances in science or about advances in clinical medicine or about the way this country works. I am not pessimistic; I am, in fact, an incurable optimist. I believe that no matter how complicated and how disturbing this matter of abortion is, that this country can find its way to a resolution which will allow Americans to live with themselves.

I am not a pessimist, Dr. Williams, not about politics and not about medicine or science.

Some of the things you said about my testimony where you indicated that I felt that life was merely a continuum, those were quotes from Joshua Lederberg, a very well-known scientist and currently the president of Rockefeller University. I did not write those words; I used them to indicate the wide array of opinions that scientists have used to talk about the matter of when human life begins. To me it seems like the extreme example of how difficult it is to precisely define the moment.

Dr. Williams talked about amniocentesis and said that if there have been 100,000 amniocenteses performed for prenatal diagnosis, there have been perhaps an equal number of mistakes made. I am sorry, but I must disagree with that statement. I believe that there are statistics on this matter which have been published in reputable obstetrical and genetic journals. They indicate the frequency with which errors are made in amniocentesis and they perhaps number less than 1 percent. There is nothing like the frequency of errors which Dr. Williams just stated.

Surely there are errors because the people who carry out amniocentesis, just like anyone else, are frail and human and subject to error. That does not mean that the procedure itself has been discounted in terms of its value to the people who seek it.

I have no quarrel with Dr. Williams about his statements concerning the quality of life. I understand that there is an enormous range of opinion about the quality of life. I in no way am sitting here advocating abortion of anyone. I am simply here to say that these are the most personal matters that I believe exist.

I have counseled hundreds of families in my career. I think that the decision of a woman, of a couple, to terminate a pregnancy is one of the most painful, disturbing responses that I have ever witnessed. I do not believe people undertake this decision lightly. It is not a trivial matter. It is the most intensely personal matter I know.

Senator EAST. Thank you, Doctor.

I would like to pick up on several themes here and would appreciate getting your responses to them.

First, on a very narrow point, I would like to clarify something. As I understand the two of you, Dr. Bongiovanni and Dr. Williams, as regards the narrow question of section 1 of S. 158, and that is all I am focusing upon—and, gentlemen, correct me if I am wrong because I do not mean to put words in your mouth—the two of you are saying that you find section 1, "that Congress finds that present-day scientific evidence indicates a significant likelihood that actual human life exists from conception," at least from your scientific, medical perspective, to be a meaningful and understandable concept. It is not a figment of some lawyer's imagination or someone who lacks expertise in your area. That is a meaningful, workable concept?

Dr. WILLIAMS. I do.

Senator EAST. As we were noting yesterday extensively, at the time the sperm penetrates the ovum a cell is created. That cell at that point has the capacity to develop into mature human life as we know it and understand it. Hence, in determining at what point human life begins, as you see it from your scientific, medical point of view, that is the point at which to begin the evaluation.

I appreciate it does not mean it dictates what the answer will be in all of this complex and difficult area of abortion policy. However, at least on that narrow point of section 1 of S. 158, the two of you find that a meaningful concept?

Dr. BONGIOVANNI. I do.

Dr. WILLIAMS. I do.

Senator EAST. Dr. Rosenberg, correct me if I am in error. You feel that section 1, as you see it as a medical man and as a man of science, is really not a workable, meaningful concept? The idea of human life is infinitely more complex and elusive than the simple point of conception, ovum and sperm coming together? You are very uncomfortable with it, and perhaps beyond that you think it is somewhat meaningless. It is like speculating on things to which one can never determine the answer. Hence, one might as well concede it and look for other ways to justify what you are doing, be it moral, ethical, philosophical, sociological, economic, or whatever.

I gather as a scientist you are very troubled that your profession and the expertise that it has given to human civilization is being employed here in this way.

Dr. ROSENBERG. Yes, Senator East; that is entirely correct. I tried, as clearly as I could, to distinguish the difference between a living cell and a human life. There is no question in my mind that the fertilized ovum is a living cell, but the concept of human life is not a scientific one.

Therefore, if you would like to revise section 1 to read, "The Congress finds a significant likelihood that actual human life exists from conception," of course I certainly am not in any position to tell you not to do so. However, I do not believe that there is scientific evidence on the point. The word "actual" is in my mind the critical word in addition to the words "scientific evidence."

Senator EAST. All right. Thank you.

Dr. Rosenberg, as a layman on these matters of medicine and science, let me pursue this point. I would appreciate your candid response to it.

As a layman and as a legislator confronted with a real problem in the real world of policy and politics, I do not as a Senator have the luxury simply to say the matter is complex, intricate, difficult, and, hence, we will absolve ourselves of making a decision here.

The problem that a person participating in the legal process faces is that we do have ultimately to acknowledge, do we not, that there is such a thing as human life? That is a meaningful, workable concept, at least at the broadest level of theorization. Human life is something that is. That is point No. 1.

Point No. 2 is that we have historically in the Anglo-American, Western, and indeed worldwide tradition, developed law to protect human life in the broadest sense of the word. The law has never been able to say in the Anglo-American tradition that the concept of human life is so impossible of really defining and is so complex and elusive that we could not develop laws to protect it. Hence, we would not have laws against perhaps murder, or any other kind of law, and we would tend to opt out for the idea that it was elusive and vague.

It strikes me as a layman, not an expert in the field of science, that I am on sound ground in saying there is such a thing as human life. I do have a problem as a legislator of determining when it begins simply for the purpose of protecting it, inasmuch as we are all agreed the law at some point must protect it and will protect it.

I appreciate the great complexity of this problem of determining when that point is reached that the law ought to protect it. Let me ask you a rather personal question. I do not mean to put you on the spot. At what point would you protect it?

I am not going to let you off the hook by your saying, "That is complex, Senator, and I don't know," because at some point I presume you will protect it, be it at the time of birth or maybe puberty or sometime prior to the end of the continuum, which is death. At some point the law will insert itself. Convenience, rights to privacy, and other factors will not be allowed to intervene and supersede in a value sense, in a moral sense the right to life.

I agree with you that ultimately we are into the moral and ethical dimension of this, but the right to life ultimately, it strikes me as a lawyer and as a political scientist and as a former teacher of political philosophy, may very well be argued in a hierarchy of value to be the highest one. The law and the legislative body are bound at some point to have to protect it.

I am simply asking you as an individual a very difficult question, but then we have to answer it. At what point do you consider it being worthy of protection or would you allow the state to intervene in some way or other to protect it?

Dr. ROSENBERG. I am not surprised, Senator East, that you would ask me the question. I have asked myself the question ever since I was invited to testify. I will not beg the question or duck it. As long as you understand that I am giving you my personal opinion and that I am not speaking in the name of science, I will be happy to respond.

I would protect at the point of viability. I would protect at the point that the human being can exist on its own outside of the uterus.

Senator EAST. Again, I respond as a layman. It is a good point that you raise.

Is viability any more capable of precise scientific definition than, let us say, conception? It strikes me, again as a layman—and correct me if I am in error—it would be more elusive, more difficult of precise determination than the point of conception.

My agony as a legislator is that the law has to have a degree of certainty in it. Sometimes I agree that in order to have a degree of certitude in the law, we may have to be a bit more precise than we would allow, or our knowledge would allow us, to understand where the point ought to be. You say viability is that point.

Viability is elusive, isn't it? Wouldn't it be so? Just at the moment concentrating upon the unborn from the time of conception to birth, would there be unanimous agreement among gynecologists and others where viability lies?

Dr. ROSENBERG. I am sure there would not be consensus as to the precise point at which viability lies, but I think there is some greater consensus about what we mean by the word "viability." It means that the fetus, the newborn, is able to exist outside of the uterus and to grow and develop as a more independent individual.

However, I cannot help you, Senator East, with the clarity. You are asking me for something that I do not have.

Senator EAST. I am trying to find in my groping here a point of reference in protecting human life at this end of the spectrum, at the beginning, that would be more useful to us as legislators than would the idea of conception. You mentioned viability, but concede it may be even a less precise term than would be conception.

Let me just finish my thought on this matter of viability. It strikes me, again as a layman—and you have made a very telling point in your original commentary—maybe ultimately we are going to find in these hearings that science can help us in a very limited way and ultimately we get into a moral and ethical judgment here.

However, I am a little troubled about viability being the criterion by which you determine the right to life. Actually, once born, there is not viability if by viability one means the capacity to exist independently.

Viability, for example, does not exist then. The child is totally dependent upon mother and parents and family. Why, indeed, if we want to expand into a philosophical understanding, no man or woman stands or lives alone. No one is viable in the ultimate moral and ethical sense that we live freely and totally autonomously.

Then I think ultimately at the other end of the continuum of the old, the senile, the aged, the infirm, the disabled, the afflicted. If I let loose the concept into the world that viability is the ultimate criterion by which you determine the right to life, I am profoundly troubled with that as a matter of moral and ethical implication, and as a policy position I would have to disassociate myself from it. It would produce all kinds of perverse results, wouldn't it?

Why don't you respond to that, Dr. Rosenberg, and then we will hear from Dr. Williams.

Dr. ROSENBERG. Senator East, I do not think I have anything more that I can say on the matter.

What you are saying to me is that you have great problems with this area. What I am saying to you is that as a scientist I have great problems with this area as well. What I am asking you is whether this bill will help the American people resolve those great problems.

Senator EAST. I find you have been extremely helpful, although I obviously disagree with you on some points here. You have been extremely helpful in terms of suggesting there are other points of view on it and that fair-minded, reasonable people can disagree over this issue; there is no question about that.

Not to distract us, but what I find is valuable in this, and wnat I missed in *Roe* v. *Wade,* is the public dialog on the issue. We are here as a part of the legislative process—and you are making a vital contribution to it—where we can air these differences and begin to probe public feeling and sentiment on it.

I would hope this is the great virtue of the legislative deliberative process. We are better equipped to do it than the judiciary, in my opinion. We might try to see if we could build some sort of public consensus. Perhaps we never will, but I like to feel, because of the quality of your testimony and the others here, too, that you are making a very excellent contribution to the public discussion on the matter.

I would like to think in the long run, whatever happens to S. 158 or whatever happens to the constitutional amendment or whatever else is down the road, that at least we have been allowed now to begin a public discussion on a very vital, critical, important matter of moral, ethical, sociological, and economic consequence.

That little sermonette was unwarranted, but the quality of your testimony prompted me to say it.

Dr. Williams, you wanted to make a comment?

Dr. WILLIAMS. I was going to comment, but the chairman made most of the comments I was going to make.

I have great reservations about his use of the term "viability" as a time for deciding when to protect human life. Certainly when I started in medical school they talked about viability at 28 weeks. Then when I finished my residency they had backed it down to 20 weeks. Then when Edwards came out with this test tube baby, it proves that viability exists from the moment of conception. We have the tools and we can do it. It costs a lot of money, but we can do it.

All of this prenatal time is obviously a viable time. Then when you go on the other side of the question and look at the hundreds and thousands of babies and young folks who die on my south side of Chicago every year, I agree with the Senator that even when you get out of the uterus you may not be viable on your own. In many instances you are not.

Senator EAST. Fine. Thank you.

Dr. ROSENBERG. Senator East, I wonder if I might make just one additional comment.

Senator EAST. Yes. Please go ahead.

Dr. ROSENBERG. In these hearings I think I am correct that you have heard perhaps seven scientists and medical people say that they can accept section 1 of S. 158 and I am the only one who has appeared before you to say that I do not believe that they can. I hope that you and the rest of the subcommittee would not take that ratio of 7 to 1 to reflect the scientific opinion of the American scholar. If you wish to know more about how American scientists feel on this issue, I would hope that you will continue to seek additional opinion.

Either I am talking only to one particular group of people or else there is a very considerable fraction—I would think a great majority of the American clinicians and scientists in this country would support my side of this argument despite my distinct minority before you in the past 2 days.

Senator EAST. Doctor, you certainly make a valid point. I feel impelled to make it again and again as we go through these hearings. We would all do a disservice to our own cause to judge, for example, on 1 day's testimony or one person's testimony or the precise ratio or proportion at that time. You make a valid point. Obviously my being here this morning ought not to be interpreted as unanimity on this subcommittee or on the Judiciary Committee, let alone the U.S. Senate, on this point of view. I think your point is well taken and I appreciate your bringing that out.

Dr. Bongiovanni, you wanted to add an additional thought?

Dr. BONGIOVANNI. Thank you, Senator East. I would like to make two brief points.

I brought data with me supporting Dr. Williams' statement that the definition of viability changes every 3 or 4 years. The definition of viability in practical terms in the arenas in which all of us work is important. Do you take this fetus and put it in the nursery? You must define it. Our well-respected institutions do that. You know you are confronted with it. Babies of a certain size and a determined viability are not put in the trashcan. I know Yale would not do it and we would not do it.

We are in a spot where we have to define it. Whether we say we can or we cannot, there has to be a definition on the wall.

Your institution has one of the most heroic technological setups for keeping alive tiny little infants. I know the people in there. If you give them a 400-gram baby, they are going to do the best they can at that level but they are going to try.

This troubles me a little bit also about viability. Viability is going to change. We have to define it. Our institutions have to have something. Senator East needs something for a different set of reasons.

I also want to mention that, as in other areas of our culture today, technology has jumped ahead of us. We cannot deal with it. We see there are arguments in atomic energy. We have the same problems here.

I have great respect for Dr. Rosenberg; I want to make that clear.

I have spent my life with a disease which in biochemical terms is rather trivial and easily correctable. Now Dr. Williams is probably wrong that there are 100,000 mistakes for 100,000 correct ones, but I am with Dr. Williams because I must stand by and watch the

prenatal diagnosis of a trivial disease end up in abortion. I know what to do about this disease. It is easier to manage than diabetes. I come toward the end of my career having to face a situation in which a problem has been solved by a very simple medical means that is not heroic. Prenatal diagnosis is brought into the picture. It is regarded as justifiable cause in many places.

Thank you.

Dr. ROSENBERG. May I respond, Senator East?

Senator EAST. Yes.

Dr. ROSENBERG. I did not mean to suggest that the word "viability" was a passive word in any sense. I agree with Dr. Bongiovanni entirely that heroic attempts should be made to save the life of any premature infant, no matter how small. I am not talking about the trash can. I am talking about viability in the sense of the result of every possible effort to save that life.

With regard to his second point, I agree with him absolutely that amniocentesis should not be used to diagnosis prenatally every condition that it might be able to diagnose. If I had the ability to diagnose the disease for which Dr. Bongiovanni has made major contributions, I would feel exactly as he does, that to diagnose that disease with the aim of aborting that fetus was an inappropriate use of medical technology. We have no argument on that matter.

Senator EAST. Fine. Thank you, Doctor.

Dr. WILLIAMS. I want to correct an impression which apparently I made. Apparently both these gentlemen think that I said that there would be 100,000 amniocentesis mistakes with 100,000 amniocenteses. I did not intend to say that.

What I was saying is if you do 100,000 amniocenteses—Dr. Rosenberg referred to that number and stated that these had helped that many people or so many people—that 100,000 would not be 100,000 mistakes. I had no intention of saying that. I said that the procedure has been given such a build up and it has been used almost indiscriminately, particularly in our teaching hospitals. Therefore, offsetting the advantage that may be gained by those 100,000 well-intended, carefully done with the percentage of error that is inherent in the procedure, there were 100,000 useless, error-making, damaging amniocenteses done last year in the United States, perhaps even more.

Senator EAST. Gentlemen, I wish to thank you. Your testimony has been valuable and useful.

I would hope that we have learned this morning a little better insight at least into how science and medicine can help us on this matter. Certainly, Dr. Rosenberg, you very well point out the great limitations of science in this area, that at some point we go beyond the matter of science and medicine and we are into the area of value judgment preference, and the philosophical, moral, and ethical. At the proper time in these proceedings we certainly want to get into those matters extensively.

You also raised good points, upon which I will forgo commenting because I would like to take them up when we get to the legal and constitutional implications of this legislation.

I would like to offer that I hope that yesterday and today we have at least begun the discussion by getting into this question of when life begins within the meaning of S. 158. If conception is not

a good point of making that determination, is viability? Or maybe in due course some other concept will emerge. At least we can test whether it is an improvement over what is provided for here in section 1 of S. 158.

I had indicated earlier there is a movie to be shown on this matter of conception, again simply to make graphically the point that has been made extensively on this matter of when life begins. I do not wish to suggest in the showing of this we are trying to say that dictates the total answer in the whole abortion area. We are simply saying it does clarify what our testimony has indicated--that there is a very profound event that takes place, conception; and there are those who think otherwise, as Dr. Rosenberg has very eloquently indicated. However, there are those who feel that is a workable and definitive point at which to begin consideration of this matter of protecting human life.

We will consider this movie as a part of our formal hearings. Obviously people are free to go anytime. There is no change in that rule.

With your indulgence, we would like to show this movie. It will last approximately 30 minutes. Therefore, we should be out of here by a little after 12 o'clock.

As I have indicated, we will be continuing these sessions in the latter part of May, according to our best estimates at this point.

Could we please have order? If those who are not interested in watching the movie would please leave the hearing room, that would be appreciated so that we can continue on and conclude our hearings.

[Whereupon a movie entitled "The Beginning of Life" was shown.]

The film was produced by Cine-Science, Tokyo, 1970, and first released in the United States in 1975 by Pyramid Films. If was produced with the cooperation of the Department of Obstetrics, Toho University, and the National Institute of Preventive Hygiene, Japan. "The Beginning of Life" is a live-action film shot through microscope photography at up to 200,000 diameters enlargement, by means of the endoscope lens inserted to the sites at which human egg and sperm cells develop, and life begins. It shows the processes of fertilization, cell division, and growth to first heartbeat.

Senator EAST. May I have your attention for just a brief moment?

First, I would like to thank our three witnesses this morning, having contributed to what I would like to think was a very fine discussion on this very difficult, sensitive issue.

If any of the three gentlemen would have any additional comments they would like to submit in written form as a part of the record, we would be delighted to do that.

I would like to thank the audience for their cooperation and interest. Again, I repeat that we shall be picking up on this issue in the latter part of May.

At this time I shall declare our session adjourned.

[Whereupon, at 12:03 p.m., the subcommittee adjourned, to reconvene at the call of the Chair.]

# THE HUMAN LIFE BILL

WEDNESDAY, MAY 20, 1981

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 1202, Dirksen Senate Office Building, Senator John P. East (chairman of the subcommittee) presiding.

Present: Senator Baucus.

Staff present: James McClellan, staff director and chief counsel; Grover Rees, Craig Stern, and James Sullivan, counsels.

## STATEMENT OF CHAIRMAN JOHN P. EAST

Senator EAST. I would like to call our third session of this Subcommittee on Separation of Powers to order so that we might continue our formal hearings on S.158.

I welcome my distinguished minority colleague here this morning, Senator Baucus.

I would like briefly to review for you what we have been doing and where we intend to continue to go in this series of hearings. At our previous hearings we dealt with the medical question that the bill requires us to look at; namely, when life begins. Today we are continuing that discussion from now until 1 o'clock, at which time we will terminate this hearing—no later than 1 o'clock.

Tomorrow, beginning at 1 o'clock in the afternoon, we will begin discussing the statutory and constitutional implications of S. 158. We expect to continue a second session on that theme on the 1st of June, as a tentative date. We expect to have additional hearings during the month of June, possibly continuing those particular matters as well as eventually shifting into the general question of what this would do as far as the change of abortion policy in the United States.

As I said at the initial hearings—and I will repeat it again—we intend to move along in an orderly way to conclude these hearings and eventually decide what we wish to do with this bill. However, within that obvious limitation, we intend to do justice to the subject, which is one over which strong-minded, well-intentioned, and reasonable minds are differing. No one has any illusions about the profound differences of opinion over this matter.

We intend to do justice to the subject in terms of the breadth and depth of the hearings, so that, whatever side one might come down on, at least when we are finished you can say, "Well, they seemed to have exhausted the subject," at least as much as one can possibly do in public hearings. We would all acknowledge there are, of

course, built-in limitations as to how exhaustive one can be in public hearings. At least we hope to continue the public dialog on this in a responsible way.

This morning we have two panels. The first panel will come up in a moment. We will ask each of them to please summarize their remarks as briefly as they can consistent with making their points.

I would like to remind all witnesses that the written statements will be made a part of the record. Therefore, there is no need for you to read verbatim your statements. Senator Baucus and I and all other members of this subcommittee, as well as our staff, have had an opportunity to read your written statements, so we do not start from ground zero.

Again I would encourage you to summarize your remarks, realizing that your written statements will be part of the record. That will allow us more time for questions and for probing. In a public hearing probably it is more valuable to do that than simply to listen to people read papers because we are all literate and can do that on our own.

Therefore, I would encourage you please to summarize your remarks. If you want to read selected portions, that would be appropriate but keep in mind the time limitations. We want to get the statements in as quickly as we can, again consistent with making your points, so that we can get on to the discussion.

Inasmuch as we have 3 hours and we have two panels, we are anticipating roughly 1½ hours per panel. We will try to move it along in that fashion.

First, I would like to ask my good friend and colleague, Senator Baucus, if he has a statement that he would like to make at the outset. I already made my comments at the earlier hearing and I shall not repeat myself.

Senator Baucus?

## STATEMENT OF SENATOR MAX BAUCUS

Senator BAUCUS. Thank you, Mr. Chairman. Thank you for your courtesy today.

As you know, I was unable to attend the earlier hearings due to scheduling conflicts in my home State of Montana. For that reason, at the beginning of this hearing I would like to make a brief statement.

Mr. Chairman, seldom in this Nation's history have the public policy questions surrounding an issue been as complex or controversial as they are with abortion. The bill we are considering today, S. 158, is no exception. Abortion has divided Americans for decades. Advocates of each side feel intensely that their view is the right one. I would not for a moment question the sincerity or the genuineness of their views.

But because advocates view this issue with such intensity, too often the debate has not been informative but confrontational. Some of the rhetoric has been inflammatory. Like most highly charged issues, the result is that public attention has become focused on the actions of those who are advocates of one side or the other.

These hearings could mark a turning point in the debate on abortion. They could offer an opportunity for a national dialog, a

dialog that is responsible, thoughtful, and educational. We will not find the truth or make the best policy or determine the right course of action by shouting at each other across a crowded hearing chamber. Answers to the difficult questions will only result from responsible hearings, discussion, and debate by this subcommittee, the full Judiciary Committee, the Senate, and the Congress.

While there are many activists in favor of or opposed to S. 158, I believe there also are many more Americans who, like me, are wrestling in the deepest part of their soul with the questions raised by abortion. All of us can afford the time to try to understand these very complex medical, philosophical, and social issues more fully. All of us should be willing to listen carefully to all sides and to understand each other's perspective a little bit better.

I am convinced that only after such a debate will the Senate be equipped to make a responsible policy decision. This is the opportunity we have on this committee. I hope we take full advantage of it.

I would like to turn to what I believe are some of the critical issues in S. 158. One of the most critical passages in Justice Blackmun's decision in *Roe* v. *Wade* reads as follows:

> We will not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and technology are unable to arrive at any consensus, the judiciary at this point in the development of man's knowledge is not in a position to speculate as to the answer.

In my view S. 158 raises four basic questions about the words of Justice Blackmun:

No. 1, was the Supreme Court saying that the judiciary could not answer the question of when an actual human life begins or that Government could not answer that question?

No. 2, even if the Court only addressed the limits of the judiciary, can Congress find consensus today among experts in medicine, philosophy, or theology on the question of when an actual life begins?

No. 3, even if Congress can find a consensus on the question of when an actual life begins, does the Constitution permit Congress to define the term "personhood" by statute or can the term "personhood" only be defined by the Supreme Court or by constitutional amendment?

No. 4, if the Congress can by statute legislate the definition of the term "personhood," does the Constitution permit Congress to eliminate lower Federal court jurisdiction over cases involving constitutional rights?

These questions in my judgment are paramount and are the ones that this subcommittee should focus on. Today we will primarily focus on the second question.

In addition to those questions on which we will focus today—I would like to emphasize the great need to fully explore the issues raised by the third and fourth questions. I believe this subcommittee, the Separation of Powers Subcommittee, has a special responsibility to address the consequences of S. 158 on the delicate balance between Congress and the courts.

I understand the desire at times to alter or overturn court decisions. I often share that desire myself. However, our attempts to limit the courts must be within the parameters of the Constitution.

The overriding concern of this subcommittee should be with how we can find responsible congressional responses to judicial action.

Personally, I favor congressional assertiveness, but the question before us is whether S. 158 represents responsible or irresponsible congressional action. This subcommittee cannot afford to evade that issue.

Today the subcommittee will hear testimony from a distinguished panel of Americans who will discuss what the medical and scientific community knows about when an actual life begins. Their credentials speak for themselves. They will discuss the extent to which there is medical consensus on the issue of when an individual human life begins. They will also address whether scientific and medical knowledge on the question of when an individual human life begins has increased since the *Roe* v. *Wade* decision.

Finally, I would like to express my hope that these hearings will proceed with the highest degree of professionalism and fairness. This country deserves nothing else. Failure to proceed in this manner will only lead to further factionalism over the abortion issue. The timetable and witness list that the subcommittee decided upon should enable us to analyze the issue responsibly.

Mr. Chairman, I very much appreciate your willingness to permit me to make this more lengthy statement at this time. I look forward to working with you in the weeks and months ahead on this issue.

Senator EAST. Thank you.

Senator BAUCUS. Mr. Chairman, at this point I would like to insert in the record letters from five distinguished scientists and physicians. Those five are Dr. James D. Ebert, president of the Carnegie Institution of Washington; Dr. Robert H. Ebert, president of the Milbank Memorial Fund and former dean of the Harvard Medical School; Dr. Sherman M. Mellinkoff, dean of the UCLA School of Medicine; Dr. Arno G. Motulsky, director of the Center for Inherited Diseases of the School of Medicine, University of Washington, Seattle; and Dr. Frederick C. Robbins, president of the Institute of Medicine, National Academy of Sciences.

Senator EAST. It shall be so ordered that they shall become a part of the permanent record.

[The letters referred to by Senator Baucus follows:]

CARNEGIE INSTITUTION OF WASHINGTON
1530 P STREET, NORTHWEST
WASHINGTON, D. C. 20005

1981 APR 23 AM 8 33

OFFICE OF THE PRESIDENT
(202) 387-6405

April 21, 1981

The Honorable Max Baucus
United States Senate
Washington, D. C. 20510

Dear Senator:

I am responding to your letter of April 16, about the assertions contained in S. 158 that "human life shall be deemed to exist from conception".

Before proceeding, let me emphasize that the observations that follow are my own, arising out of my special competence as a student of developmental biology. They should not be taken as representing an official opinion of the Institution I serve as President.

I do not believe that the statement in Chapter 101, Section 1 can be supported. This Section reads "The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception." This statement embodies and expresses a dogmatic and dangerously narrow definition of "actual human life", for human life cannot properly be said to begin at any single moment fixed in time.

Indeed, human life is a continuum, proceeding generation after generation. The eggs contained in the ovary of the young girl ripen and are shed over her reproductive lifetime. These eggs like the other cells of the woman's body are living. The sperm maturing in the human male are no less alive. The union of living egg and living sperm results in a living zygote, no less alive than its parental predecessors, but differing from both of them. But the zygote is but one fleeting morphologic and physiologic entity in the panorama that is human development. When does "personhood begin"? In my opinion, the question cannot be answered scientifically. Some might argue for the moment of conception, others for the moment at which the heart first begins to beat, or the face takes shape, or the brain begins to function. Some physiologic functions do not come into play until after birth; and as Peter Medawar has written "birth is a moveable feast in the calendar of development".

Nor must one be confined to the study of normal development to question the validity of the definition of "human personhood as beginning at conception". The study of birth defects similarly reveals that some defects are indeed embodied in the genes and present from conception, while others are extragenetic, arising later in the course of development.

It is my opinion that one cannot "fix" scientifically the time at which "human personhood" begins, for development is, to use the well accepted scientific term epigenetic, in which the morphologic and physiologic characters of the human are delineated gradually.

In short, it is my view that the question of human personhood cannot be considered in simplistic medical and scientific terms. It embodies moral and ethical questions that have occupied the mind of man for as long as man has been recording his thoughts. In essence, philosophical thought is part of that continuum that is human life itself.

I would hope that such difficult and important questions as the performance of abortions, whether or not at public expense, would not be regulated arbitrarily by invoking questionable "present day scientific evidence" that "actual human life exists from conception", when the circle of life is in fact continuous.

I hope you will not hesitate to call upon me if I can be of further service.

With every good wish,

Yours sincerely,

James D. Ebert

James D. Ebert

---

MILBANK MEMORIAL FUND

1 EAST 75TH STREET

NEW YORK, NEW YORK 10021

ROBERT H. EBERT, M.D.
PRESIDENT

[212] 570-4806

April 22, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

This is in response to your letter of April 14, 1981 asking me to comment on S.158 in my capacity as a medical and scientific expert.

I know of no "... current medical and scientific data ..." that supports the contention " ... that human life in the sense of an actual human being or legal person begins at conception." Life in the biologic sense does not begin the moment that an ovum is fertilized by a sperm, since both have life prior to that event.

In my view the question of human personhood is neither a medical nor a scientific question. In one sense it is a philosophical question which can be debated endlessly and has to do with how one defines a person and "self." But in the context of the present legislative proposal I believe it can best be described as a religious question. There are those who hold the strong religious conviction that life begins with conception and not only should that life be protected, but also that it is immoral to use artifical means to prevent conception. I respect those beliefs, but I do not subscribe to the notion that they should be imposed on others who do not happen to share that particular set of religious beliefs. Many of our forefathers came to this country because there was freedom from the imposed morality of a single authoritarian religion and because our founding fathers recognized that in a true democracy a particular religious moral code cannot be legislated.

Is it proper for the Congress of the United States to legislate on what is essentially a religious issue? That is the fundamental question. It is

entirely appropriate for any group of citizens to accept the belief that human personhood begins at the moment of conception and to shun any personal action or measure that conflicts with this belief. It is entirely inappropriate for that group to impose their beliefs on all of the citizens of this nation.

As a citizen I find it abhorrent to contemplate the force of law being given to one set of religious beliefs. As a physician who has had some experience as an active scientist I consider it scientific nonsense to legislate that human life begins the moment of conception. To do so is rather like legislating the origin of the universe. For these reasons I urge the Congress to reject S.158.

Robert H. Ebert, M.D., D.Phil., M.A.C.P.
Caroline Shields Walker Professor of
Medicine Emeritus, Harvard University
Former Dean of Harvard Medical School

---

UNIVERSITY OF CALIFORNIA, LOS ANGELES UCLA

BERKELEY · DAVIS · IRVINE · LOS ANGELES · RIVERSIDE · SAN DIEGO · SAN FRANCISCO SANTA BARBARA · SANTA CRUZ

OFFICE OF THE DEAN
UCLA SCHOOL OF MEDICINE
CENTER FOR THE HEALTH SCIENCES
LOS ANGELES, CALIFORNIA 90024

May 7, 1981

Senator Max Baucus
Ranking Minority Member
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I appreciate your interest in my responses to the important questions you raise in relation to S.158 now under consideration by the Senate Judiciary Committee's Subcommittee on Separation of Powers. It is my view that the determination of the beginning of human personhood is a philosophical and/or religious issue, rather than a medical and scientific question.

Specifically my responses to your three questions are as follows:

1. Do you believe that the question of human personhood is a medical and scientific question?

   Response: No. Medicine and science can describe the biological and genetic processes. Human judgment, drawing on ethical or religious beliefs, ascribes value and meaning to those processes as they relate to human personhood.

2. Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question?

Response: It is primarily and perhaps exclusively philosophical, religious and/or political.

3. Would you agree that medical and scientific data alone cannot determine what the definition of human personhood should be in the present context?

Response: Yes.

Through medical and scientific research, we now have a relatively sophisticated understanding of the biological and genetic processes of human reproduction and prenatal development. It is well-established that when a human sperm and ovum unite, the resultant zygote contains the biological and genetic material of a new human organism. However, the distinction between biological existence and truly human existence, continues to be debated by philosophers, theologians and laypersons, as it has been for centuries. Scientific knowledge of the biological process of development is primarily descriptive, mapping out the distinctive changes or stages on the continuum that begins with the fertilized ova and ends with the infant independently capable of separate life. The factual information does not tell us when in this process the distinctive elements of human existence come into being.

Thus, different schools of thought about the nature of personhood have developed over centuries and continue to exist today. These schools postulate ideas about personhood and then use scientific data about the various stages to justify the postulates. Viability, in the later months of pregnancy, marks the beginning of personhood for those who maintain that a truly human being exists only as a self-conscious being, one who can assume a social role, one who has the ability to have relationships with other human beings. Actual brain wave activity, detectable as early as the eighth week of pregnancy is necessary for those who hold that self-awareness and reason or consciousness and self-reflection are the essential qualities of humanness. At least three groups recognize the zygote at the moment of conception as the beginning of human life, but for differing reasons. One group asserts that the zygote contains all genetic information necessary and its subsequent development proceeds in a continual, uninterrupted process through birth. Another maintains that the zygote is the beginning of the human body and that a person's physical being cannot be separated from his psychological and intellectual being. A third group believes that because God gives the value of human life, then God can confer that value at the earliest stage possible, the zygote. Others maintain that human life begins only after nidation or implantation in the second or third week after conception because before that time, the cells have not become biologically committed to the development of a specific individual and may actually be spontaneously aborted.

These examples illustrate the divergence of judgments about the beginning of human personhood. That such diversity continues to exist is the strongest evidence that the factual information provided by scientific medicine is not an adequate basis for an answer to the question. Although a political body might wish to establish an "official" view of the matter, there is no way that such a view can be verified as "accurate" or "true" in the sense that science uses such words. The determination of personhood is essentially a philosophical, moral and religious judgment.

If I can be of assistance to the Subcommittee in any other manner, I would be pleased to do so.

Sincerely yours,

Sherman M. Mellinkoff

SHERMAN M. MELLINKOFF, M.D.
Dean

UNIVERSITY OF WASHINGTON
SEATTLE, WASHINGTON 98195
1981 APR 28 PM 2 22

*School of Medicine*
CENTER FOR INHERITED DISEASES, RG-20

24 April 1981

The Honorable Max Baucus
United States Senate
Washington, DC 20510

Dear Senator Baucus:

It is impossible scientifically to establish when personhood begins. This issue is one of semantics and of personal or religious philosophy. A developing fertilized egg has the potential to develop human personhood. The exact time when such personhood occurs can never be established by any scientific or medical principles. It is against the public interest to legislate in this realm since it will be impossible to arrive at scientific agreement. Some observers might argue that the potential for sentient human life in a developing egg is already equivalent to human life. Many would point out that human life does not exist until it can be independently self-sustaining in a biologic sense.

The entire problem of personhood or when life starts is a moral, philosophical, and religious issue that is becoming politicized and cannot be forced into a scientific framework. Science can provide certain facts. The interpretation of facts in this area depends upon philosophical, ethical, and religious attitudes. It is most dangerous, however, to legislate such attitudes.

Let me know whether I can be of further help.

Kind regards,

Arno G. Motulsky, M.D.
Professor of Medicine and Genetics
Director, Center for Inherited Diseases
Member, National Academy of Sciences
Member, Institute of Medicine (NAS)
Member, President's Commission for the Study of
Ethical Problems in Medicine and
Biomedical and Behavioral Research

INSTITUTE OF MEDICINE
NATIONAL ACADEMY OF SCIENCES
2101 CONSTITUTION AVENUE WASHINGTON, D.C. 20418

FREDERICK C. ROBBINS, M.D.
PRESIDENT

1981 APR 23 PM 3 15

April 23, 1981

The Honorable Max S. Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I have read your letter to me of April 16 with care, and am pleased to have the opportunity to answer the questions you pose. Your attempt to obtain broader perspectives on S.158 is most commendable and is deeply appreciated. It should be clear that this is a personal statement based upon my years of experience as a pediatrician and biological scientist.

As your letter suggests, there are at present a number of individuals who claim that the methods and findings of science can resolve the question of when human life begins. I gather you will hear testimony from them this week. Even without having had the opportunity to review their statements, however, I am prepared to reject the notion that the determination of when "human personhood" (to use your phrase) begins can be made through scientific research. I do so based on a very straightforward line of reasoning. Even the most elementary understanding of biology suggests that, from the moment of conception, the human zygote is biologically alive in that it is capable of dividing and growing. That there is biological "life" is not in dispute for the fertilized egg or for other cells of human origin. What is at question is at what point the growing mass of cells--that is, the product of conception--takes on the attributes of "personhood." That is, at what point in the sequence of development do we choose to say that the organism is a person, and therefore, of special value? Clearly, the answer to such questions rests not on scientific judgments, but solely on what we choose to define as the qualities and attributes of being a person. Is it the capacity to sustain life on one's own? to think or reason? to feel? or is it some intangible quality that we cannot quite specify? In my view, it is social, philosophical, and religious values that provide the guidelines for making such determinations, not science. Science can answer such questions as, for example, when does an embryo's nervous system develop the capacity to sense pain, but science cannot answer the question of whether that particular developmental attribute therefore makes the organism a person. Science can outline the steps of prenatal brain development, but it is the broader society that evaluates such information and chooses to label one stage of life as "personhood" and another as not. In an earlier time, the question might have been posed as when does a developing human embryo possess a soul? Then, as now, the answer must spring from the philosophical tenets of the day, not from the laboratory.

In sum, I respond to your questions as follows:

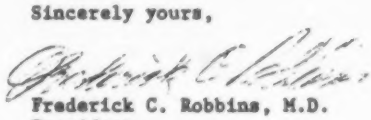
1) Do you believe that the question of human personhood is a medical and scientific question? No.

2) Is it your view that the question of human personhood is in part a moral, ethical, philosophical, religious or political question? Yes; indeed, I believe the entire issue is in this broader domain.

3) Would you agree that medical and scientific data alone cannot determine what the definition of human personhood should be in the present context? Yes.

Thank you for asking for my views and for your efforts to broaden the debate on S.158. As you point out, the purpose of this bill is to achieve a legislative reversal of the Supreme Court's ruling in Roe v. Wade. In my opinion, such a reversal would be a highly regressive move with grave consequences for many of our fellow citizens, and I encourage you to continue your efforts to guard against such an occurrence.

Sincerely yours,



Frederick C. Robbins, M.D.
President

Senator EAST. Thank you, Senator Baucus.

I wish to underscore again that you and I are in complete agreement on many things involved here, and, most importantly of all, upon the seriousness of the issue and the quality of these hearings. We are both proceeding in that vein. I am deeply grateful and honored to have you as the ranking minority member of this subcommittee to enable us to carry out this very important responsibility.

I would ask the following panelists to come forward, please: Dr. Lewis Thomas, Dr. Clifford Grobstein, Dr. James Neel, and Dr. Mary Ellen Avery.

It would be appreciated if you would speak in this order: first, Dr. Thomas; then Dr. Grobstein; then Dr. Neel; and then Dr. Avery.

It is nice to have all of you here this morning. We appreciate your taking the time from your busy schedules to help us on this critical matter. We welcome you.

Dr. Lewis Thomas, our first witness, has received degrees at 11 major universities, including Harvard, Yale, Princeton, and Johns Hopkins. He has served in various capacities at numerous universities and institutes, including as dean of Yale School of Medicine and as president of the Memorial Sloan-Kettering Cancer Center. He is the author of two best-selling paperbacks: "Lives of a Cell" and "Medusa and the Snail."

Dr. Thomas, would you please begin our discussion?

## STATEMENT OF DR. LEWIS THOMAS, CHANCELLOR, MEMORIAL SLOAN-KETTERING CANCER CENTER, NEW YORK, N.Y.

Dr. THOMAS. Senator East, Senator Baucus, my colleagues and I are grateful for the privilege of appearing before you to discuss this matter.

The question as to when human life begins, and whether the very first single cell that comes into existence after fertilization of an ovum represents in itself a human life, is not in any real sense a scientific question and cannot be answered by scientists. Whatever the answer, it can neither be verified nor proven false using today's scientific knowledge. It is, therefore, in my opinion in the domain of metaphysics. It can be argued by philosophers and theologians and perhaps settled, but it does lie beyond the reach of science.

Such a cell does not differ in its possession of all the genes needed for coding out a whole human being from any of the other

somatic cells of the body, nor indeed from any of the billions, now trillions, of human cells being cultured in research laboratories all around the world. The difference, of course, is that the progeny of a fertilized ovum develop systems for differentiation and embryogenesis. We do not yet understand this system, but the fact remains that all human cells contain the same full complement of human DNA.

There are perhaps two criteria that I can think of for guessing at the stage in an embryo's development when the essential characteristics of a human being begin to emerge. One might be the startup of spontaneous integrated electrical activity in the brain. This might be interpreted as the beginning of human life, just as we take the cessation of such activity to indicate the end of human life.

The second might be the appearance of those molecular signals or antigens at the surfaces of the embryonic cells which are the unequivocal markers of individuality and selfness. There is in this restricted immunological sense a stage in embryonic development at which the fetus becomes a specific individual. The time at which these events occur in the human embryo remains uncertain.

This is as far as I can see science making any contribution to the question of the point at which an embro becomes a human self. It is a limited contribution at least and it tells us nothing about the personhood of a single cell.

I cannot agree with the assertion in S. 158, chapter 101, that "present-day scientific evidence indicates a significant likelihood that actual human life exists from conception," or perhaps I should say that I do not know what the scientific evidence is. I might add that the phrase "actual human life" is not one that I would be willing to apply to a cell with the potential of producing a teratoma or an anencephalic monster.

My own views on this matter are shared by many of my scientific colleagues. As evidence for this, Mr. Chairman, I would like to introduce into the record a resolution which was passed by the membership of the National Academy of Sciences at its annual meeting on April 28, 1981. To quote:

> It is the view of the National Academy of Sciences that the statement in Chapter 1010, Section 1, of the U.S. Senate bill S. 158, 1981, cannot stand up to the scrutiny of science. This section reads, "The Congress finds that present-day scientific evidence indicates a significant likelihood that actual human life exists from conception." This statement purports to derive its conclusions from science, but it deals with a question to which science can provide no answer. The proposal in S. 158 that the term "person" shall include "all human life" has no basis within our scientific understanding. Defining the time at which the developing embryo becomes a person must remain a matter of moral or religious value.

That is the end of the National Academy of Sciences resolution. Thank you, sir.

Senator EAST. Thank you, Dr. Thomas.

Dr. Clifford Grobstein received his M.S. degree in zoology from the University of California at Los Angeles and his Ph. D. from the University of California at Los Angeles. He is presently a professor of biological science and public policy at the University of California at San Diego. Dr. Grobstein is a member of the National Academy of Sciences and the American Academy of Arts and Sciences.

Dr. Grobstein, please give us your statement.

## STATEMENT OF DR. CLIFFORD GROBSTEIN, PROFESSOR OF BIOLOGICAL SCIENCE AND PUBLIC POLICY, UNIVERSITY OF CALIFORNIA, SAN DIEGO

Dr. GROBSTEIN. Mr. Chairman, I am Clifford Grobstein, professor of biological science and public policy at the University of California, San Diego. That title suggests that my academic activity deals with the relationship between biomedical science and public policy in an effort to assist and illuminate public policy issues by reference to what we understand scientifically and technically about the issue in question. That includes the subject before us today.

I also served as dean of the school of medicine and vice chancellor for health sciences at the University of California, San Diego, for some 6 years. Earlier as a laboratory scientist I was an embryologist, one of the subdivisions of developmental biology. In that capacity I served as president of the American Society of Zoologists and the Society for Developmental Biology.

I will not read the statement which I have submitted. I would like to try to highlight some points made.

First, I suggest that scientific knowledge, particularly that relating to the process of development, has applicability to the issue before this subcommittee even though clearly other considerations are also relevant.

The matter cannot be settled by science, but it is also not a matter that can be settled without examining carefully what we know scientifically about the process of development. What we know scientifically is part of our objective knowledge, and objective knowledge has advantage because it is potentially accessible and common to all parties to a dispute. Therefore, it deserves attention in controversies of this kind.

Second, I emphasize that life in general does not begin in each generation, but rather is continuous through generations. So far as we know there is no origin of life on the contemporary Earth; all life is descended from preceding life and through continuing processes.

I also emphasize that this statement applies to human life. Eggs and sperm are alive and human, and so, too, is the cell that results from their fusion and all of its products. Fertilization is not when life begins; it is an important stage in the continuity of life from generation to generation.

### A NEW GENERATION

Fertilization does initiate a new generation. It does so in two ways. It initiates development of the egg and it provides a new genetic constitution, which, speaking generally, is unique to the individual in question.

We know scientifically that at the moment of fertilization a new individual in the sense of singleness does not arise. This is known not from experiments on humans, but on nonhuman species. Those indicate that twinning can occur at stages well beyond the time of fertilization. Also, fusion of early stage embryos can be performed yielding a single individual. Therefore, in the early stages of development beyond fertilization an individual has not yet been firmly

and stably established. The early embryo is in fact an aggregate of cells which have not yet formed a distinct collective in the sense of an individual organism.

At 2 weeks after implantation twinning is still possible, suggesting that even at that point a new individual has yet not been stably constituted. Two weeks is beyond implantation.

At still later stages our knowledge indicates that there is continuing transition and emergence of properties normally associated with self or personhood over a considerable period of time, just as there is with all morphological or functional characteristics of the developing individual.

There is certainly question as to what characteristics should be regarded as particularly significant with respect to defining a person, and there is question as to exactly at what time these arise. Therefore, it is not at the present time possible to make a precise statement. Definition depends on what our purposes are, and the purpose is not the business of science to decide but the business of the body politic. Therefore, science has to back off from providing any precise statement as to exactly when personhood arises.

### INVOLVEMENT OF CENTRAL NERVOUS SYSTEM

It is, however, clear that with respect to such characteristics as sentience or selfness or consciousness, correlation with the development of the central nervous system is very close. We know that it is not until 4 weeks that the first recognizable rudiment of a nervous system appears, and that at that time there are no identifiable nerve cells, no identifiable synaptic connections among them, and no identifiable neurotransmitters.

Through the gradual maturation of the spinal cord, and particularly of the brain, the underpinning for properties such as sentience presumably appear. It is not until 8 to 10 weeks that there are spontaneous movements in the human fetus, quickening of course not occurring until about 18 weeks. It is not known whether these early movements represent something that should be interpreted as sentience or selfness, or whether they are more in the nature of what would be called unconscious reflex activity.

Therefore, because of inadequacy of our information to date, it is not possible scientifically to specify exactly at what point selfness appears.

To conclude these comments, I have attempted to show that existing scientific knowledge is importantly relevant to discussion of the time of origin of human life; that such knowledge cannot settle all issues but it can set limits to the area of controversy; and that it is desirable that any formulated policy with respect to the matter should neither disregard nor conflict with existing scientific knowledge.

It is especially to be emphasized that with so complex and value laden a phenomenon as human development, purposes must be carefully and fully specified since suitable definitions must conform to particular purposes. To impose an arbitrary definition to satisfy one purpose may do violence to other equally or more important purposes.

A humane society cannot avoid finding this a troubling process. It is a price we pay for maintaining the right of self-decision on

profoundly important personal matters that also have a public impact.

Thank you, Mr. Chairman.

Senator EAST. Thank you, Dr. Grobstein.

Our next speaker, Dr. James Neel, received his Ph. D., M.D., and doctor of science degree from the University of Rochester. He is presently chairman of the department of genetics and professor of internal medicine at the University of Michigan Medical School. He is a member of the Institute of Medicine, the National Academy of Sciences, and the American Academy of Arts and Sciences. Dr. Neel is also the president-elect of the Sixth International Congress of Human Genetics.

Dr. Neel, we welcome you.

**STATEMENT OF DR. JAMES NEEL, CHAIRMAN, DEPARTMENT OF HUMAN GENETICS, UNIVERSITY OF MICHIGAN MEDICAL SCHOOL, ANN ARBOR, MICH.**

Dr. NEEL. Thank you.

Mr. Chairman and other distinguished members of this subcommittee, in view of the introduction, I do not think I need to repeat my credentials. Let me proceed directly to my statement. Inasmuch as it is a very brief and condensed statement to begin with, I ask permission simply to read it.

I find it impossible to address myself to the issue of when, following conception, actual human life begins without some reference to the concepts of evolution. Along with a large body of scientific thought, I subscribe to the thesis that step by step we have evolved from much simpler living creatures. We still have much to learn concerning the wonder of human evolution, but the evidence that it occurred seems sound. However, I would have great difficulty in saying at what point in that long process we passed over the threshold that separates human beings from the rest of the living world.

One of the bases for a belief in human evolution is the events of early human development. At about 30 days after conception, the developing embryo has a series of parallel ridges and grooves in its neck which are interpreted as corresponding to the gill slits and gill arches of fish. At that same time, it has a caudal appendage which is quite simply labeled "tail" in many textbooks of human embryology. Traces of this phase of our development can even be found in the adult.

The early embryo appears to pass through some of the stages in the evolutionary history of our species. The scientific dictum is: "Ontogeny recapitulates phylogeny," which translates into: during embryological development we repeat in abbreviated form many aspects of our evolutionary past. In this setting I can rephrase this as follows: the potentiality for becoming a human being is clearly present from the moment of conception, but to judge by external appearances, that potentiality is not immediately realized.

Given these facts, I find it most difficult to state, as a scientist, just when in early fetal development human personhood begins, just as I would find it impossible to say exactly when in evolution we passed over the threshold that divides us from the other living creatures. At some point as the amazing chain of events that

results in a fertilized egg becoming a human being unfolds, we acquire the basis for those attributes that make us humans, but precisely when I cannot say. In other words, I can find no biological basis for saying at exactly what stage in development human personhood begins. The definition of that moment is a matter of religious conviction, philosophical inclination, or legal necessity.

Thank you.

Senator EAST. Thank you, Dr. Neel.

Our next commentator is Dr. Mary Ellen Avery. Dr. Avery is presently the Thomas Morgan Rotch professor of pediatrics at Harvard University and the physician-in-chief of the Children's Hospital Medical Center in Boston, Mass. Dr. Avery is a well-known lecturer and author and is a member of numerous medical academies and associations and is on the editorial board of several medical journals.

Dr. Avery, we welcome you this morning.

**STATEMENT OF DR. MARY ELLEN AVERY, THOMAS MORGAN ROTCH PROFESSOR OF PEDIATRICS AND PHYSICIAN-IN-CHIEF, CHILDREN'S HOSPITAL MEDICAL CENTER, BOSTON, MASS.**

Dr. AVERY. Thank you, Senator East and Senator Baucus. I am honored to be able to speak to you today from a somewhat different perspective than my three colleagues, but I agree completely with their wise words.

I come to you as one who has specialized in the care of prematurely born infants and who has had many years of close association with their parents and their advisers on many of the complex questions that are raised in the setting of neonatal intensive care. Inasmuch as many of these issues pertain to the legislation under consideration, I would like to speak to them. I think my views are widely shared by my pediatric colleagues.

We take pride in the dramatic reduction in serious morbidity and mortality in the perinatal period that have resulted from both scientific understanding and social programs that foster care for pregnant mothers and their infants.

This remarkable lowering of mortality now permits a woman to feel reasonably confident that a given pregnancy will come to successful completion. No longer is she compelled to undertake multiple pregnancies to produce a surviving child.

I have also witnessed the extraordinary advances in the ability of physicians to detect birth defects in the first months of pregnancy and have been engaged in fostering prenatal diagnosis and genetic counseling to prevent reoccurrence of some inherited diseases. Some of the most serious, disabling, and often fatal disorders of new-born infants, such as Tay-Sachs disease, have been dramatically reduced through programs that alert potential parents to their carrier status and offer prenatal diagnosis in the first trimester. I view these advances as among the great scientific and social achievements of our age.

For many couples in whom the risk of recurrence of a major illness in the infant may be as high as 1 in 4 or sometimes even 1 in 2, prenatal diagnosis offers the options of having a normal child.

Without it, some parents would have elected to have no more children.

As a pediatrician I participate with parents and their counselors in many of the very painful decisions that they may confront with respect to the birth of a very immature infant or an infant with major disabilities that cannot be treated medically or surgically. I can assure you that the kinds of decisions we must make involve a wide range of complex issues, such as ascertaining the likelihood of survival in the event of very premature birth. Troubled parents and their physicians, sometimes the clergy and members of the judiciary, find they have to struggle to come to a conclusion in a given instance even when they have all available facts at hand.

Can one conceive of any piece of legislation that could be written that would be appropriate under all of these circumstances?

### RIGHTS OF MOTHERS AND CHILDREN

Speaking now as a child advocate, I believe every child has the right to be born healthy, or at least with reasonable probability of restoration of health, to be wanted and nurtured by parents, to enter a society with the appropriate social support mechanisms and educational opportunities to support growth and development.

Women should have the option of knowing the risk of abnormalities in the fetus they bear and they should also have the right to choose whether they wish to continue that particular pregnancy. The consequences of pregnancy in the young teenager and the woman over 40 carry hazards that may adversely affect both mother and infant.

We urge health education in the prevention of unwanted pregnancy and applaud efforts of many agencies to achieve that. To deprive teenagers and others of the option for abortion is to foster the specter of illegal abortion, the associated mental and physical anguish, to set the child at risk of abuse or an otherwise less than optimally supportive environment. To prohibit termination of pregnancy in the face of knowledge of some major future problems is to inflict on parents and society an unwanted burden, often of many years' duration. Society has a profound obligation then to support that handicapped child.

Because of what I have just said, and speaking now as a woman and a pediatrician who cares deeply about fostering the best interest of children, I hope we live in a society that still allows women freedom of choice with respect to pregnancy based on the best information available in the safest possible environment. I also hope that when women choose to have children they will find themselves in a society that will make it the mother's right to have prenatal care and safe delivery and the child's right to receive appropriate support during that period of dependency, the first years of life.

Once again, I thank you for this opportunity to present my views.

Senator EAST. Thank you very much, Dr. Avery.

I would appreciate it if all of you, within what would be consistent with your time schedule and opportunities, would be willing at your convenience to respond to written questions that might be submitted to you. Obviously we do not have time to go into every-

thing today. That would allow other members of the subcommittee who are not able to be here today to submit written questions. It could be done at your convenience. We would appreciate your willingness within rules of reason to help us on that score. I want to make that part of the record.

Senator Baucus and I have agreed that maybe a good way to go about this questioning would be to rotate on a 10-minute basis. He and I will go back and forth if none of our other colleagues arrive. I will begin the questioning. It is about 10 minutes until 11. I shall let Senator Baucus take over around 11 o'clock or thereabouts.

I appreciate all of you coming and your fine testimony. I am deeply aware of the time limitations that we have in trying to get at the heart of this very complex thing. What I would like to do—and I think this would expedite it and it would help me—I would like briefly to respond to the four of you as to what my reactions are to your testimony, and then one or several of you may respond to that as the spirit so moves you.

First of all, as a layman on this matter of when life begins, I suppose in the scientific community we obviously can find people on both sides of it. We had some very distinguished witnesses at our previous hearings who were quite categorical that life does begin at the time of conception; that in that first cell there are all of the attributes that have come together at the time of fertilization; and, if that cell is allowed to grow and develop, it will become an adult, a mature human being. We have heard testimony to that effect.

It strikes me that what is being said here by all four of you is that is a very imprecise kind of thing. You are not quite so sure that it is so, and we ought not expect science to take us further or bear a heavier burden here or to carry more water in answering this question than it can.

At least for the moment, as a layman I do not have the wisdom of Solomon to adjudicate that dispute between you people, all very distinguished people in the world of science. However, if I might reflect upon it as a legislator, a lawyer, and a former teacher of political science, it does strike me that the commonsense of the argument is that life does begin at some point. There is such a thing as human life. You are alive and I am alive.

The problem we face in the real world of legislation and the public arena is to determine at what point that life ought to be protected by the law. We certainly agree that the law does protect life; we merely are quarreling over at what point it begins. It is a very important debate, mind you, and I suspect that is what this is about.

We certainly agree, it seems to me, that after birth life is protected, and it will be protected until the time of death. We are generally against euthanasia. We are quarreling over at what point prior to birth is life to be protected.

As I understand your position and others that are opposed to this bill—and, again, once I am finished you certainly can correct me on this—it strikes me that it is a viability argument; that perhaps you would protect life once you can detect viability. I find that a more imprecise term than I do "conception." I do not know how one determines what viability is. Even a child at birth is not viable

if you mean autonomous and independent. Indeed, no one walks this life alone, I would contend—let alone the disabled, the retarded, the old, the senile.

I am a little troubled with the idea that the right to life is dependent upon some vague conception of "viability." I am troubled with that morally and legally, to be candid with you.

I would like to make one final point. I realize time is pressing on here.

Dr. Avery, you make an interesting point that modern medicine can determine this problem of defect of the fetus. It is an interesting point, and I am always amazed and impressed, and indeed happy, with the advance of modern medicine and what it can do for us. However, I am troubled with that; I will be candid with you.

I had polio at the age of 24 before the vaccine. I am paralyzed from the waist down. I have often wondered if, for example, medical science had been perfected to the point that it could have told my mother that this fetus was susceptible to polio whether we are then suggesting mother ought to have considered aborting. If so, I would like to have discouraged that, needless to say.

For example, in our office we have a deaf girl working as a mail sorter. She is a beautiful child, 22 years old, stone deaf and has been since birth. If we went in to Karen and said, "Karen, what would you have thought about having been aborted because it was determined you were to be deaf," I know what Karen would say and I would not have to ask her. She would say, "Thanks, but no thanks."

I am troubled with this idea of the right to be born healthy, the perfect environment, perhaps free of cleft palates. I agonize over that. It conjures up a world that I personally could not endorse.

I am not saying you are, but to me the tone of your remarks is very disconcerting in terms of the intricately planned technical, scientific society where technicians dictate whether the quality of life as determined through these kinds of tests will be allowed to go to term and be born.

Frankly, I am more comfortable on the other side of the argument—that there is this problem of imperfection; there may be defects; there may be disease. However, do we really want to have such a cavalier attitude on the taking of the lives of the unborn? I am deeply troubled with that as an argument—that abortion ought to be raised to that level of perfection.

It may be a slightly different argument than the fundamental problems involved in S. 158, but you have brought it in as a vital and interesting part of this discussion.

I am troubled with that. I am troubled with the viability standard and, as I already indicated, I do not really quite know how to resolve this dispute among you good scientists about when life begins. Again, my commonsense answer to it is that it begins at some point, and I am not saying conception is necessarily perhaps the ideal point to dictate abortion policy. However, again, just reflecting as a layman, it seems as good as any since everything may be a bit arbitrary in this, and viability is so vague and so indefinable and so inapplicable in the real world because we are all dependent.

I remember the year I spent hospitalized I was not viable. I was dependent upon other people to keep me alive and well.

It seems to me we ought to have a little deeper thought on the viability argument if that is now the standard by which we determine the right to life.

I have said enough. If any of you would respond to any phase of that, I would appreciate it.

Dr. Avery?

Dr. AVERY. I would like to respond. You have raised some very cogent and important issues. I hope that I am not advocating a cavalier attitude or being so naive as to say perfection or nothing. I think you have put the argument in an extreme posture for good reasons. But let me try to give it a little different balance and a little different perspective.

If I were to tell you that prenatal diagnosis could determine with great accuracy the presence of some of the very major life-threatening, lethal disorders of childhood and that an abortion would permit that mother not to carry that responsibility of caring for a grossly malformed or dying child, most would opt, I believe, to have that pregnancy terminated.

It does not say that anyone is going to pass judgment on risk factors of later problems or to make the statement that everyone has to be perfect in order to have a right to live. That is not the issue. The issue is to prevent some of the catastrophes of pregnancy. The issue is to lighten the burden of a woman caring for a child with major problems, not trivial problems.

Also, I would like to take issue with your equating viability and dependency. You ask what is a definition of viability and you worry that there is not going to be a precise one, and you prefer the precision of the phrase "conception."

We have an operational definition of viability with respect to the low birth weight infant. It is our capacity to provide an appropriate supportive environment to allow that infant to grow. At this time infants under approximately a pound and a half birth weight are not able to survive more than weeks after birth. Infants over that weight have a better chance, the chance of survival increasing with each increment in weight.

A pound and a half birth weight is not achieved until after the second trimester. If I put it in weeks, I would say operationally rarely does an infant born under 26 weeks gestation survive. I think it would be hard to document that it ever happens under 24 weeks. Therefore, there is an operational definition of viability. Birth before the end of the first trimester does not permit the life of that infant to be supported with all intensive care and all that modern neonatology could bring to bear.

Senator EAST. I think we can take one more response. Then we will let Senator Baucus ask a question.

Dr. GROBSTEIN. Thank you, Senator. I will be brief.

Your question, of course, was a long and complex one, and one might like to respond to a number of aspects. However, I will just pick one that does seem to me to be important.

That is the question that you raise about facing this issue legislatively and the very natural inclination to try to find a solution which is simple, precise, and hopefully implementable. Therefore,

one looks at some particular point that one can finger and use as a criterion.

My suggestion would be, however, that we are dealing with a very complex phenomenon, not only in terms of the biological and social side but obviously in terms of our value system as well. The simple solution may not in the long run be the most desirable or implementable.

I suggest that it is necessary legislatively to take into account the fact that we already have made provision for different levels of rights for different levels of maturation. An infant has the right to life—we all in this society believe that—but it does not have the right to vote.

With respect to the question about the status of the prebirth infant, the fetus, the same possibility has to be considered that there has to be a correspondence between certain rights and appropriate levels of maturation rather than to seek one stage at which rights are delivered, so to speak, as a single package.

Senator EAST. Thank you, Doctor.

Senator Baucus?

Senator BAUCUS. Thank you, Mr. Chairman.

As we all know, the Supreme Court stated in its 1973 decision, based upon medical-scientific knowledge at that time, that it was not competent to determine an answer to the question of when actual human life begins. In your view have there been any recent developments in scientific or medical knowledge, since 1973 that bear upon this question? Any of you can answer that question.

Dr. GROBSTEIN. The difficulty, of course, is knowing exactly what we mean by an actual human life in the context of your question. I have tried to address particularly the difference between what happens genetically in the egg at the time of fertilization and what we mean by individualness in the developing embryo. With respect to the latter, there have been certain advances made since 1973. I would not suggest that they are sufficient to alter understanding totally by any means.

However, evidence has been accumulating to indicate that individuality, the singleness aspect, does not appear until later than estimated before.

I refer particularly to experiments done on fusion of early embryos. By fusing early embryos after fertilization one can obtain a single individual having multiparentage genetically. The cells derived from two individuals genetically fuse and become one individual developmentally. This is a further indication that individuality in the sense of singleness has not yet been established at the moment of fertilization but appears at some later stage.

Senator BAUCUS. If I understand you correctly, you are saying that based upon your understanding, the concept of individual uniqueness of a human being, according to more recent developments in medical and scientific knowledge, is perhaps sometime later than the instant of conception; is that correct?

Dr. GROBSTEIN. I want to be quite precise. The uniqueness in the genetic sense is established at the moment of fertilization, but the integralness, the singleness that makes for a multicellular individual functioning as one organism, that does not occur until considerably later.

Senator BAUCUS. Going back to my original question, though, have there been any significant developments in science that bear on this question?

Dr. Thomas?

Dr. THOMAS. I would say that to narrow the response to your question so that it deals with that sentence in the bill that reads, "The Congress finds that present-day scientific evidence indicates a significant likelihood that actual human life exists from conception," I know of no evidence before or since 1973 that provides a scientific basis for that statement.

Senator BAUCUS. Dr. Avery or Dr. Neel, do you have any views on this question as to whether there have been significant new developments?

Dr. NEEL. I know of no development that would significantly alter that decision.

Senator BAUCUS. I am talking about new evidence that would bear directly on when actual human life begins.

Dr. NEEL. I know of no such development.

Dr. AVERY. Neither do I.

Senator BAUCUS. In your analysis of previous testimony, I take it you feel that those who testified at the prior hearings have based their conclusions on basically the same scientific and medical knowledge that the Supreme Court had available to it in 1973. In your view they are not basing their conclusions on new scientific information; is that correct?

Dr. AVERY. Yes.

Senator BAUCUS. If I understand you all correctly, your general view is that when actual human life begins is not a scientific question but rather a moral, religious, and philosophical question; is that correct?

Dr. AVERY. Yes.

Dr. GROBSTEIN. I am afraid I do not quite agree with that. It does depend upon how the proposition is phrased. On the question of whether or not human life in the abstract sense is continuous or begins at the time of fertilization—I think the scientific consensus would be that human life does not begin at fertilization; it is rather a continuing process and fertilization is an event in it.

If the question is whether an individual human life in the sense of a new generation is beginning, I think the consensus answer on that would be that genetically, yes, it beams at fertilization because new genetic information is put together in fertilization. However, in terms of the singleness to which I was referring before, that does not begin at fertilization but at some later time.

Senator BAUCUS. It is my impression that the medical witnesses who testified at the prior hearing do take the view that the question of when human life begins is a scientific question. I take it you disagree with that, is that correct?

Dr. GROBSTEIN. I would have to say again, Senator, it seems to me that the question has scientific aspects and there is scientific information which bears upon it. I think that it is correct in the context in which it usually comes up in public policy discussion, that it is correct to say that there are other considerations than scientific ones that need to be taken into account.

Senator BAUCUS. Dr. Thomas, do you have a view on that?

Dr. THOMAS. No.

Senator BAUCUS. Is it fair to say, though, that pure science will not be able to answer the question of when actual human life begins?

Dr. Neel?

Dr. NEEL. I do not think any of us would say that science could never answer that question because that prejudges possible future developments. What we are saying is that at the moment science, at least most of us feel, is unable to answer that question.

Senator BAUCUS. Based upon present knowledge?

Dr. NEEL. Based upon present knowledge.

Senator BAUCUS. May I ask each of you your individual view on this. At what point does each of you feel that human life begins? When does personhood begin?

Dr. NEEL. It is important to distinguish between the potentiality and the realization. I agree with the statement of Dr. LeJeune in the earlier session that the potentiality is established at the time of fertilization. All of the genes, the genetic determinants, we are ever going to have are present at the time of conception. However, when that potentiality becomes realized is the point at issue. I cannot improve upon my earlier statement. I do not know when that potentiality is realized to such an extent that we can say this is a human person.

Senator BAUCUS. Even though you do not know precisely, could you give us a rough approximation as to when you personally think that occurs?

Dr. NEEL. Senator, that is a "no win" question.

Senator BAUCUS. We all have to face it, I know.

Dr. NEEL. At the one extreme, clearly at birth you are dealing with a human being. Clearly many of the premature infants who have the potentiality of surviving are human beings. I accept what my distinguished colleague on the right has said.

However, when you start to push it back, we get into this area of uncertainty where I cannot fix a hard dividing line.

Senator BAUCUS. Can you give us any guidance? We have in some sense to make that decision.

Dr. NEEL. Yes, you do. Fortunately, I do not.

Senator BAUCUS. Dr. Avery?

Dr. AVERY. I would like to rephrase the question in the operational terms that Senator East put forth, which I think is of the essence.

Senator East, I believe you asked at what point should life be protected by the law. I can speak to that with more focus than I can in the more metaphysical realm of the definition of life. It would seem to me that if you know that infants born in the first trimester of pregnancy cannot be kept alive by all of modern science, I would say as of this point such infants are previable. When they reach a stage of development where we can mobilize supportive care, they become viable. At that stage I would welcome legislation that protects their life, supports it, and optimizes it.

Senator BAUCUS. Dr. Grobstein?

Dr. GROBSTEIN. The concept of a person as far as I am concerned is legal, social, psychological, and not purely biological. Therefore,

to address it, one has to think in legal, social, and psychological terms.

My view is that there is, however, a biological underpinning for personhood in legal, social, and psychological terms. I view as part of that underpinning the function of the central nervous system, which we are increasingly relying on in relation to questions of termination of life—death. It seems to me appropriate to think in those terms with respect to the beginning of personhood.

The appropriate maturation of the central nervous system is only a necessary condition of personhood. What we normally assign as rights to persons we do on the basis of our experience largely with mature individuals who have the same characteristics that we feel we have.

When that collection of characteristics reaches the point where it should be given the legal and social status of personhood seems to me to be a political matter to be decided in the way that the legislature is attempting to do so. However, I would hope that any legislation would take into account that there is a biological underpinning necessary in order for personhood to be displayed.

Senator BAUCUS. Dr. Thomas?

Dr. THOMAS. Senator Baucus, you are asking for opinions, and I would have to say that my opinion should in this instance carry no more weight than your opinion inasmuch as it is not based, and cannot be based, on persuasive, scientific evidence.

I am persuaded by Dr. Avery's view that viability is perhaps one criteria that could be used fairly in writing law. I am also persuaded, as I said earlier, that the time at which the central nervous system begins functioning as an integrated collection of cells and fibers is another possible criterion. A third one might conceivably be the unmistakable marks of identity and selfness that appear coded out by the immunologic system at some point in the emergence of the human embryo. I cannot tell you at what stage that is. I would guess it is sometime after the first trimester.

Senator BAUCUS. Your view as to the point at which the law should protect the fetus is based more in your view on your personal religious, moral, and philosophical views than it is upon your scientific knowledge?

Dr. THOMAS. I am afraid that is true.

Senator BAUCUS. Excuse me?

Dr. THOMAS. I am afraid to say that is true.

Senator BAUCUS. Would that be true also for you, Dr. Avery and Dr. Grobstein? Is it true that your personal view as to when the law should protect a fetus is based more upon your personal moral, religious, social, and philosophical values than it is upon your professional knowledge as a scientist? Is that true for you, Dr. Avery?

Dr. AVERY. No. Much of what I say comes from my experience as a pediatrician looking after premature babies. That is my professional, scientific experience.

Senator BAUCUS. Your view is based upon your experience then——

Dr. AVERY. Yes.

Senator BAUCUS [continuing]. More than it is upon your scientific knowledge of the development of the fetus through the various stages?

Dr. AVERY. I speak in terms of being involved in the complex decisions that have to be made when a 1-pound infant is delivered. That involves an admixture of what I know about development, what I know about the capacity for modern medicine to support live, and what I know about the concerns of parents and others who are involved in that decisionmaking.

I would hate to see rules written with such precision that they would deprive knowledgeable, concerned individuals of some opportunity for choice in the face of these complex decisions.

Senator BAUCUS. Is that generally true, then, for all scientists, including those who testified at the prior hearings? Their views as to when actual human life begins are in all probability based more on their individual moral, religious, and philosophical values than upon their understanding of scientific knowledge?

Dr. AVERY. If the question is worded that way, "when life begins," yes. However, it seems to me that this piece of legislation has implications that deal in operational terms, with our behavior thereafter. I am speaking to the implications of the legislation rather than focusing on the definition of life.

Senator BAUCUS. Thank you very much.

Senator EAST. Thank you, Senator.

Dr. Avery, as I understand it, you are saying on this matter of when the law ought to protect life that it is the point of viability? Is that what you are saying in terms of the unborn? As I understood it, you were saying viability begins at the end of the first trimester?

Dr. AVERY. I should not have said it that precisely.

Senator EAST. I understood you to say that.

Dr. AVERY. Clearly in the first trimester there is no chance of viability within our present knowledge. For the most part it is well into the second trimester. In fact, a significant probability of survival does not take place until the end of the second trimester.

Senator EAST. Then you are saying that you think by viability the point then would be at the end of the second trimester?

Dr. AVERY. I would hate to be pushed to the point of answering that question yes or no because in biologic phenomena there is always some spread of events. It is not a precise date that could be written into law. However, there is a period of time around the end of the second trimester when the odds favor survival sufficiently so that I would say that becomes an operational definition.

Senator EAST. Looking at life as a continuum from conception to death, would you apply the viability standard to any other level in the continuum or only in this weakest link of the unborn?

Just as a personal experience I had, which we all go through, this dear mother to whom I referred earlier died in January of this year. From the age of 75 to 82 she was totally dependent upon others. She was senile mentally and became physically decrepit. She had to have constant attention. In short, she was not viable in any reasonable use of the word "viable." If you mean that she could take care of herself independently, there was no viability.

However, I presume at that end of the continuum you would not apply the viability test.

Dr. AVERY. I do not feel I am able to generalize about such a complex matter at that end of the age spectrum.

Senator EAST. But, Doctor, life is complex and we have to make complex judgments. At some point the commonsense of someone says life is life and it is a reality—we know it, we live it, we are, we exist. To slough off or to evade the question by simply saying it is complex—you are not suggesting that we could make a case for having done mother in, are you? What is so complex about that? To me, the answer ought categorically to be, no, mother ought to be taken care of to the extent of our abilities and talents to do it.

Dr. AVERY. I think that is correct.

Senator EAST. That is not complex.

Dr. AVERY. But I would not say that mother was not viable in that sense. That is not what I mean by viability.

Senator EAST. If you could have seen mother, she was not viable. She required constant care and attention, and she often took a few support mechanisms, not permanently. Frankly, you use the point of unwantedness, and I suppose with some aging parents, just to shift this in order to get perspective on it, sometimes one could argue that aging parents are inconvenient, unwanted. They are expensive sometimes. They cause trouble and anguish.

I do not mean to put words in your mouth, but what I am saying is that it seems to me that ultimately I guess it is a moral and ethical question, but at some point you say life is sacred; it is God-given and it ought to be protected, and we do not define it out of existence simply by saying it is a complex question.

I do not understand why if we would all agree—and I would hope we would—that we would protect the senile and the aged, then why is it with the weakest link in the chain, the unborn—the weakest link in the chain—we cavalierly dispose of that upon some test of "viability"? To me, morally and ethically it is repulsive.

I am not suggesting I have an easy answer to it. I am not suggesting it is not a complex issue. I am not suggesting reasonable and fairminded people cannot disagree on it. However, to suggest that life, the greatest God-given thing that we have, is dependent upon this vague thing of viability as defined by the groping of science just flies in the face of my conception of a really profound, deep, and penetrating understanding of the moral and ethical question involved.

I suppose I would put it this way: Maybe we do not have sufficient moral background or understanding of the issue in the country really to get to the heart of the problem. I may be one voice, but I am deeply troubled that life is dependent upon some vague conception of viability. It seems to me that is where you are leaving us. Is that correct?

Dr. AVERY. I simply do not share your views. As you said at the beginning, I recognize that thoughtful people can have different views here. I cannot accept the fact that every human pregnancy must be carried to term simply because the egg was fertilized. I think there is an enormous range of times—rape being one, for example—when the intervention of abortion must be an option. I

happen to think that when the fetus is defective that option should be presented to the mother. The mother matters here.

I think I am asking who are we to conceive of putting into legislation rules that will affect every woman who ever becomes pregnant and say to her, "You must carry that pregnancy to term because it is life." Senator East, I think that's nonsense. [Applause.]

Senator EAST. Doctor, let me respond to you this way: There are and can be exceptions made in the abortion area. However, with all due respect to the applause you get, I will not yield the point personally that a society that accepts the abortion clinic concept, as we do, as a way of life and as a part of its culture has a healthy, moral understanding of what life is and that we ought to have reverence for it. [Applause.]

I would appreciate it if both sides of this issue would understand that applause is a violation of the rules of the Senate. I would appreciate your respecting that.

Let's just concede this point. Let's talk about where there are not defects, where there are healthy fetuses and there are women who could take them to term, if, for example, the public law could give them some support, some encouragement. On this matter of being unwanted, who does not want it? There are parents trying to adopt children who cannot get them who could give them love and compassion and understanding.

I do not mean to get overly dramatic about it, but when you say unwanted, maybe God wants it. You tell us science cannot help us here, but it seems to me science is dictating to us what we shall do.

In my judgment there is a legitimate and profound moral question here. I am not suggesting I have an easy public policy answer to that. That is what all these hearings are about.

However, I personally will not yield the point—and I am not saying others cannot—that we do not have a serious moral and ethical question here.

I remember when she received the Nobel Prize for Peace, Mother Teresa—and I am not a Catholic—said that she thought that abortion on demand was a great threat to world peace because, as she said, if we encourage our young women to destroy the children in their wombs, is it any wonder we end up destroying one another as adults, because the latter is a less callous act than the former? At least in the former case, I agree with her, we seem to be inflicting destruction upon the innocent and the helpless.

I understand there are exceptions. I understand it is complex. However, I still will come back to the fundamental premise that where you have women with healthy children that could go to term and give birth to that child and put it up for adoption, or who knows what, what is wrong with a public policy that might foster that end?

Today the public policy—because the edict of *Roe* v. *Wade* dictates a totally contrary policy—is abortion on demand. It is a legal, constitutional premise that gives aid and comfort to the abortion clinic society.

I do not know where this issue comes out. I do not have the slightest idea. However, I do know if we continue on with *Roe* v. *Wade*—and we may; this bill may fail; the idea of a constitutional

amendment may fail—there will continue to be in this country people who will want to speak out, if for no other reason than for this purpose—to encourage women who may be pregnant and feel they can carry that child to term to consider it. We want to give them moral and legal support so that when that child is born—bless it—it might possibly be adopted or find a wanting, caring, and loving home.

I do not find anything so preposterous about that. I think it is an imminently reasonable proposition morally, ethically, legally, and in every other way.

I do not mean to overreact to your good points, and you say them with great eloquence and precision, but I sense the world of science here, in the name of saying they cannot help us, has actually overwhelmed us and dictated incredibly perverse, contorted, and convoluted public policy. I suppose our deliberations are to try to find some way out of this jungle, this moral jungle in which I feel very strongly that they are.

I have said my peace on this. Senator Baucus, maybe you have a parting thrust.

Senator BAUCUS. Thank you, Mr. Chairman.

Actually I have several more questions. Mr. Chairman, I think you hit upon the nub of the problem here. All of us want to foster more reverence for life; there is no doubt about that. All of us certainly want as many parents as possible to have healthy children.

I have often thought that perhaps one way out of the dilemma is for Congress to encourage adoptions more than it has in the past. When there is an unwanted pregnancy—and they sometimes occur—the child could be adopted by parents who want to provide him or her with a healthy and sound environment. It is not a total solution, but I think it is one way to help us out of this dilemma.

Mr. Chairman, in your characterization of this issue you said maybe it is ultimately a moral and ethical question; maybe God wants the child. That, of course, is a religious question.

You also said there are legitimate, profound, moral questions involved here. Frankly, I think the problem before us is an ethical, moral, religious, and philosophical question more than it is a scientific question.

It is a question with which we are all going to be wrestling not only today and this year but in succeeding generations. It is our duty to grapple with it and find a responsible solution as best we possibly can.

Let me ask a couple questions here, if I might.

Dr. Thomas, could you tell me—and I know this is a difficult question to answer—whether or not most biologists, according to your knowledge, agree with your views on this bill? Could you answer that, please?

Dr. THOMAS. I can say only that my fellow members of the National Academy of Sciences, who represent the biomedical field, do agree, as evidenced by the resolution passed at the last meeting. The only other answer I could give you would be an anecdotal one. I have not met anybody yet in my field or in related fields who feels differently about the question.

Senator BAUCUS. What about you, Dr. Grobstein? Do most embryologists generally agree with your view as far as you know?

Dr. GROBSTEIN. I am sorry, Senator?

Senator BAUCUS. Do most embryologists generally agree with your view of this bill insofar as you know?

Dr. GROBSTEIN. I have not expressed a view on the bill directly, Senator. I would not be able to say what embryologists would say about the bill. I do believe that the things that I have said scientifically most embryologists, if not all, would agree with; yes.

Senator BAUCUS. Dr. Avery, I wonder if you could comment as a pediatrician on whether you believe others in your field would share your view.

Dr. AVERY. I hope I am reflecting the views of most concerned pediatricians. I am surely not reflecting the views of all of them. However, I would agree very much with Senator East that we share and agree on the need to have great emphasis on sex health education, on widely available services that will not lead to abortion mills, if that is the phrase you use, but will simply put abortion in the repertoire of responses that the medical profession has to make under certain conditions that will be individualized at a given time.

Senator BAUCUS. Dr. Neel, what about the geneticists?

Dr. NEEL. I would think most would subscribe to this position. I would like to respond to Senator East in agreeing with him, although perhaps not in the context that he would desire.

At one point he said science should not dictate in these matters. I agree. I think you have sensed this morning a notable reluctance on the part of science to dictate in these matters.

Senator East said that the issues are moral and ethical and legal, and that is what I said in my testimony. I do not see science trying to dictate the moment at which human personhood begins.

Senator BAUCUS. I have a general question about the degree to which this bill, if it were enacted, could prevent the use of IUD's and oral contraceptives. Could any of you address that issue?

My understanding is that because IUD's operate by preventing the implantation of a fertilized egg that if this bill were to become law it could lead to the banning of IUD's.

Second, because in some cases oral contraceptives have the effect of preventing implementation rather than preventing fertilization, it is my understanding in those cases, too, oral contraceptives could be banned under this bill.

Dr. THOMAS. That seems beyond question.

Senator BAUCUS. Unquestioned?

Dr. THOMAS. Beyond question. As I understand it, the bill would make these measures illegal.

Senator BAUCUS. Does anybody here have a contrary view?

[No response.]

Senator BAUCUS. Everybody agrees then?

[Dr. Thomas, Dr. Grobstein, Dr. Neel, and Dr. Avery nod their heads in agreement.]

Senator BAUCUS. I see everybody's head nodding.

Thank you very much.

Senator EAST. Senator, I would simply like to comment on that point. We will get into the legal and constitutional implications of

this legislation tomorrow. The time is running on for us, so I do not mean to pursue it.

However, in this area I feel more competent than I do on the scientific end of it because of my background and training. What this bill would do would not make those determinations. This bill would return the issue to the States where they could enact legislation consistent with the general requirement of the due-process clause of the 14th amendment. It would not dictate what the results would be on that kind of device. It would not dictate the precise form that any State action might take.

I do not mean to anticipate that debate tomorrow, but I would like the record to show that because otherwise my silence might be interpreted as consent.

I frequently get over my head when I get into the world of science, and I sometimes find scientists when they talk about S. 158 get over their heads when we talk about the legal and constitutional implications of it. I feel that is in my bailiwick. I can assure you quite competently that would not happen, so you can sleep well tonight. That is not the intent or the implication of this bill.

I would like to thank each and every one of you for coming and the great contribution you have made to this. We appreciate the spirited dialog that we have had.

Senator BAUCUS. Might I just ask one other question?

Senator EAST. Yes.

Senator BAUCUS. It is a scientific question.

What percentage of fertilized ovum do not reach birth? What percentage spontaneously abort before implantation, and what percentage of those that are implanted spontaneously abort? I am trying to get a sense of the percentage of fertilized eggs which are actually born.

Dr. GROBSTEIN. The information that is available indicates that only about one-third of human eggs that are fertilized in the normal process go to term. About two-thirds are lost along the way. Of those two-thirds, I believe more than half are lost prior to implantation. Once implantation has occurred, the wastage is reduced very considerably.

Most of the loss occurs prior to implantation, but there is still some loss after implantation but declining as the pregnancy progresses.

Senator BAUCUS. Those are all losses due to natural causes, though; is that correct?

Dr. GROBSTEIN. One would have to say that at the moment they are due either to natural causes or unknown causes. There certainly is some question whether certain environmental factors may contribute to that loss.

Senator BAUCUS. Does mother nature play a role here? I am trying to get a sense of why only one-third of all fertilized eggs actually are born.

Dr. GROBSTEIN. The percentage of loss varies in different species and is quite high in the human species, perhaps higher than any other.

When you ask does mother nature play a role, I assume that to mean that you are asking whether or not there appears to be some good biological rationale for this.

Senator BAUCUS. That is correct.

Dr. GROBSTEIN. The answer to that is that it appears that a high percentage of those eggs that do not continue to term are defective in one way or another. A considerable percentage of them can be shown to be defective in terms of chromosomal abnormalities, but about others one cannot be certain; they do not show gross malformations of that sort.

The interpretation is that very likely this is a protective mechanism to reduce the number of embryos that would go to term and be defective genetically or otherwise.

Senator BAUCUS. Thank you very much.

Senator EAST. Again I wish to thank the four of you for coming. We appreciate your excellent contribution.

[The prepared statements of Professor Grobstein and Dr. Avery follow:]

## Prepared Statement of Professor Clifford Grobstein

Mr. Chairman, Members of the Sub-committee, Ladies and Gentlemen:

The Supreme Court of the United States, in its landmark decision in Roe vs. Wade (1973), said the following: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus; the judiciary at this point in the development of man's knowledge is not in a position to speculate."

This statement, which has been widely quoted, fails to reflect accurately current scientific understanding and consensus in this difficult area. It is true that existing scientific knowledge alone cannot define definitively the status of nascent human beings. The matter is plagued not only by limitation of knowledge but by profound value differences in long-established traditions. Nonetheless, there is scientific consensus on important aspects of the matter. Such consensus should be clearly recognized because it can set limits to the range of controversy, at least among those who place confidence and trust in objectively verifiable knowledge. To establish these limits is an important advantage, even if it offers no panacea.

My objective thus is to state clearly what we do and do not know scientifically about the onset of human life as it relates to proposed legislation before this sub-committee. S. 158 specifies that "human life shall be deemed to exist from conception", echoing again "the difficult question of when life begins." (Roe vs. Wade) I will address this question in a series of statements that I believe can claim consensus among biologists who study developmental processes.

1. No form of life begins in each generation, rather it is continuous through generations. So far as we know no new life begins on the contemporary earth, it is all descended from pre-existing life. Life is transmitted, not initiated, as new generations arise.

2. These statements apply to human life. The egg and sperm that unite in fertilization are themselves living, human

cells, as were their precursors in the parental bodies. Their union does not initiate human life but continues it. The humanness and vitality of eggs and sperm are not readily apparent to casual observation but they are readily demonstrable scientifically. This means that fertilization is not "when life begins," it is a particularly significant stage in its continuity.

3. What fertilization initiates is a new generation. There are two meanings and aspects of this initiation. The first is that fertilization activates the egg to continue development and it is in development that a new individual is generated. The second aspect is that as a result of fertilization the fusion-cell carries hereditary contributions from two members of the preceding generation, borne in the egg and sperm and combined when they fuse.

4. The fusion-product is hereditarily new but not yet developmentally a new individual. Its hereditary difference from either parent makes it a new generation because its hereditary constitution, derived in complex ways from those of its parents, is uniquely its own. However, we know scientifically that it is not yet a new individual because, depending upon circumstance, it can yield less than a complete individual or more than one. Thus, in natural or induced twinning it may produce two or more individuals with identical hereditary constitutions (identical twins).

5. Developmental activation of the egg leads to division of the fusion-cell to yield a many-celled embryo. The products of the first several divisions are equivalent in developmental capability. In non-human species they have been separated and recombined, even with cells from embryos of other parentage, to produce normal individuals with mosaic hereditary properties. It is thus clear that in early stages the embryo is not yet stabilized as an individual but is simply a collection of cells. The multicelled but non-integrated stage persists for at least several days beyond fertilization. There follows a process of compaction in which cells become closely adherent and more

difficult to separate. This probably is a first step toward formation of a new multicelled individual.

6. At about two weeks after fertilization the multicellular embryo, now embedded in the uterine wall, has a scientifically identifiable sub-population that has been shown to be precursor to all of the cells and tissues of the adult. There is evidence that twinning in such embryos can still occur through splitting of the precursor population. Therefore, full biological individuality may not yet be established even at this stage of development.

The implication of these statements is that at fertilization a new generation in a genetic sense is constituted, but that two weeks later a new and stable biological entity or individual is not yet certainly present. Exactly when such an entity arises is not known for certain in the human species but it is probably not many days later. The development of such an entity, therefore, is gradual and involves a number of transitions and stages. No single moment nor event is known scientifically to mark its initiation, rather it emerges steadily out of the developmental process as an additional characteristic beyond being alive and biologically human.

Returning to the language of Roe vs. Wade and S. 158 it would be scientifically more accurate to say that "Human life does not begin with fertilization (conception) but hereditary individuality does. Individuality in the sense of singleness and wholeness, however, cannot be said to be established until more than two weeks after fertilization."

Biological individuality is, of course, not equivalent to the complex set of characteristics that we normally associate with human beings as persons. These characteristics progressively arise as development continues. If scientific and technical knowledge is to be useful in establishing the social, political or legal status of a nascent human being it is necessary to specify what characteristics are primary and for what purpose. It is not the capability or role of science to make such choices.

Once decided, however, science can help to implement purposes or to estimate consequences.

For example, among the suggested purposes for defining the time of origin of human life are: to accord rights, to preserve human dignity; to avoid cruelty, to protect life potential, etc. To further illustrate the role of scientific knowledge in dealing with the problem of nascent human life I shall comment briefly on two of these possible purposes - to accord rights and to avoid cruelty.

It is clear that in other circumstances assignment of rights takes into account level of maturation in the developmental sense. Infants are accorded the right to life but not the right to vote. Elder citizens are accorded certain rights - e.g. public transportation at reduced cost - that younger citizens do not have. In the continuing progression of development there is necessarily arbitrariness in defining any specific time or stage to assign particular rights. The public decision is ultimately political but it clearly is not desirable to disregard or to conflict with what we know scientifically about the nature of the process of development. In this sense scientific knowledge can afford a rational framework of objective validity on which to base policy.

With respect to the avoidance of cruelty a particularly knotty issue is raised, but one to which scientific knowledge can also be helpfully applied, at least to define limits. The issue focuses on the stage of development at which an embryo or fetus can be expected to become sentient, in the sense of capability to experience discomfort or pain. Our most direct information bearing on this comes from our own experience and the experiences we share with others through communication. In the absence of communication we infer such experiences from behavior or from other identifiable correlates of discomfort or pain. In all instances specialists on these matters find involvement of the nervous system, and particularly the brain, in the experiences of human discomfort and pain. Indicators of the involvement are electrical activity of nerve

cells, presence of neurotransmitters at synaptic connections between nerve cells, synthesis and break-down of enzymes, etc.

The central nervous system makes its first appearance in human embryos as a thickened cellular plate that folds into a hollow tube. This recognizable rudiment is not present until about four weeks after fertilization. At this stage, however, the cells of the rudiment look nothing like nerve cells, there are no synaptic connections, no neurotransmitters and no characteristic electrical activity. With continued development these features gradually appear, at different times in different sites within the nervous system. Associated with cellular maturation localized movements begin to occur at about 8 weeks after fertilization. These precede the larger and more general movements that are recognized as "quickening" at about 18 weeks. Generally speaking cellular maturation in the nervous system proceeds upwards, i.e. earliest in the spinal cord and latest in higher centers in the brain. There is uncertainty whether even the late stage fetus has achieved sufficient brain maturation to have internal subjective experiences such as discomfort and pain.

If one accepts the impressive scientific evidence that subjective states depend upon some level of maturation of the brain - not specifiable as yet in detail - it follows that such subjective states cannot exist prior to the appearance of some functionally connected nerve cells in upper brain levels. This minimal criterion suggests that not until at least some months after fertilization can a developing human embryo experience discomfort or pain. More detailed scientific information and greater understanding of the essential requirements for discomfort and pain might alter such a judgment, particularly considering the moral imperative to maintain a margin of safety against the impingement on sensitivity of a nascent and sentient human being.

To conclude these comments, I have attempted to show that existing scientific knowledge is importantly relevant to discussion of the time of origin of human life, that such knowledge cannot settle all issues but can set limits to the

area of controversy, and that it is desirable that any formulated policy with respect to the matter should neither disregard nor conflict with existing scientific knowledge. It is especially to be emphasized that with so complex and value-laden a phenomenon as human development purposes must be carefully and fully specified since suitable definitions must conform to particular purposes. To impose an arbitrary definition to satisfy one purpose may do violence to other equally or more important purposes. A humane society cannot avoid finding this a troubling process. It is a price we pay for maintaining the right of self-decision on profoundly important personal matters that also have a public impact.

---

## Prepared Statement of Dr. Mary Ellen Avery

Senator East, Senator Baucus and Members of the Subcommittee: I am honored to be invited to speak before you today from the perspective of one who has spent her professional life in study and care of infants, particularly those born prematurely.

First, let me identify myself. I am Physician-in-Chief of the Children's Hospital, Boston, and Professor of Pediatrics at Harvard Medical School. My medical school training and residency in pediatrics was at Johns Hopkins. Subsequently I pursued research in neonatology and pulmonary physiology at Harvard's Medical School and School of Public Health. I have been engaged in caring for newborn infants, in research on their many problems, and in teaching of medical students and house officers for the past twenty-five years. For five of those years I was Professor and Chairman of the Department of Pediatrics at McGill and Physician-in-Chief of the Montreal Children's Hospital in Canada. I am the author of one of the standard textbook on Diseases of the Newborn, which I hope assists physicians in the care of infants. I have specialized in the care of prematurely born infants and have had many years of close association with parents and their advisers on many of the complex questions that are raised in the setting of neonatal intensive care. Since some of these issues pertain to the legislation under consideration, I welcome the opportunity to speak.

I share with my colleagues in obstetrics and pediatrics pride in the dramatic reduction in serious morbidity and mortality in the perinatal period that have resulted from both scientific understanding and social programs that foster care for pregnant mothers and their infants.

Infant mortality is now the lowest in our history. In the past eight years it has dropped 32 percent. More than 21,000 babies survived in 1978 who would have died if the 1970 mortality rate had prevailed. Part of the improvement is surely due to the relatively fewer births to women who are at high risk of complications of pregnancy because of age or parity. Part is due to advances in obstetrics, to regionalization of perinatal care, and I believe a considerable contribution is related to our ability to provide appropriate intensive care to sick newborns. This remarkable lowering of neonatal mortality now permits a woman to feel reasonably confident that a given pregnancy will come to successful completion. No longer is she compelled to undertake multiple pregnancies to produce a surviving child.

I have also witnessed many of the extraordinary advances in the ability of physicians to detect birth defects in the first trimester of pregnancy, with use of ultrasound and amniocentesis, and have been engaged in fostering prenatal diagnosis and genetic counselling to prevent recurrence of some inherited diseases. Some of the most serious, disabling and often fatal disorders of newborn infants, such as Tay-Sachs disease, have been dramatically reduced through programs that alert potential parents to their carrier status, and offer prenatal diagnosis in the first trimester. I view these advances as ~~one~~ of the great scientific and social achievements of our age.

Let me illustrate. We are now in a position to diagnose some of the major malformations through chromosome analysis in the first trimester of pregnancy. For example, infants with an extra chromosome, known as trisomy 13 or trisomy 18, which result in early death, can be recognized in time for termination of pregnancy. For many of the couples in whom the risk of recurrence of a major illness in the infant may be as high as one in four, or sometimes

even one in two, prenatal diagnosis offers the option of having a normal child. Without it some parents would have elected to have no more children.

As a pediatrician I participate with parents and their counsellors in many of the painful decisions that they may confront with respect to the birth of a very immature infant or an infant with major disabilities, such as anencephaly, that cannot be treated medically or corrected surgically. I can assure you that the kinds of decisions we must make involve a wide range of complex issues, such as ascertaining the likelihood of survival of an infant of only one pound birth-weight. Troubled parents and their physicians, clergy and on occasion the judiciary find they have to struggle to come to a conclusion in a given instance even when they have all available facts at hand. Can one conceive of any piece of legislation that could be written that would be appropriate under all circumstances?

Speaking now as a child advocate, I believe that every child has the right to be born healthy or at least with a reasonable probability of restoration of health, to be wanted and nurtured by parents, and to enter into a society with appropriate social support mechanisms and educational opportunities to support growth and development. Women should have the option of knowing the risk of abnormalities in the fetus they bear, and they should also have the right to choose whether they wish to continue the pregnancy.

The consequences of pregnancy in the young teenager and women over 40 carry hazards that may adversely affect both mother and infant. We know, for example, that the risk of premature birth in mothers under 16 years of age is greater than at a later age. We also know that pregnancy in the very young is often unexpected and unwanted. We urge health education in the prevention of pregnancy and applaud the efforts of such agencies as Planned Parenthood. To deprive teenagers and others of the option for abortion is to foster the specter of illegal abortion, the associated mental and physical anguish, and to set the child at risk of abuse or an otherwise less than optimally supportive environment. To prohibit termination of pregnancy in the face of knowledge of some major future problems is to inflict on parents and society an unwanted burden, often of many years' duration.

Family planning has had a significant impact on the reduction in both numbers of stillborn infants and those who die shortly after birth. From statistics published in the Report of the Select Panel for the Promotion of Child Health 1981, we are told that almost four-fifths of all married couples were using one or another form of contraception. Of the remainder, about 13 percent were seeking to become pregnant or were pregnant, and only 8 percent were non-users of contraceptives at risk of having an unplanned pregnancy. Surely such data reflect current practices and also exemplify current mores.

Because of what I have just said, and speaking as a woman and a pediatrician who cares deeply about fostering the best interests of children, I hope we live in a society that still allows women the freedom of choice with respect to pregnancy, based on the best information available and in the safest possible environment. I also hope that when women choose to have children they will find themselves in a society that will make it the mother's right to have prenatal care and safe delivery, and the child's right to receive appropriate support during the period of dependency, the first years of life.

Once again I thank you for the opportunity to present my views, and I welcome your questions.

Senator EAST. I would like to ask Dr. Daniel Callahan, Dr. Carl W. Tyler, Dr. Jessica Davis, Dr. George Ryan, and Dr. Mildred Jefferson to come forward, please.

I wish to welcome the five of you. We appreciate your taking the time to come and to share in this vital discussion.

Again, we all apologize for the time restraints. I remind you that your written statements will be made part of the record, so we would appreciate it if you would summarize as easily and as quickly as you can, once again consistent with making the key points that you would like to make.

As we did with the previous panel, we will let all five of you comment and then we can begin the questioning.

Dr. Daniel Callahan will be our first witness. Dr. Callahan is the founder and director of the Hastings Center, the Institute of Society, Ethics, and the Life Sciences. Dr. Callahan received his Ph. D. in philosophy from Harvard University and is an elected member of the Institute of Medicine, the National Academy of Sciences.

Dr. Callahan, we welcome you this morning.

## STATEMENT OF DR. DANIEL CALLAHAN, DIRECTOR, HASTINGS CENTER, HASTINGS-ON-HUDSON, N.Y.

Dr. CALLAHAN. Thank you, Senator.

I would like to make a variety of points on the issue of the beginning of life, particularly that issue as it relates to the pending bill. I think the bill rests on three faulty premises.

The first faulty premise is that the issue can be decided scientifically; namely, the issue of when human life begins. If one wants to define human life in the narrowest genetic terms, one might say, yes, it is true life begins then. However, I think for the purposes of a bill whose ultimate implication is to deal with abortion, one has to make a distinction between genetic human life and personhood. The bill seems to want to make a very rapid move from human life to the concept of personhood to the concept of protecting that personhood. That seems to me too rapid a leap in the bill.

I do not believe in the first place that the issue is scientific. In any event, I do not think one can move that rapidly from the notion of the scientific beginning of human life to that of personhood.

A second faulty premise, and a more subtle one, is that from scientific evidence moral conclusions can be drawn. There is an old principle in philosophy, which is my field, that one cannot derive an "ought" from an "is." In this case the argument is somehow that if we can get scientific evidence about human life, we can, therefore, morally conclude how we ought to value that life and how we ought to behave toward it. It seems to me that issue is a quite severable issue; namely, what do we do with the scientific evidence once we have it for moral purposes?

I might simply give an analogy. Science, for instance, might well argue that there is a significant likelihood that nuclear powerplants are dangerous. It would not necessarily follow from that factual evidence that we ought not to build such plants, for our moral values might conclude that despite the dangers we ought to have them anyway.

I would also note that the general arguments concerning the relationship between scientific evidence and human personhood have taken a number of different directions. Some would argue strictly from genetic knowledge to the conclusion that life ought to be protected from conception. Still another school of thought would argue that it is important that there be some development, that some potentiality be realized before that protection ought to be accorded.

Others would argue that only social consequences count. They are in effect saying "draw the line anywhere you want, but only draw it on the basis of what you would take to be the most fruitful social consequences."

Still others—I suppose the most radical position—would argue that personhood is achieved only when there is full self-consciousness, rationality, and a conscious desire to live. Obviously if somebody drew a line of that sort, infanticide would be possible and probably fairly late infanticide.

I think there is a third faulty premise behind the bill also; namely, that an issue of this kind can be decided by a legislative vote. If the issue is, indeed, a scientific issue, I would only point out that matters in the scientific community are not decided by vote.

Beyond that, one ends up with a very paradoxical situation; namely, the bill defines the issue as essentially scientific and then

leaves a matter defined as scientific up to a vote by lay people—that is to say, by legislators who are not scientists. This at least is a paradox of that bill.

Now I would like to add one other consideration. If one thinks that this is a matter to be decided by legislation—namely, that the question of when human life begins can be decided by a vote—I would point out logically that another legislature in another era might very well decide that the scientific evidence has now changed, that life begins at 1 year after birth and that, therefore, we can take a vote on that and thus change the law.

It seems to me one is on a very slippery slope to decide an issue of this kind in a legislative manner and that the results could be very dangerous in quite a different setting.

I would like to stop at that point, but I would simply add one final thought. I, myself, support *Roe* v. *Wade*. I think the issue ought to be left up to the individual woman to decide, simply because I think the moral and philosophical issue is sufficiently in doubt to make that the only reasonable conclusion.

The real choice and the real question ought to be what ought women to think about when they go about making that choice, when they exercise their judgment. What moral standards ought to be brought to bear in deciding to have an abortion? At that point the question of when human life begins becomes a critically important one and needs to be taken very seriously in order to come to a responsible, moral judgment.

Thank you.

Senator EAST. Thank you, Dr. Callahan.

Dr. Tyler is the Assistant Director for Science at the Center for Health Promotion and Education of the Centers for Disease Control in Atlanta.

Dr. Tyler, we welcome you.

**STATEMENT OF DR. CARL TYLER, ASSISTANT DIRECTOR FOR SCIENCE, CENTER FOR HEALTH PROMOTION AND EDUCATION, CENTERS FOR DISEASE CONTROL, ATLANTA, GA.**

Dr. TYLER. Thank you very much.

In addition to my present post which is given in the written statement you have before you, I have served for more than a decade as the Director of the Family Planning Evaluation Division at CDC, and I am a board-certified obstetrician/gynecologist. Those are the really more relevant reasons for my being before you.

My testimony is intended to bring you up to date on factual information with regard to the public health practice of legal abortion and how it has been related to the health of American women.

In 1969, the Centers for Disease Control (CDC) recognized that illness and death associated with abortion constituted an important public health problem and, because of the inadequacy of national statistics, CDC initiated epidemiologic surveillance of abortion. Since then, CDC has been compiling, analyzing, and disseminating data on abortion in the United States. The objectives of this activity have been twofold: First, to document the number and characteristics of women obtaining abortions and, second, to identify and eliminate preventable mortality and morbidity related to that procedure.

In 1978, the latest year for which we have data, the 50 States and the District of Columbia reported 1.2 million legally induced abortions. That was a 7-percent increase over the preceding year. The national abortion ratio also increased from 325 to 347 legal abortions per 1,000 live births.

As in previous years, women who obtained these procedures were most often young, white, unmarried, and of low parity. Two-thirds were less than 25 years of age; two-thirds were white; one-third was black and other races. Roughly three quarters of all women obtaining abortions were unmarried at the time of the procedure, and more than one-half had no previous live births.

Curettage continued to be the most widely used procedure for reported legal abortions, accounting for 95 percent of those performed in 1978. Compared with 1977, the percentage of saline instillation procedures used after 15 weeks' gestation decreased, dilatation and evacuation procedures increased, and instillation of prostaglandin and other agents remained unchanged.

Women continued to seek abortions at earlier gestational ages; over half of all abortions were performed on women who were less than 9 weeks pregnant. Ninety percent were performed within the first 12 weeks of pregnancy.

In 1978, 27 women died from abortion. That was eight fewer than in the preceding year. Four of the 11 legal abortion deaths were associated with ectopic pregnancies that were diagnosed after attempted legal abortion. There were seven deaths after illegally induced abortion and nine deaths after spontaneous abortion. The death-to-case rate for legally induced abortions decreased from 1.4 in 1977 to 0.6 per 100,000 procedures in 1978.

In August 1977, Federal funds for financing abortions of medicaid-eligible women were restricted. In order to study the health impact of this restriction, CDC reviewed medical records of women with abortion complications in three cities for 1 year before and 1 year during the restriction. A similar analysis was done for three cities where public funding for legal abortions had not been restricted.

Assuming that the number of complications reflects the number of abortions, we found that the restriction of public funding for legal abortions had not increased the number of illegal abortions, but that it had reduced the number of legal abortions obtained by poor women.

An estimated 30 to 55 million abortions are performed worldwide each year, making this one of the most prevalent means of fertility control. The majority of the world's population lives in countries where abortion is permitted either on request or for social reasons. The United States was sixth of the 18 countries reporting abortion rates and eighth of the 16 countries reporting abortion ratios. In 1978 the United States reported one of the lowest percentages of abortions to women over age 40 and to women with four or more children and one of the highest percentages to never married or previously married women and to women with no living children.

That is the end of my testimony. I will be pleased to accept questions at any time.

Senator EAST. Thank you, Dr. Tyler.

Dr. Jessica Davis is our next witness. Dr. Davis received her M.D. from Columbia University. In addition, she received an NIH-sponsored post-doctoral fellowship in genetics at the Albert Einstein College of Medicine. Dr. Davis is presently the director of the Child Development Center and the chief of the division of genetics at the North Shore University Hospital and an associate professor of clinical pediatrics at the Cornell University College of Medicine.

Dr. Davis, we welcome you.

**STATEMENT OF DR. JESSICA G. DAVIS, DIRECTOR, CHILD DEVELOPMENT CENTER, CHIEF, DIVISION OF GENETICS, NORTH SHORE UNIVERSITY HOSPITAL, MANHASSET, N.Y.**

Dr. DAVIS. Thank you, Senator East. Thank you, Senator Baucus.

My areas of expertise not only include medical genetics and embyrology, but also pediatrics with a special emphasis on the acquired and genetic problems of the developmentally disabled.

The major issue under consideration today is the validity of the statement in section 1 of your bill, S. 158, which states, ". . . present-day scientific evidence indicates a significant likelihood that actual human life exists from conception." I cannot affirm the validity of this proposition.

Let me begin by concurring with Dr. Leon Rosenberg's statements made at your last hearings before this committee. You will not hear a clearer or more humane expression of present day scientific thought.

With all due respect to the powers of Congress, I believe it is trying to do something beyond its temporal authority. It is trying to establish that mystical, ineffable instant when human life starts. From the perspective of a scientist I believe this question is not a scientific one. There is no scientific evidence that can tell us when life begins. For me, it is a theological, religious, philosophical, ethical, cultural, or moral question. It is a subject for debate and analysis perhaps, but hardly resolvable by legislative fiat.

In the interest of time, I shall not review again with this committee the generally accepted scientific facts concerning the earliest stages of development. I believe that these were magnificently reviewed last time by Dr. Rosenberg and more recently today by this morning's speakers. However, these are recorded in my testimony.

The scientific facts that we accept do not support either side of the proposition which S. 158 seeks to affirm. I believe these facts are neutral on the issue and that the question "Does human life exist from conception?" can only be answered by bringing in ideological concepts from nonscientific disciplines. The fact that scientists may be swayed by nonscientific ideology merely demonstrates that scientists, too, are human.

Other lawmakers and many philosophers have debated when life begins. Their answers vary, as you have heard, from conception to other arbitrary time periods, to quickening, to brain functioning, to the existence of the soul. Again in the interest of time, I shall not read all my examples, but I would like to cite one.

In Ecclesiastes, chapter 11, No. 5, it is said:

> As you do not know how the spirit comes to the bones in the womb of a woman with child, so you do not know the work of God who makes everything.

While an embryologist can tell you when bones develop in the womb, she cannot tell you when the spirit comes.

Now I should like to state my thoughts on the practical effects of this bill and the debate on the bill. If this bill becomes law, it will adversely affect current medical genetic practice. Three million living children are born in the United States each year. Of these, 3 to 5 percent have a significant chromosomal abnormality, such as trisomy #21 or Down Syndrome; a congenital malformation, such as a defect in the formation of the brain or spinal cord; or a genetically determined biochemical disorder, such as Tay-Sachs disease.

One-fifth of all infant deaths in our country are due to genetic problems or congenital defects. Recent studies indicate that a major portion of those pregnancies which are miscarried spontaneously after implantation do have underlying genetic problems. Genetic disorders also account for significant life-long morbidity.

During the past decade the development of new technologies, such as ultrasonography and amniocentesis, has aided physicians in diagnosing certain hereditary disorders and congenital defects in early pregnancy. The use of these optional techniques in conjunction with genetic counseling enables many couples at risk to have healthy children. Previously these couples refrained from becoming pregnant because of concern about their known recurrence risks.

Powledge and Fletcher in a 1979 report in the New England Journal of Medicine on "Guidelines for the Ethical, Social and Legal Issue in Prenatal Disagnosis" state, "The desired and intended result of prenatal diagnosis is information about the presence or absence of a possible disease or defect in the fetus."

To date, approximately 40,000 amniocenteses for antenatal genetic diagnosis have been performed in the United States. It must be emphasized that in the vast majority of cases—96 percent—the outcome results are favorable and indicate that the fetus is not affected with the condition for which the test was performed. This underscores the fact for me that amniocentesis can and does provide reassurance for the majority of individuals at risk undergoing this procedure.

According to a report of a Consensus Development Conference sponsored by the National Institute of Child Health and Human Development, "* * * should the fetus prove to be affected with the 'at risk' disorder * * *" families can now decide if they wish to avail themselves of selective abortion and subsequently have offspring "not affected with the condition for which they are at risk * * *".

Other individuals and families when faced with the intrauterine diagnosis of a fetal anomaly can use this information to become more fully informed about the nature of the defect. Parents-to-be can then maintain a pregnancy with anticipation and they can plan for any special provisions which the birth of the abnormal child may require. At the present, the responsible use of antenatal diagnostic methods permits reproductive decisions to be made on a more informed basis.

Antenatal diagnostic techniques are also essential in the development of therapeutic strategies in order to treat and cure genetic disorders. At the present time, amniocentesis enables the diagnosis

and treatment of two serious biochemical disorders in the fetus: Methylmalonic acidemia and biotin dependent carboxylase deficiency. Investigators in our field hope to expand the therapeutic capability of these techniques in order to treat more metabolic conditions in utero.

If S. 158 becomes law, antenatal diagnostic techniques may be abandoned. There is a small risk associated with amniocentesis and it does include the possibility of inducing a miscarriage. Under this proposed bill physicians may fear criminal prosecution and refrain from performing the procedure.

Furthermore, S. 158 specifically states that it would be illegal to terminate a pregnancy because of an adverse genetic diagnosis. Couples at risk for genetic disorders that can be diagnosed in utero would then be denied the possibility of having a healthy child. Our ability to diagnose, treat, and cure numerous diseases will be stopped cold; the illegal abortion will flourish and take its toll of life. Thus, the net result of this bill predictably will be to take life, to deny life, and to prevent cures of horrendous birth defects.

I would like to end by saying that Margaret Sanger said that there were three great battles for liberty in the United States: First, the American Revolution to secure political liberty. Second, the struggle to exercise freedom of religious opinion by eliminating the blasphemy laws. Third, the fight to prevent the obscenity laws from applying to birth control information.

I suggest we are in the midst of a fourth struggle: the fight to permit women safely and legally to choose when they wish to bring life on this planet without the backward authoritarianism symbolized by S. 158.

I have great faith in the institution of Congress, but I have no respect for this bill or its unstated goal of suppressing alternatives medically safe to women who elect them.

Perhaps, on reflection, this august body will concede that in our country there are many faiths and many opinions, many of which cannot be reconciled with each other on the great moral issues. Would not wisdom suggest that rather than legislate philosophical truth Congress should allow the citizens of this country to exercise their pluralistic beliefs?

It is for this reason that I urge the committee to seek the withdrawal of this bill.

Thank you.

Senator EAST. Thank you, Dr. Davis.

I am sorry to say that Senator Baucus and I are going to have to take a temporary recess in order to go to the floor to vote. That long bell you just heard meant a vote is coming up. Therefore, we will recess for a few minutes while we go over and do our public duty, if you would like to look upon it that way. We shall promptly return so that we can conclude these hearings by 1 o'clock. If you will be patient, we will be back soon.

Thank you.

[Recess taken.]

Senator EAST. We will reconvene this hearing. Please take your seats and give us your attention.

We now have Dr. George Ryan. Dr. Ryan received his M.D. at Harvard Medical School and a master's of public health at the

Harvard School of Public Health. He is presently a professor of obstetrics and gynecology and community medicine at the University of Tennessee Center for the Health Sciences. Dr. Ryan is the president of the American College of Obstetrics and Gynecologists and a member of the Section Council for Maternal and Child Health of the American Public Health Association.

Dr. Ryan, we welcome you this morning and appreciate your coming.

**STATEMENT OF DR. GEORGE RYAN, PROFESSOR OF OBSTETRICS AND GYNECOLOGY AND COMMUNITY MEDICINE, UNIVERSITY OF TENNESSEE CENTER FOR THE HEALTH SCIENCES, MEMPHIS, TENN.**

Dr. RYAN. Thank you, Mr. Chairman and Senator Baucus.

I appear before you today as an individual physician, but I am prepared to share with you the official policies and the current position of the American College of Obstetricians and Gynecologists with regard to the legislation before this subcommittee. In either role—as a physician with nearly 30 years' experience in obstetrics and gynecology or as the president and spokesperson for the largest professional association concerned strictly with women's health—I solicit your consideration of the few points that I feel must be made here today, and I invite your questions and comments.

The legislation now before the subcommittee has been introduced in Congress in various forms—as a proposed amendment to the U.S. Constitution, as a proposed revision or addition to the United States Code—and in both forms it has been proposed with and without exceptions, explanations, and other variables. The common element in all of this legislation, however, is the goal of making the provision of abortions illegal in this country.

I do not wish to engage in a debate of the relative rightness or wrongness of abortion. My position, and that of the American College of Obstetricians and Gynecologists, is in support of the Supreme Court decision in *Roe* v. *Wade.*

PURPOSE OF TESTIMONY

My purpose in being here is to provide expert testimony which I, as well as many of my colleagues, feel is absolutely necessary to assure that Congress has information on the broad health ramifications of this bill rather than viewing it only as a measure that simply addresses the abortion issue. The concern which you must hear from me and from my colleagues of the American College of Obstetricians and Gynecologists is that when Congress equates cellular life to personhood it is taking a substantial leap beyond the current views of the medical and scientific community that will have a major and lasting effect upon the health care of women in this country, the practice of medicine in this country, and the personal health practices of a large portion of our population.

BASIS OF OPPOSITION TO S. 158—IMPACT ON PREGNANT WOMEN

To declare rights of the conceptus equal to those of the woman will create competition for medical care since the health interest of

the fetus is not always consistent with the health interest of the pregnant woman. In fact, the physician potentially could be required to make medical decisions not in the best interest of either woman or fetus, and possibly to the detriment of both.

The majority of pregnancies in this country occur in circumstances where the woman is not seeking abortion but is understandably concerned with maintaining her own health and producing the healthiest child possible. We, as physicians, offer care and advice to enhance the health and quality of life of the woman, both as an individual and as the bearer of children. In this role, the physician is committed to the best interests of the woman, who entrusts herself to the physician's care. This proposed legislation would create unsolvable problems for us in meeting this commitment.

For example, some of the major advances in obstetrics over the past 20 years relate to our ability to evaluate the intrauterine status of the fetus and perform early delivery of the fetus when indicated. Many of these premature births relate to maternal disease.

For example, toxemia is a disease of pregnant women characterized by high blood pressure, possible convulsions, coma, and even death. Prevention of the more severe effects of this disease involves early delivery, with concomitant risk to the fetus and baby. Failure to act in this situaton for fear of abridging the rights of the fetus could result in death of mother and fetus.

This bill, then, would create impossible dilemmas for the practicing physician trying to meet his or her ethical responsibilities to act in the best interest of the pregnant woman. Many diseases of pregnant woman require procedures or medicines which pose a risk to the fetus. Examples include appendicitis and other abdominal diseases in the pregnant woman. Surgery for these conditions may produce a miscarriage.

Medications such as dilantin for the treatment of epilepsy and cortisone-like drugs for other conditions may be necessary in the interest of the pregnant woman but pose an increased risk of fetal abnormalities. These are clear-cut instances in which the physician has traditionally acted in the best interest of the pregnant woman and accepted a risk to the fetus. The proposed legislation would potentially restrict our freedom to so act.

### IMPACT OF S. 158 ON NONPREGNANT WOMEN

Thus far I have spoken only to the impact of this legislation upon the pregnant woman. The woman who is not pregnant also has a vital and justified interest in the maintenance of good health which will be impacted by this legislation. For over 10 million women in this country the exercise of self-determination includes management of their reproductive functions by means of the intrauterine device and the birth control pill.

In spite of your previous experiences, if this legislation as proposed were to pass, any known contraceptive which interferes with the development of the fetus would be suspect. Consequently, I believe that it is realistic to assume that the IUD and the low-dose oral contraceptive pills could be considered as abortifacients and therefore declared illegal. In fact, this objective was stated in testi-

mony before the House Subcommittee on Health and the Environment just last month by proponents of this legislation.

This subcommittee, the Senate as a whole, and the people of this country must be made aware of the impact that removal of these popular and effective birth control methods would have. If this legislation is passed and if a State views the intrauterine device as an abortifacient, what will I as a physician do when a pelvic examination reveals that my patient has an IUD in place? Do I remove it? Do I request that she have it removed? What if she refuses? Do I report her to a law enforcement agency? Or am I indeed a party to a criminal act if I do not report her?

Mr. Chairman, these are just the highlights of our concerns about the problems which would be created by passage of this legislation. There are also complicated medical issues which would arise immediately regardless of what approach the State legislatures might take.

If the Federal statute defines as human life any conceptus, regardless of heath, defect, or condition of dependency, we must consider how the medical profession will deal with the relatively frequent incidence of such conditions as ectopic pregnancy, where the conceptus develops outside the uterus, usually in the tube, and we remove it surgically as soon as we can diagnose it. If not, some of these will go on to rupture and result in hemorrhage and even death of the mother.

Or there is the case of hydatidiform mole, which is a technical name but really refers to a product of conception composed of abnormal placental tissue. Some of these actually are cancerous. Our treatment when we diagnose this condition is to empty the uterus and remove it. Under the terms of this proposed legislation, that mass of tissue would have civil rights.

Today if in our judgment a spontaneous abortion is inevitable, it is treated by emptying the uterus promptly to reduce the pregnant woman's pain, blood loss, and risk of infection. Each such medical judgment could be opened to potential judicial review if the human life bill becomes law. How long do we wait in a patient who is threatening to abort before we can intervene without breaking the law?

These are but a few examples of the impact of this law. There are many more.

We have made great progress in improving the quality and manner of delivery of health care for women in this country. Maternal mortality and infant mortality are the lowest in the history of this Nation. To introduce into this improved environment of health care a factor as threatening as that involved in a new definition of personhood is to push backward that history of progress.

I encourage you to consider not only the primary goal of this legislation, but also its impact. In fact, I believe that you will find, as we have found in the American College of Obstetricians and Gynecologists, that regardless of your stand on the issue of abortion, this legislation presents a range and a depth of problems so complicated and so far-reaching as to far transcend the basic intent of the legislation; that is, to prohibit abortion. State governments would be enabled to intrude into the most personal and private

decisions of pregnant and nonpregnant woman and their physicians.

As a physician, as a citizen, and as the president of the American College of Obstetricians and Gynecologists, I ask that you acknowledge and assess the fundamental medical changes and critical side effects inherent in this legislation. This is not the way to resolve the abortion issue.

It is heartening that we have been invited to testify here today. The emotions generated by the underlying debate on abortion have made it difficult for us to focus attention on the many other ramifications of this bill. The Congress and the public must hear the whole story. This has indeed been an opportunity to expose the subcommittee to the full measure and import of the issues surrounding this legislation in order that your votes will be assured to be informed votes.

Thank you.

Senator EAST. Thank you, Doctor.

Our final witness this morning is Dr. Mildred Jefferson. Dr. Jefferson has received 26 degrees, including her M.D. from Harvard Medical School. She was a post-graduate in the Department of Surgery at Massachusetts General Hospital and is past chairman of the surgery section of the Massachusetts Medical Society. She is presently assistant clinical professor of surgery at the Boston University School of Medicine.

Dr. Jefferson, we welcome you this morning.

**STATEMENT OF DR. MILDRED F. JEFFERSON, ASSISTANT CLINICAL PROFESSOR OF SURGERY, BOSTON UNIVERSITY SCHOOL OF MEDICINE, BOSTON, MASS.**

Dr. JEFFERSON. Thank you very much, Mr. Chairman and Senator Baucus. I am honored to have the opportunity to speak at this hearing today.

The central conflict in our public policy crisis is over the proposition that some lives are less valuable than others and that the lives of less value can be sacrificed for the good of other concerned individuals or society.

When the U.S. Supreme Court gave the matter of getting rid of a baby to the private decision of woman and doctor, the high court stepped out of its responsibility to interpret the Constitution and acted as a super-legislature to create a new body of social law. As the final decision on abortion was left up to the doctor's medical judgment, the high court gave to my profession an almost unlimited license to kill. In assuring the execution of the privilege, the high court separated the biological and legal meanings of personhood and denied the protection of the Constitution to the member of the human family who needed it most—the unborn child.

The mischievous effect of this social law has been to induce scientists to abandon scientific method to become social mechanics and to seduce doctors to forsake usual standards of professional practice to become social technicians. With the obstetrician and mother becoming the worst enemy of the child, and the pediatrician becoming the assassin for the family, the State must be enabled to protect the life of the unborn child. The human life bill makes this possible.

The human life bill does not reach the jurisdictional question of the conflict of laws, the conflict of rights, but it does provide the expansion that enables the unborn child to have the legal protection.

When the point comes that those who are informed in science and in medicine hide behind the confusion that the seven Justices who signed the majority opinion hid behind, then I am afraid the objective is simply to leave the question in confusion.

When Justice Blackmun stated, in the words that I have heard repeated this morning, that it was not the position of the Court to decide the difficult question of when life begins, he still undertook a time table for allowing that life to be destroyed. By that action the high court itself destroyed the balance of powers and forced the people who object to the decisions to go to the body through which they speak and to whom they must appeal for the restoration of the balance of powers.

Senator EAST. Thank you, Dr. Jefferson. We appreciate your statement.

I again will proceed as we have been. The time is 20 minutes until 1. We were hoping to adjourn in the vicinity of 1 or very shortly thereafter. Therefore, I will try to keep on that timetable. Then we will pick up the loose ends tomorrow beginning at 1 p.m.

Dr. Davis, getting back to this question of when life begins, as a layman, as a person not professionally in the field of science, at least physical and natural sciences, I do not wish to go on ad nauseum about this question of when life begins. However, it occurs to me that in the scientific community there is obviously some difference of opinion on it.

If I might, I would like to just quote briefly here from three authors and get your response. Bradley Patten in his book, "Human Embryology," third edition, 1968, at page 43, says:

> It is the penetration of the ovum by a spermatozoon and the resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of fertilization and marks the initiation of the life of a new individual.

Then Leslie Arey in "Developmental Anatomy," revised seventh edition, 1974, at page 55, says:

> The formation, maturation and meeting of a male and female sex cell are all preliminary to their actual union into a combined cell, or zygote, which definitely marks the beginning of a new individual.

Then, finally, Keith Moore in "The Developing Human," second edition, 1977, at page 1, says: "Zygote. This cell results from fertilization of an oocyte by a sperm and is the beginning of a human being."

The earlier testimony we had of Dr. LeJeune and others who were here said the same thing. Are they in error and confused? Is that what you are saying?

They are definitely saying that marks the beginning of a human being, of a new life, of a new individual. You are simply saying they are in error. Am I correct there?

Dr. DAVIS. In answer to your question, I do not think there is any scientific evidence that is able to tell us when life begins. I think that is really the fact and what we really are discussing today.

The fact that so many different people have different views shows that this an area in which there is no consensus of opinion.

There is no consensus of opinion in the scientific community, although I believe in my own personal belief that the majority of scientists, those who have come before you today and those who are out there working in the laboratories and in hospitals and clinics, would support the notion that there is no scientific evidence when life begins. Fertilization does not equal life.

In reading the bill from my own point of view—and we are now talking about semantics—the confusion that I find is the terminology "actual," "actual life," "actual human life," and then you drop "actual" and it never appears again, and you come back to "human life," and then you come to "personhood" or "individuality." We could define that genetically; we could define it spiritually; actually I could define it poetically for you.

Senator EAST. You notice the act says that there is "a significant likelihood." Even with that qualification, you are not willing to say that life begins at the time of conception?

Dr. DAVIS. Significant likelihood for a scientist is really not good enough. You need to have a hypothesis which can be tested and you need to have data that can be drawn from it that are reproducible. There is no data.

Senator EAST. Of course, the agony we face, as earlier witnesses noted, is that we have to decide in the public arena in terms of a public policy. We do not quite have the luxury of simply saying we shall never answer the question. Everyone seems to agree that human life will be protected, but we are quarreling over when the point begins. You are saying that you do not know. I respect your position from a scientific standpoint, but in the public arena we must make that decision.

As one of the earlier witnesses today noted, he did feel that science could help us reach that public policy decision. He said it could not in a categorical way dictate what it ought to be, but it could help us.

When I hear scientists telling me that we cannot determine when life begins, as a layman I find that a little hard to accept in that there are so many who are saying, as Dr. LeJeune and others said, that it is unarguable that life begins with that first cell because if that first cell is allowed to evolve and grow, it will develop into a mature individual human being.

It strikes me that there is a tendency here simply to deny the obvious. It is like saying the Earth is not round, it is flat, because one is uncomfortable with the result that comes from acknowledging it is round.

For example, I could see scientists might say, "Well, yes, life begins of course, obviously, at the time of conception, but that does not necessarily dictate what your abortion policy ought to be." If that is what they were saying, then we could go to that next phase.

What I find somewhat intellectually agonizing is that we are asked to deny what seems to me from so much evidence is a commonsense observation. Of course I began as an individual resulting from conception in my mother with my father. The sperm and the egg came together. I began there. I suspect the average person in the street could understand that quite clearly, at least as clearly—let's be candid—as you can get in this imperfect world of making public policy.

When I hear people with M.D.'s and Ph. D.'s coming in and saying, "Well, there just isn't any point in time where you could make any intelligent judgment about that," I am not disputing you; I am simply appalled that that is a conclusion of people in the scientific community.

I appreciate your candor on the point. It does appear to be a critical point of difference. That is the purpose of this dialog and discussion—to bring it out.

Dr. Ryan, if I might move to you briefly, I would simply like to comment upon some of your observations.

I am not a gynecologist and I do not pretend to delve into surgical techniques or the medical implications of that field. However, I can assure you, as a lawyer and as a political scientist and a man intensely interested in this public matter, that this bill will not do and is not intended to do the things you are saying. It does not outlaw IUD's at all. Congressman Hyde has made it clear there is no intention of outlawing them.

First of all, the bill does not determine anything except to say that *Roe* v. *Wade* would be vitiated; the issue would be returned to the States for State action consistent with now of the 14th amendment.

I do not wish to be too harsh on you, but I think you are a little bit over your head when you get into the ramifications of the bill constitutionally and in the statutory sense, which we will be taking up tomorrow in detail. It would be like my perhaps trying to tell you what are the implications of certain kinds of surgical techniques in your field.

We are totally resistant to what you are saying. It is not the intention of the bill, nor is there any reason to believe that it would do many of the things you claimed it would do. The law would return the regulation of abortions to the States, and prior to 1973 no State did that sort of thing. There is no reason to believe any State would do so today. If one did do it, there is every reason to believe the Supreme Court might hold it unconstitutional.

I think there is a tendency—and I agree it is on both sides—perhaps to inflame the issue by throwing up all kinds of weird and contorted results the bill might have. Our effort here, or the effort of those who are proposing this bill, is a serious one; it is not frivolous. We are deeply sensitive to the problems and the complexity of this matter and the need to proceed with care and prudence and circumspection.

However, I cannot resist responding to you that we are not cavalier and foolish in what we are doing. We have no intention of bringing the law or the Senate or this very important and delicate issue into disrepute by doing the kinds of things that you are suggesting we would do.

Of course, the purpose of this proceeding is to clear the air on that, to make sure where we are going, and we would expect to keep careful attention on all these things to make sure that we do not have results that no one has intended. No one is intending that kind of result. I would submit as a lawyer and a political scientist that there is no reason to believe at this juncture that would occur.

Dr. RYAN. May I respond, Senator?

Senator EAST. Yes, you certainly may.

Dr. RYAN. I do not see how you can pass a bill that you say will return authority to the States and then tell me that none of those States will take the kinds of action I have indicated. As a matter of fact, it will turn every State legislature into a legal battleground with pressure groups pro and con abortion battling to have their point of view written into law.

Indeed, these possibilities that I have mentioned are real possibilities. I may be over my head in judicial law, but I am quite familiar with the legislative process in State legislatures, and I can tell you there are going to be people fighting very hard to ban the IUD and to ban oral contraceptives and to make any interference with that fetus and its well-being an act perhaps punishable by the homicide laws of that State.

There are going to be attempts to do that. Whether they will be successful or not, I cannot say any more than you can. However, just to say that you are going to pass a bill and return it to the States and leave it to them, and reassure me that they will not do anything such as I have suggested, I find difficult to accept.

Senator EAST. You conjure up a chamber of horrors that had never occurred prior to 1973, and there is absolutely no reason to believe it would occur now.

We can all rabble rouse on the excesses of this issue. I could rabble rouse on the garbage cans in the birth clinics with the fetuses piled up like at Dachau and Auschwitz. You would probably say, "East, don't put it that way. We've got a very delicate problem here and we must not inflame it by bringing in the excess rhetoric."

I am trying to avoid that, but I am simply saying when you conjure up in your imagination the worst possible thing that a legislature of Nevada or North Carolina might do, maybe we are back to this problem—I have more confidence in State government than you do. I have more confidence in the good judgment of State legislators than you do.

All I am saying is, Doctor, that there is no intention on the part of the proponents of this bill to bring about such perverse results, and there is no reason to believe that the State legislatures of this country would do it. That is what I am objecting to.

Dr. RYAN. Senator, prior to 1973 this bill that we are considering today was not in effect. That did not have the force of law. I think I clearly made the point that the crux of the issue with this bill is that it would give to that developing conceptus equal rights with the mother. That was never the rule of law prior to 1973.

If this passes in 1981 and goes back to State legislatures, that will be the rule of law, and that woman who trusts herself to her physician to act in her best interest now finds that there are two persons in one body and that their interests do not always coincide. We will have great difficulties meeting our commitments to that woman, her husband, and perhaps her other living children under those circumstances.

I am trying to indicate that for the practicing obstetrician and gynecologist this bill does have significant implications for the health care of women in the coming years.

Senator EAST. You state your case well, and I have no quarrel with that. The bill has implications and we want to explore them. I

am only trying to dampen the notion that we are setting in motion here some horrendous chain reaction to frighten people about what is going on here. That is what I am resistant to.

Dr. RYAN. I have no desire to create a scenario that would be unrealistic, but I am faced with 23,000 practicing physicians out there who join me as an organization in expressing to you their concerns about this.

Senator EAST. Whether you speak for all of them, I do not know. I can say personally that I have had people in your profession contact me frequently lately, once I got involved in this thing. They have told me they are deeply concerned about the current abortion-on-demand practice in this country and find it deeply revolting.

I am not saying that they speak for all of your profession, but from my own personal experience I do not find that what you are saying is uniformly, unanimously agreed to——

Dr. RYAN. Not at all, Senator.

Senator EAST [continuing]. By all gynecologists and all people in the medical profession.

Dr. RYAN. Like all other organizations, certainly there are differences of opinion. Yet, it is a democratic organization rooted in State sections which bring district-regional representatives to the executive board, and the executive board has indeed taken the position that they are extremely concerned about the medical implications of this bill for health care for women in this country.

Senator EAST. To state it that way, I would have no quarrel with it. They should be deeply concerned about this bill or any other proposal in the change of the abortion laws in this country. It is one thing to say that; it is another thing to conjure a chamber of horrors about what this bill might do. Again, that was what was troubling me.

I deeply appreciate your candor and forthrightness on this matter.

Time marches on. Senator Baucus, I think I had better turn it over to you now.

Senator BAUCUS. Thank you very much, Mr. Chairman.

This discussion on the constitutional and legal ramifications of this bill I think has been very interesting. We are going to be exploring this much more at a subsequent hearing.

It is fair, though, to say, as Dr. Ryan has pointed out, that this bill was not the law in 1973. Insofar as this bill states that a fertilized egg at conception is a person and insofar as the 14th amendment states that Congress shall not deny persons equal protection under the law, it certainly is arguable that the State legislatures, if not compelled to adopt the kinds of statutes that Dr. Ryan talked about, at least are going to be pushed in that direction. There will be a strong impetus in that direction.

Obviously, if this bill were to become law, various interest groups would strongly push States in that direction.

Dr. Jefferson, let me ask you a question. Is your support of this bill based upon scientific or medical knowledge or is it based upon your deep-rooted, strong, personal feelings on the subject?

Dr. JEFFERSON. My position, as expressed on the bill here today, has to do with what I think is the matter addressed in the bill—the necessity of trying to find on the basis of scientific evidence wheth-

er there is substantiation of the claim made in the bill, which is that life is deemed to exist. I have not heard any testimony to prove that it does not exist at the point at which the bill suggests.

The bill, as I read it, does not claim to define when life begins. It points out that it is deemed to exist at conception, fertilization.

In the testimony that I have heard of the beginning witnesses, I think each one of them made it quite clear that they were referring to the beginning of the life of the individual, not the *de novo* beginning of all life. Anyone who is looking at the question would agree that it does not really matter when approximately 3.5 or 4 billion years ago the first spark started that we know of as the life process. It is a continuum, but the point of transmission of life to the individual in question, whether that individual at the time of abortion is one or twins or triplets, is at that point of transmission known as fertilization. I have not heard one bit of evidence against that this morning.

Senator BAUCUS. Why in your view is it at that point?

Dr. JEFFERSON. Because that has been demonstrated as often as anyone could get a living egg and living sperm in the laboratory, so I do not understand what the scientists who spoke today mean by having no evidence of the point.

Senator BAUCUS. Is your view based upon the precision of that with which one can define that event?

Dr. JEFFERSON. No; it is not a matter of the precision.

For example, before we had the electronmicroscopy, the idea was that the fertilization process started, the first cell division of the zygote occurred at approximately 36 hours, but there was not a great deal of understanding of what was happening to that point inasmuch as most of the time when someone saw the cell preparation it was already static; it was already stopped.

However, with the advances now, and certainly with what the molecular geneticists can tell us who observe that from the moment that the interaction at the cell wall begins that you begin the continuous processes that we know as "life," I do not understand what people are talking about when they say they do not have scientific evidence of that point of transmission.

Senator BAUCUS. Dr. Ryan, in your testimony you talked about various dilemmas that physicians might face if this bill becomes a statute. Do you see the relative value and importance of a fetus as compared with the mother as co-equal under this bill or do you see this bill as giving a greater protection to the fetus than it would to the mother?

Dr. RYAN. I see it as creating co-equals. As I have indicated, in the past the obstetricians and gynecologists have not eliminated value from the fetus. We try our best for those women—and that is the majority—who become pregnant and are trying to carry that baby through. We work very hard to get them the healthiest baby possible.

However, the fact is that in the past the woman's interests have been in the ascendency. People have accused us of ignoring the value of the fetus. I do not think that is true. I think the important thing is the woman's interests have been placed first in issues where conflict arises. I believe this bill would put us in legal

jeopardy if we do have two co-equal, right-bearing people. That is the very crux of my concern.

Senator BAUCUS. Dr. Jefferson, so that I may more fully understand your view, is it your personal view that regardless of the abnormality of a fetus, and regardless of when abnormality is determined, that the fetus should under all circumstances be carried to term?

Dr. JEFFERSON. May I respond just briefly to your question to Dr. Ryan before answering that?

Senator BAUCUS. Yes.

Dr. JEFFERSON. We have a problem with the obstetrical profession because the obstetrician, I feel, has always looked upon himself as the agent of the woman. In fact, that is why I did not go into obstetrics when invited by the chief who headed the department when we were in medical school. This creates the circumstance of the bonding of the mother and doctor, and the interests of the child do become secondary.

I feel for the advancement of their specialty they need to change the attitude because I do not feel that they can give the most effective care to the prenatal circumstance with this kind of attitude. Because of this, it becomes difficult for them to be committed to having to use the same effort to save both mother and child. I believe that is the medical obligation, understanding that at this point in our medical development we will save the life of the child less often because of the failure of our technological development.

In spite of the fact that in our very best centers there is difficulty maintaining the life of the very immature, premature baby, I believe there is still the obligation to save both mother and child. It is not the fault of the child that it does not survive. It is the fault of our technology and our capability that we are not able to duplicate the environment from which it has been removed. That is in the clinical setting.

However, in the laboratory setting we have information from the medical literature that there are laboratories that can maintain the life of the developing embryo or fetus from any point that it can be removed whole from the uterus or, if the fertilization is done in the petri dish, the developing embryo has been maintained as long as 63 days in laboratory circumstances in Italy. The question in the clinical circumstance is that we simply do not have the capability of saving the baby under the difficult circumstance.

Now to the matter of the very, very severe deformity. I recall Professor Lejeune in another circumstance pointing out that in a society such as ours is becoming we develop such hostility and distaste and anger for the defect that we do not wait to learn to love the child.

My sympathy is always for the one who will suffer the affliction, not for someone who is going to suffer because he sees the affliction and feels uncomfortable. My sympathy will always be for the underdog. If that child with the defects can manage the difficult problem of developing within the uterus and surviving this matter of getting born, I certainly will do everything possible to help it live and get it to parents that can accept the child with a defect or certainly make sure the social and economic circumstance can be assisted.

Dr. RYAN. I would like to respond to Dr. Jefferson's comment about the obstetricians. I have to point out that Dr. Jefferson is a general surgeon. She does not take care of pregnant women and has not devoted her life to this. I am not at all surprised that she does not understand what I am talking about. There are lots of times when I do not understand what she is talking about. We are in different fields.

I have tried to bring before you, as an expert witness from the specialty of obstetrics and gynecology, our concerns. I think the fact that other people in other fields do not understand or identify with that should not lessen the import which I ask you to give our concerns.

Senator BAUCUS. Again, I will ask Dr. Jefferson the question. Regardless of the degree of abnormality and regardless of the time when it is determined, is it your view that, notwithstanding the wishes of the parents, that the fetus must be carried to term?

Dr. RYAN. I do not agree with that at all.

Senator BAUCUS. I am asking Dr. Jefferson that question.

Dr. RYAN. Oh, I am sorry.

Senator BAUCUS. I did not expect you to agree with that.

Dr. JEFFERSON. If it can possibly be maintained, then it should be.

Senator BAUCUS. Regardless of the wishes of anybody else?

Dr. JEFFERSON. Yes; because the problem now is the idea of determining whether or not there is going to be a defect.

In a book by the British geneticist Harry Harris, he called attention to the fact that in the climate after the 1973 abortion decisions there is a change in the attitude of the human geneticists, the majority. That changes the traditional posture of medicine.

Our traditional posture has been to make a diagnosis for the purpose of cure, correction, or amelioration of the condition. The objective now is to search out the defect for the specific purpose of getting rid of the one who is defective. I am not willing that medicine step aside and accept this kind of elitist view because I know very well that you cannot determine on the basis of the defect the value of the person or the contribution that person may make to society.

I also know that these parents who want so very perfect children may not be perfect themselves. Even though they may be perfect at the time the perfect child is born, just as they grow older they are becoming less perfect each day. I simply do not accept the basic proposition.

Senator BAUCUS. Dr. Ryan, do you want to respond to that?

Dr. RYAN. We already have talked about situations incompatible with life. Let's get specific about this bill. An anencephalic, which is a product of conception which is so grossly deformed it does not have a head really or brain, is incompatible with functional human life as we know it. Yet, this would be protected.

If we could identify it with ultrasound in early pregnancy, that woman would be forced to go through 9 months of her pregnancy carrying that, and most of those frequently go overdue as a matter of fact. She would have to go through the agony. To me, this is a denial of humanistic considerations in terms of the pregnant

woman to force her through this when we know we are not going to come out with a living, functioning human being.

One of the basic fallacies in this bill which creates the problem for us is the assumption that every fertilized egg will eventuate into a "human being" or "person." That is just not true.

Dr. JEFFERSON. I would like to respond to that because I feel that it is even more gross medical judgment or misjudgment to do an operation to kill a child that is going to die. You are only subjecting the woman to an unnecessary operation to produce a dead baby at an earlier phase than the child will die later.

I have seen anencephalic children. For those who do not understand the term, the brain does not develop so that only the lower functions are maintained. These children do die because we have found no way to maintain them, but I certainly do not see any reason to kill the child early just because it is going to die later.

Senator BAUCUS. Dr. Tyler, let me ask you a few questions on another point.

Some argue that the availability of abortions has led to widespread nonuse of contraceptives. I wonder whether there is any evidence you are aware of, that would establish the validity of that assertion.

Dr. TYLER. I think that in fact the availability of abortion has been associated with an increase in the use of contraception. There is evidence to show that the use of contraception following abortion is substantially greater than the use prior to abortion. The fact of having gone through that kind of a procedure seems to induce a favorable awareness of the need for fertility control.

Senator BAUCUS. Does having gone through the procedure itself cause this phenomenon? My question really goes to women who have not had abortions?

Dr. TYLER. The prevalence of contraceptive use has been increasing over the same period of time that the practice of abortion has been legalized. I think what we are seeing is a nationwide increase in the awareness of the importance of fertility control.

Senator BAUCUS. What has been the effect of legal abortions on the formation of the family in your view?

Dr. TYLER. In the testimony that I read a substantial proportion of the women undergoing legal abortion are quite young. A third of them are less than 20. There has been a decline in marriage rates among teenagers, so that we feel there has been a favorable effect on a dimunition of high-risk marriages, that is, marriages that are likely to be dissolved at a later time.

Senator BAUCUS. It also has often been said that abortion deaths are under-reported, especially as compared to deaths resulting from completion of pregnancy and childbirth. I wonder if you have any statistics to indicate that this is or is not the case.

Dr. TYLER. During the time that the Center for Disease Control has been conducting epidemiologic surveillance on abortion mortality we have had a chance to compare our information with that of the National Center for Health Statistics. I think we are now at a point where we have a high level of completeness of abortion death reporting. Some of this has been made public in professional journals. Our estimates are that abortion mortality reporting is on the order of 94 to 95 percent complete.

We are now going through a similar sort of exercise with maternal mortality reporting, and our findings are not comforting ones, quite honestly, because individual States may be underreporting conventional maternal mortality by as much as 30 to 50 percent. In terms of getting some accurate information on this, we have a good deal of homework to do.

Senator BAUCUS. I have no further questions.

Senator EAST. Thank you, Senator Baucus.

I would like to ask just a few more questions and then I will be finished.

Dr. Ryan, you are comfortable then with the result of *Roe* v. *Wade*? You feel that is a workable public policy answer on this as you understand it?

Dr. RYAN. It seems to have functioned in our society for the past 8 years. Whether or not, as I said, the abortion issue is to be resolved in favor of legal abortion or illegal abortion, my concern is that this bill is not the way to address that issue. That, to me, is another debate.

I would like to see Congress address itself to a bill to outlaw abortion, if you will, to make it illegal. Let's put it up and let's see what the public would like to do with it—can it get passed?

This bill has so many other impacts upon us that I just cannot believe that we would pass this bill and force the practicing obstetricians into those kinds of unsolvable problems I have already outlined.

Senator EAST. You are uncomfortable then with *Roe* v. *Wade* and would not be averse to Congress developing an alternative policy to it?

Dr. RYAN. No; you are paraphrasing me. I did not say I was uncomfortable with it. I said I am uncomfortable with this approach to the problem. I believe the problem should be addressed directly.

If you are asking for my personal beliefs, my personal beliefs are that the *Roe* v. *Wade* decision had some very important public health impacts, many of them very positive. I do not oppose that decision. I believe that, in spite of all of Government's wisdom, the individual woman facing those critical decisions related to her pregnancy can probably make them better than having the courts or Congress or others make that decision for her.

Senator EAST. Thank you. I have one final question.

We were talking about the use of techniques to determine defect and, hence, to predicate an abortion judgment on that. What do you think about the use of those techniques to determine the sex of the unborn? If it is not of the desired sex the prospective parents might want, would you acquiesce in an abortion in that case?

Dr. RYAN. I would not. I doubt that very many of my colleagues would, either.

Senator EAST. But you would not want the law to intervene in terms of making a decision; you would still leave it up to the parents or at least to the mother to decide. If, for example, she had four girls and she is pregnant again and, "Oh, my gosh, it's another girl," the election might be, "We really have all we can handle in terms of girls."

I gather under *Roe* v. *Wade* and under your current policy position she would have that very clear election; no question about it. Is that correct?

Dr. RYAN. That is not my interpretation. Yours is stating that the woman herself has the complete control over that——

Senator EAST. She does under *Roe* v. *Wade.*

Dr. RYAN [continuing]. And that the physician is nothing but a technician. I would deny that. The physician plays a major part in counseling that woman. I think my colleagues would counsel that woman that that would not be an appropriate way to handle the process of getting the kind of child you desire in terms of sex.

Senator EAST. I think there would be honorable members of your profession who would do that, but the abortion clinics do not inquire about anything. A woman could go into one of our major abortion clinics in this country. We have them in North Carolina. They are running ads against me, which is all right because it is a free country. A woman could go into that abortion clinic and get an abortion for that reason. There would not be anything in the law that would prohibit that.

Now you are saying, "Yes, but there are responsible gynecologists who would counsel against it." I am simply saying under the law they do not have to do that. There are irresponsible ones who set up these clinics and no questions are asked. You could get an abortion for that reason.

It strikes me that this question suggests the Achilles' heel in the current abortion policy. I have not found anybody who thinks that is a good idea—that you abort a child simply because you are uncomfortable with the sex.

Then you get on into the question of defects, as you say. Perhaps they will not walk well, hear well, or see well. Maybe they will have cleft palates or this and that and the other thing. I think we get off into a very difficult area here.

Dr. RYAN. Would you propose this bill to deal with that problem?

Senator EAST. Pardon?

Dr. RYAN. Would you propose this bill to deal with that problem?

Senator EAST. I am simply inquiring whether *Roe* v. *Wade,* which you like, does allow that kind of result. I am simply inquiring, because this is what this whole dialog is about, whether we want to live indefinitely with *Roe* v. *Wade.* Whether S. 158 is the magical answer I do not know—that is the purpose of this hearing—or whether constitutional amendment A, B, or C is the answer I do not know.

However, it does seem to me one might, through sufficient dialog in this country, generate enough consensus and doubt about *Roe* v. *Wade* that we might find an alternative to it. If these hearings did nothing else, I would consider that a positive contribution.

Senator BAUCUS. Mr. Chairman, I notice Dr. Davis anxious to answer that last question.

Dr. DAVIS. I am not anxious to answer, but I will try to do so.

You talked a great deal around the issue, but I think you should be aware of the facts, Senator East, in terms of how people learn about the sex of the fetus. They would have to have undergone amniocentesis. They would have to have passed through a process

of genetic counseling and understood full well what all the options and risks were and what could be determined.

From my own experience and that of my colleagues—and on this I do have good reporting—people who come for genetic counseling about amniocentesis are not coming for frivolous reasons at all. The vast majority is coming for medical reasons and medical questions, ones that at this point have been accepted as good medical practice in terms of what constitutes an at-risk pregnancy.

If we are talking about questions around the at-risk pregnancy related to the sex of the fetus, we are talking then about genetic disorders; namely, recessive disorders primarily. On that basis, yes, for some of the serious ones there may be families who decide to listen to the conversation and not have the procedure at all, and there are other families or individuals who will opt for the procedure, wanting to learn the information—and all of us have had this in our practice and have made provisions to nourish and care for the children that come to birth at the end of those pregnancies—and others will opt for selective abortion. It does not make any difference. You cannot predict how people are going to act.

I will come back on your last statement. You were talking with Dr. Ryan about the way things are right now. I think the way things are right now—and in terms of the paper I referred to by Powledge and Fletcher in the 1979 issue of the New England Journal of Medicine in my testimony—the way things are right now is that, yes, it would be left to the conscience of the individual to decide that issue in the quiet of their own heart and chamber.

I do not think any geneticist or obstetrician would be directing them as to what to do. Our ethical code is to be nondirective. We all feel that this would be a frivolous use of this very technical, difficult procedure—the counseling and the amniocentesis. In our own experience there have not been terminations in this country on the basis of someone frivolously coming and saying they want a girl or a boy baby.

We have good follow-up data as to the end of the pregnancies, what happens for those who have been monitored. Most of us have pretty good reporting on the people who decided not to monitor but honor us by telling us what happened at the time of birth.

Senator EAST. But, Doctor, under *Roe* v. *Wade* and the policy it allows in this country you can, and you do, do what I am saying. You can go to an abortion clinic with no questions asked or no counseling and simply get an abortion.

I remember as a college professor before I was elected seeing ads in the student newspaper that pregnant girls could call a number and expect to get an abortion with no questions asked.

I am not saying all of your profession is that way, but it is quite clear that there is a group of people who are professionally licensed to practice medicine in this country who have taken *Roe* v. *Wade* and built the abortion clinic upon it. They do these very kinds of things.

I am not imagining this. This is not East's chamber of horrors. This is a fact. People can go in and get an abortion with no counseling of any consequences and with no questions asked.

It is that kind of weakness, degeneracy—maybe those words are too strong; I do not know—it is that kind of thing that deeply concerns many Americans in this country.

*Roe* v. *Wade* precipitated the crisis. It has now been thrown back into the legislative body, the U.S. Congress, to try to unravel it.

I am just trying to grope here with Dr. Ryan and with you that you are comfortable with *Roe* v. *Wade*. If so, it seems to me one has logically to live with the results of *Roe* v. *Wade*, which means the abortion clinic. It means you could go in and get an abortion for no reason at all—simply inconvenienced, did not care for the sex of the child, or whatever it might be.

I see enormous gaps here in terms of this very romantic concept of professional responsibility that you are presenting and the real world of the abortion clinic in which the young women of this country are invited to come in willy-nilly and to be done with it. It is troublesome.

Dr. Jefferson?

Dr. JEFFERSON. If I might, I would like to add a brief comment and response to several things said, Senator East.

First of all, with regard to *Roe* v. *Wade* and the circumstances following it, for those who are in the special centers who can see only the ideal I suppose it is very easy to deny what is happening outside. Even the popular press has picked up the problem of some people who simply can manipulate the doctors so that they have and do get abortions done for sex selection. That has already been documented not just in the popular press, but in the medical literature.

In the matter of my being a general surgeon looking upon what the obstetricians do, *Roe* v. *Wade* separates abortion out as a special procedure. On the one hand, it opens the door for it to be handled as just another operation, but when we require that the operation undergo the same scrutiny as the operations we perform, we find a curtain drawn. The standards are even exceptional.

The suggestion that maternal deaths are underreported by some 30 to 50 percent, and that deaths from abortion circumstances are reported 94 to 95 percent, cannot be believed by me because I know at any given time you will not get more than 40 percent reporting from the abortion facilities. I know that there is still a tendency to try to obscure deaths and complications from the abortion circumstance.

Speaking of the American College of Obstetricians and Gynecologists, within that group there is the American Association of Pro-Life Obstetricians and Gynecologists, which number about 800 dues-paying members. In general, such efforts reflect about 1 in 10 people who might reflect a similar sentiment. However, the president of that organization, Dr. Matthew Bulfin, has made a special study of complications, serious mutilating complications, in teenagers and the results simply are not the kind of favorable ones that we so often hear.

We cannot tell what the impact on the family has been on the open abortion circumstance that *Roe* v. *Wade* allows. Until recent decisions at least gave parents the right of notification—teenagers could go into the abortion clinics without the knowledge and con-

sent of their parents, so that essentially the teenager became the ward of the abortionist behind the closed clinic door.

Dr. Carol Cowell in Toronto, Canada, calls attention to the fact that the younger a girl is when a first pregnancy is interrupted by abortion, the higher the incidence of sterilizing complications. We do not know what the effect is on the family now or the families that might be.

Insofar as contraceptive use is concerned, no one really has any hard information on whether it has gone up or down. However, if you look at perhaps 1.5 million or more abortions a year, you simply cannot suggest that you have all of these very careful, concerned people who are having that kind of accident.

Discussion with people coming out of clinics indicates a different experience from that people like to believe—of everybody carefully using contraceptives. In general, teenagers, whether they have sex education and are provided the equipment or not, do not use it reliably.

On the other hand, when the focus is on contraception, then any error of contraception means just something to be corrected, and the developing child does not become a factor in the consideration.

As our Nation could not exist half slave and half free in the last century, it really cannot expect to survive very long into the next century with part of its population throwing away its young and the rest of it denying the humanity of its young.

The protection of life must be the absolute priority of the society. That should never be made secondary to any sliding scale of human values.

Senator EAST. Thank you, Doctor.

We wish to thank you all again for appearing. I regret our time has run out.

[The prepared statements of Drs. Callahan, Tyler, Davis, Ryan, and Jefferson follow:]

## PREPARED STATEMENT OF DANIEL CALLAHAN

My name is Daniel Callahan, and I am the Director of The Hastings Center, Hastings-on-Hudson, N.Y. I was trained as a philosopher and, traditionally, philosophy is understood to be the pursuit of wisdom. For a number of years I have tried to ask myself, and others, just what constitutes "wisdom" in the nasty and controverted realm of abortion. I cannot say that I have ever achieved any final wisdom on the subject. For me at least, it remains a difficult and deeply troubling issue. I can only look with wonderment on those confident enough to take part in marches, to vociferously assail and impugn the motives of their opponents, and to be prepared to offer instant advice to courts, legislatures, and individuals.

The question of the beginning of human life is a severe test for anyone who seeks wisdom and the truth. That scientists and physicians are divided on the point is evident. That those who have not had the benefit of a scientific or medical training are no less divided is equally evident.

Why are there such differences of opinion and conviction? One reason may be that the different evaluations of the beginning of life reflect mere self-interest on the part of those doing the defining. Clearly, a definition of human life that would locate "the beginning" at conception serves the interests of the "pro-life" group. No less clearly, it serves the interests of the "pro-choice" group to see the issue as one that is inherently undecidable, and thus to be left to individual choice.

Unfortunately, this mode of analysis does not take us very far. The "pro-life" group wants to speak to the interests of the fetus and the protection of human life. That is surely not a debased or trivial interest. The "pro-choice" group wants to speak to the interests of the right of women to make their own decision concerning their procreative freedom, and that is not an unworthy or debased interest either. Each side, moreover, is prepared to proclaim that it is not insensitive to the concerns of the other side: the more responsible of those on the "pro-choice" side do not see themselves as hostile to childbearing, much less see themselves as "baby killers." The "pro-life" group, since it consists of a large number of women, hardly thinks of itself as anti-female. In sum, an examination

of the motives of the opposing forces is not ultimately illuminating. Moreover, there is on both sides the usual human quota of hypocrisy, but that seems to me only to prove that human beings are not always in practice as admirable as their ideals, not a particularly original observation.

If the issue is to be decided at all, then, it must be decided on the basis of sound argument, on our conception of how we as human beings ought to live together, and how we believe difficult political and social issues ought to be decided in our society.

I cannot support the Human Life Bill, S. 158. I believe it rests on a number of faulty premises. The first faulty premise is the assumption that the issue is scientific, that science can give us a decisive answer to the question of when human life begins. The second is the assumption that one can draw obvious moral conclusions from scientific information. The third faulty premise is that matters of profound philosophical and religious depth can be decided upon by a political vote. I would like to examine each of those premises.

The first faulty premise is contained in the phrase from the bill that says "present day scientific evidence indicates a significant likelihood that actual human life exists from conception." If one wants to define "human life" as simply genetic individuality, then it is scientifically supportable to argue that "human life exists from conception." However, since genetic individuality is a necessary but not sufficient reason to characterize an fully entity as/"human life," it is by no means evident that one can make the logical leap that the bill would like to make--from "human life" to "person," and from "person" to the endowment of full moral standing on the newly fertilized egg. It is both possible and useful to distinguish between "human life" and "person," which the bill lumps together. A being with a flat EEG reading whose heart and lung activity is kept going by an artificial respirator is surely, genetically speaking, "human life." But just as surely that life is not a "person."

The distinction is important, since abortion is not merely a scientific issue, but, instead a moral issue with a scientific component. For moral purposes, scientific evidence is not and cannot be decisive; scientific facts do not carry their own moral meaning with them, nor do they provide any

guide to behavior. They are simply meaningless raw data, in need of interpretation and evaluation. Only scientific facts in conjunction with a moral point of view and philosophical definitions can help us to determine a proper and moral course of behavior.

That point leads directly to the faultiness of the second premise. For the assumption is that from scientific evidence a clear moral conclusion can be drawn. That simply does not follow in this case. It is perfectly possible to argue, for instance, that "human life exists from conception" but to conclude that, in some circumstances, the right of a woman to take that life is the morally superior course of action. A simple analogy will make my point. Consider the following proposition: "Science indicates a significant likelihood that nuclear power plants are dangerous." It does not, however, follow from such a proposition that nuclear power plants ought not to be built. On the contrary, we may judge that the danger is worth running because of the benefits that such power plants may produce. An analogous point can be made in the case of the beginning of human life. It does not follow that a scientific definition of the beginning of human life automatically entails how that life ought to be valued, or who ought to make decisions concerning that life

There are, in fact, at least four different schools of thought on the kinds of moral conclusions that could or might be drawn from the scientific data. The first I will call the "genetic school." It holds that genetic individuality is crucial, and that once the genetic pattern is in place the full potential for human personhood exists. That school would then want to argue that the potentiality is morally decisive, and that abortion should be prohibited from the moment of conception. The second school, which I will call the "developmental school," holds that while genetic individuality is present from conception, potentiality must be realized to some significant degree before it is appropriate to say that the right to life of the fetus ought to outweigh the right on the part of a woman to choose an abortion. The third school, which I will call the "social consequences" school, holds that it is entirely a matter of human choice where we draw the line concerning the beginning of human personhood, and that it is the social consequences of those choices that ought to be morally decisive in the making of deci-

sions. That school would argue that the consequences of denying abortion to a woman are grave enough that we ought, therefore, draw the line on personhood comparatively late in pregnancy, or possibly up to the very end of pregnancy. The fourth school, which I will call the "full personhood" school, argues that a person does not exist until self-consciousness, rationality, and a conscious desire to live exist. In principle, this school would admit the possibility of infanticide, since the conditions for full personhood are not normally realized until some years after birth.

I personally do not find the arguments for the "social consequences" or "full personhood" schools of thought at all persuasive. In fact, they seem to me socially and morally very dangerous. The real choice, I believe, is between the "genetic" and the "developmental" schools, and I think the developmental school has the better of the argument. In essence, I believe it reasonable to contend that personhood develops gradually, and that full moral standing ought to be accorded fetuses no earlier than the twelfth week, and possibly as late as viability. I would not want to argue that this position is totally without problems. In fact, it has some significant difficulties, but I believe, on balance, that it is an approach that makes more sense than its serious competitors.

The third faulty premise behind the bill is that a matter of this kind ought to be decided by a legislative vote. If the issue is one of scientific evidence, as the bill asserts, it should be pointed out that matters of scientific truth are not, in the scientific arena, decided by a vote. Moreover, and much more importantly, a vote would prove nothing whatever concerning the beginning of human life as a scientific matter, but only be an expression of the opinions of those voting. The paradox of that situation is compounded when one recognizes that--the issue having been defined as a scientific one in the bill--it is then voted upon by non-scientists, i.e., legislators who are lay people.

There is still another consideration. If it is believed that the question of the beginning of human life can be decided by a vote, in this case a vote on conception as the beginning of life, it is by the same logic open to another legislature, in another era, to vote that human life does not begin until birth,

or until three years after birth. One can, thus, just as easily vote infanticide in as vote abortion out.

At this point some further question may occur. The moral problem of abortion cannot decisively be decided by scientific evidence. And if the truth of the matter cannot be determined by a legislative vote either, then what kind of an issue is it, and what are the appropriate means for reaching decisions? It has been argued by many that the question is essentially "religious," and should thus be left to individual conscience. I consider that a wrong position. It is at least as much a philosophical as a religious issue and, in any case, there are many other issues in our society, no less religious, which we feel can be made subject to public policy.

Ultimately, I believe, the question is a philosophical one. Scientific evidence can be relevant but not decisive. In the nature of the case, it would be inappropriate and question-begging to have it decided by a legislative vote. For that reason, I believe the Supreme Court, in Roe v. Wade, was correct in leaving the decision up to the individual woman. That seems to me the only sensible public policy on the issue. Yet I would hate to see the matter left at that. If it is assumed by those women who avail themselves of the right to an abortion that one answer about the beginning of human life is just as good as any other--that there is no possibility of any approximation of truth in this area--then I think that a false conclusion also. That there is disagreement does not \disprove/ that some modes of thinking about the problem are more reasonable than others, and some answers better than others.

To date in the abortion debate, the "pro-life" group has taken the lead in asking the serious question: when does human life begin, and what are the moral implications of our answer to that question? I hope that the "pro-choice" group will in the future be no less vigorous in its willingness to ask and confront that question, a trait that has not noticeably been present in the past. I support the right of women to make their own moral choice on abortion. But that is not the end of the matter. A no less fundamental moral problem is how that right ought morally to be used. That is the real debate we should be having, not a debate about a bill full of philosophical fallacies.

## Prepared Statement of Dr. Carl Tyler

Mr. Chairman and members of the Subcommittee:

I am Dr. Carl Tyler, Assistant Director for Science at the Center for Health Promotion and Education of the Centers for Disease Control in Atlanta.

In 1969, the Centers for Disease Control (CDC) recognized illness and deaths associated with abortion as an important public health problem and because of the inadequacy of national statistics, initiated epidemiologic surveillance of abortion. Since then, CDC has been compiling, analyzing, and disseminating data on abortion in the United States. The objectives of this surveillance are twofold: 1) to document the number and characteristics of women obtaining abortions, and 2) to identify and eliminate preventable mortality and morbidity related to abortion.

In 1978, the latest year for which the Center for Disease Control has obtained statistics, the 50 states and the District of Columbia reported 1,157,776 legally induced abortions, a 7% increase over 1977. The national abortion rate rose from 22 per 1,000 females aged 15-44 in 1977 to 23 in 1978. The national abortion ratio increased by 7%, from 325 to 347 per 1,000 live births, or more than 1 abortion for every 3 live births.

As in previous years, women who obtained abortions in 1978 were most often young, white, unmarried, and of low parity. Sixty-five percent were less than 25 years of age; 67% were white, and 33% were of black and other races. Seventy-four percent of all women obtaining abortions were unmarried at the time of the procedure, and 57% had had no live births. Curettage continued to be the most widely used procedure for reported legal abortions, accounting for 95% of abortions performed in 1978. Compared with 1977, the percentage of saline instillation procedures used after 15 weeks' gestation

decreased, dilatation and evacuation procedures increased, and instillation of prostaglandin and other agents remained the same.

Women continued to seek abortions at earlier gestational ages; over half (52%) of all abortions were performed at less than 9 menstrual weeks' gestation, and 91% of abortions were induced within the first 12 weeks. Younger women obtained abortions at later gestations than older women. Nearly half (46%) of the abortions performed after 15 weeks of gestation were to women 19 years of age or younger. A woman's race had relatively little impact on the gestational age when she obtained an abortion.

In 1978, 27 women died from abortion, 8 fewer than the 35 who died in 1977. Compared with 1977 there was a decline in the annual number of legally induced abortion deaths; 11 women died after legally induced abortion in 1978, compared with 17 in 1977, 11 in 1976, and 31 in 1975. Four of the 11 deaths in 1978 were due to ectopic pregnancy after attempted legally induced abortion. In 1978 there were 7 deaths after illegally induced abortion and 9 deaths after spontaneous abortion. The death-to-case rate for legally-induced abortions decreased from 1.4 in 1977 to 0.6 per 100,000 abortions in 1978.

Four main abortion methods have been involved: 1) sharp curettage - the classic "D & C" method; 2) suction curettage - also called vacuum aspiration; 3) dilatation and evacuation (D & E) - which involves a combination of suction and sharp curettage at 13 weeks of pregnancy or later; and (4) instillation procedures - which involve injection of substances into the uterus to cause abortion.

The role of oxytocin in augmenting the uterine activity of second-trimester instillation abortions is controversial. To evaluate the efficacy and safety of oxytocin augmentation, we analyzed data on 10,013 women who underwent hypertonic

saline instillation procedures and 1,241 women who underwent prostaglandin F2a (PGF2a) instillation procedures in the United States between 1971 and 1975. Data were obtained through the Joint Program for the Study of Abortion under the auspices of the Center for Disease Control, a multi-center, prospective, cohort study. We found that concurrent administration of oxytocin was associated with a significantly shorter instillation-to-abortion time for hypertonic saline but with a significantly longer time for PGF2a. For hypertonic saline, use of concurrent oxytocin did not affect either the success rate or the major complication rate; however, it did affect the specific type of complication that occurred. For PGF2a, use of concurrent oxytocin was associated with a lower success rate and a higher major complication rate than when PGF2a was used alone; however, the relatively small number of observations and limitations in our study design may have affected our results.

In August 1977 federal funds for financing abortions of Medicaid-eligible women were restricted. In order to study the health impact of public fund restriction we reviewed the medical records of women with abortion complications in 3 cities for 1 year before and 1 year during the restriction. A similar analysis was done for 3 cities where public funding for legal abortions had not been restricted. Assuming that the number of complications reflects the number of abortions, we found that the restriction of public funding for legal abortions had not increased the number of illegal abortions, but that it had reduced the number of legal abortions obtained by poor women. CDC initiated a hospital surveillance project in 13 states and the District of Columbia. No increase in abortion related complications was observed in this surveillance project. No abortion deaths related to either illegal or legal abortions were detected through the hospital surveillance.

An estimated 30 to 55 million abortions are performed worldwide each year, making abortion one of the most prevalent means of fertility control. The majority of the world's population (60%) live in countries were abortion is permitted either on request or for social reasons. The United States was sixth of the 18 countries reporting abortion rates and eighth of the 16 countries reporting abortion ratios. In 1978 the United States reported one of the lowest percentages of abortions to women over 40 years of age (< 3%) and to women with 4 or more children (4%) and one of the highest percentages to never-married or previously married women (74%) and to women with no living children (61%).

---

PREPARED STATEMENT OF DR. JESSICA G. DAVIS

Mr. Chairman and members of the Subcommittee on the Separation of Powers, I am here today to give testimony on several aspects of Bill S.158.

I am an Associate Professor of Clinical Pediatrics in the Department of Pediatrics at Cornell University College of Medicine. At the present time, I serve as the Director of the Child Development Center and Chief of the Genetics Unit at North Shore University Hospital, a teaching affiliate of Cornell University College of Medicine. My areas of expertise include medical genetics, embryology and pediatrics with a special emphasis on the acquired and genetic problems of the developmentally disabled.

My past training includes a bachelor's degree from Wellesley College and a medical degree from the College of Physicians and Surgeons, Columbia University. Following training in pediatrics at St. Luke's Hospital-Columbia University, I completed a three year NIH sponsored postdoctoral fellowship in medical genetics and cytogenetics at the Albert Einstein College of Medicine, Yeshiva University. I then held a two-year postdoctoral fellowship in the care and rehabilitation of the handicapped child at the Rose F. Kennedy Center at Albert Einstein College of Medicine.

During the past 16 years, I have served as a teacher and clinician and engaged in clinical research in academic medical settings. My related professional activities include membership in a number of organizations including the American Society of Human Genetics. I now serve as a member of the Society's Social Issues Committee. I am the Program Chairperson of the New York State Genetic Diseases Program and President-elect of the New York State Genetic Task Force. Though I speak today as an individual I would be surprised if many of my colleagues would be in significant disagreement with my views.

The major issue under consideration today is the validity of the statement in Section 1 of Bill S.158 which states:

"...present day scientific evidence indicates a significant likelihood that actual human life exists from conception".

I find the word "actual" to be a peculiar one. What is the difference between "actual human life" and merely "human life"? I don't know and therefore cannot affirm the validity of the proposition.

But let us drop the word "actual" (as the bill seems to do). The proposition on which this bill rests still cannot be affirmed. I should like to explain to this Committee why this is so.

Let me begin by concurring with Dr. Leon Rosenberg's statements made to this Committee. You will not hear a clearer or more humane expression of present day scientific thought.

With all due respect to the powers of Congress, it is trying to do something beyond its temporal authority: it is trying to establish the mystical, ineffable instant when human life starts. From the perspective of a scientist I believe this question is not a scientific one, but rather a theological, religious, philosophical, ethical, cultural or moral question. A subject for debate and exegesis perhaps, but hardly resolvable by legislative fiat.

84-581 O—81——10

I will try to tell this Committee what the generally accepted scientific facts are concerning human development.

What do we know about the onset of human development at the present time? We know that at conception the egg is fertilized by a sperm. The union of these two specialized cells results in a fertilized egg which contains all the genetic information necessary for the eventual development of a new being or new member of our species. Like other living cells the fertilized egg is a highly complex metabolically active cell that undergoes cell division. Again like other living cells the genetic material within the fertilized egg serves as a template so that a copy of this genetic material is incorporated into each ensuing cell.

Under normal circumstances the earliest cell divisions lead to the formation of a small cell mass which in turn is mechanically propelled to the uterine wall. After embedding in the uterine wall the as yet undifferentiated amorphous cell mass must undergo millions of cell divisions before it assumes at best a primitive humanoid form. The process takes weeks and its outcome is influenced by the complex interaction between the genetic make-up of the embryonic and fetal cells and the myriad of factors provided by and through the nourishing

maternal intrauterine environment. This symbictic relationship continues until birth.

The scientific facts which I have recited do not lend support to either side of the proposition which S.158 seeks to affirm. I believe these facts are neutral on the issue and that the ~~answer to the~~ question "Does human life exist from conception?" can only be answered by bringing in ideological concepts from non-scientific disciplines. The fact that scientists may be swayed by non-scientific ideology merely demonstrates that scientists, too, are human.

Other lawmakers and numerous philosophers have debated when life begins. Their answers vary, from conception, to other arbitrary time periods, to quickening, to brain functioning, to the existence of the soul. Glenville Williams, a distinguished British professor of law, in his The Sanctity of Life and the Criminal Law, said:

> "Although we may cling to the religious belief in the existence of a soul, we have given up asking when this soul begins, because the question has become insoluble. Clearly the billions of sperm cells that go for naught in a single act of reproduction

cannot be conceded to possess souls, and similarly it is impossible to find souls in unfertilized ova."

And in Ecclesiastes 11 (5) it is said:

"As you do not know how the spirit comes to the bones in the womb of a woman with child, so you do not know the work of God who makes everything."

While an embryologist can tell you when bones develop in the womb she cannot tell you when the spirit comes.

Now I should like to state my thoughts on the practical effects of this bill and the debate on the bill. If this bill becomes law, it will adversely affect current medical genetic practice. Three million living children are born in the United States each year. Of these, 3-5% have a significant chromosomal abnormality (eg., trisomy #21 or Down Syndrome); a congenital malformation (eg., defect in the formation of the brain or spinal cord) or a genetically determined biochemical disorder (eg., Tay Sachs disease). One-fifth of all infant deaths in our country are due to genetic problems or congenital defects. Recent studies indicate a major portion of those pregnancies which are miscarried spontaneously have underlying

genetic problems. Genetic disorders also account for significant lifelong morbidity.

During the past decade, the development of new technologies such as ultrasonography and amniocentesis has aided physicians in diagnosing certain hereditary disorders and congenital defects in early pregnancy. The use of these optional techniques in conjunction with genetic counseling enables many couples at risk to have healthy children. Previously these couples refrained from becoming pregnant because of concern about their known recurrence risks.

Powledge and Fletcher in a 1979 report in the New England Journal of Medicine on "Guidelines for the ethical, social and legal issues in prenatal diagnosis" state "the desired and intended result of prenatal diagnosis is information about the presence or absence of a possible disease or defect in the fetus". To date, approximately 40,000 amniocenteses for antenatal genetic diagnosis have been performed in the United States. It must be emphasized that in the vast majority of cases (96%) the results are favorable and indicate that the fetus is not affected with the condition for which the test was performed. This underscores the fact that amniocentesis can and does provide reassurance for the majority

of individuals at risk undergoing the procedure.

According to a Report of a Consensus Development Conference sponsored by the National Institute of Child Health and Human Development "...should the fetus prove to be affected with the 'at risk' disorder..." families can now decide if they wish to avail themselves of selective abortion and subsequently have offspring "not affected with the condition for which they are at risk...". Other individuals and families when faced with the intrauterine diagnosis of a fetal anomaly can use this information to become more fully informed about the nature of the defect. Parents-to-be can then anticipate and plan for any special provisions which the birth of the abnormal child may require. At the present, the responsible use of antenatal diagnostic methods permits reproductive decisions to be made on a more informed basis.

Antenatal diagnostic techniques are also essential in the development of therapeutic strategies in order to treat and cure genetic disorders. At the present time, amniocentesis enables the diagnosis and treatment of two biochemical disorders in the fetus: methylmalonic acidemia and biotin dependent carboxylase deficiency. Investigators hope to expand the therapeutic capability of these techniques in order to treat

more metabolic conditions *in utero*.

If Bill S.158 becomes law, antenatal diagnostic techniques may be abandoned. The small risk associated with amniocentesis includes the possibility of inducing a miscarriage. Under this proposed bill physicians may fear criminal prosecution and refrain from performing the procedure. Furthermore, Bill S.158 specifically states that it would be illegal to terminate a pregnancy because of an adverse genetic diagnosis. Couples at risk for genetic disorders that can be diagnosed *in utero* would then be denied the possibility of having a healthy child. Our ability to diagnose, treat and cure numerous diseases will be stopped cold; the illegal abortion will flourish and take its toll of life. Thus, the net result of this bill predictably will be to take life and prevent cures of horrendous birth defects.

Margaret Sanger said there were three great battles for liberty in the United States. First, the American Revolution to secure political liberty. Second, the struggle to exercise freedom of religious opinion by eliminating the blasphemy laws. Third, the fight to prevent the obscenity laws from applying to birth control information. I suggest we are in the midst of a fourth struggle: the fight to permit women safely and

legally to choose when they wish to bring life on this planet, without the backward authoritarianism symbolized by S.158.

I have faith in the institution of Congress but I have no respect for this bill or its unstated goal of suppressing alternatives medically safe to women who elect them.

Perhaps, on reflection, this august body will concede that in our country there are many faiths, some of which cannot be reconciled with each other on the great moral issues. Would not wisdom suggest that rather than legislate philosophical "truth" Congress should allow the citizens of this country to exercise their pluralistic beliefs?

For the reasons I have stated I urge this Committee to withdraw Bill S.158.

---

## Prepared Statement of George M. Ryan, Jr.

Mr. Chairman, and members of the Subcommittee, I am George M. Ryan, Jr., Professor of Obstetrics and Gynecology and Community Medicine at the University of Tennessee Center for the Health Sciences in Memphis, Tennessee. I am also currently the President of the American College of Obstetricians and Gynecologists, a medical specialty society, the membership of which includes more than 23,000 physicians who specialize in the provision of health care to women in America.

I appear before you today as an individual physician but prepared to share with you the official policies and current position of the ACOG with regard to the legislation before this Subcommittee. In either role -- as a physician with nearly thirty years' experience in obstetrics

and gynecology and related fields of concern, or as the President and spokesperson for the largest professional association concerned strictly with women's health -- I solicit your consideration of the few points that I feel must be made here today and I invite your questions and comments.

The legislation now before the Subcommittee has been introduced in the Congress in various forms -- as a proposed Amendment to the United States Constitution; as a proposed revision or addition to the United States Code; and in both forms it has been proposed with and without exceptions, explanations, and other variables. The common element in all of this legislation, however, is the goal of making the provision of abortions illegal in this country. The bill under consideration (S 158) would permit states to end legal abortion services by means of defining human life to include that period of time during which the fetus may develop following conception. I do not wish to engage in a debate of the relative "rightness" or "wrongness" of abortion. My position and that of the American College of Obstetricians and Gynecologists is in support of the Supreme Court decision in Roe v. Wade. My purpose in being here is to provide expert testimony which I, as well as many of my colleagues, feel is absolutely necessary to assure that Congress has information on the broad health ramifications of this bill rather than viewing it only as a measure that simply addresses the abortion issue.

The proposed legislation reads in part:

> ". . . human life shall be deemed to exist from conception, without regard to race, sex, age, health, defect, or condition of dependency; and for this purpose 'person' shall include all human life as defined herein."

You have heard in earlier testimony before this Subcommittee, in testimony presented by reputable and qualified physicians and scientists, that "life begins at conception." I am not here to discuss this issue which many feel is not a question subject to a purely scientific answer. At conception there is cellular life, in biological terms. However the proposed legislation attempts to integrate the presence of such cellular life with a legal definition of "personhood" with all the attendant rights of citizenry which are protected by the Fourteenth Amendment to

the Constitution. The concern which you must hear, from me and from my colleagues of the American College of Obstetricians and Gynecologists, is that when Congress equates cellular life to personhood it is taking a substantial leap beyond the current views of the medical and scientific community that will have a major and lasting effect upon the health care of women in this country, the practice of medicine in this country, and the personal health practices of a large portion of our population.

The legislation before you defines personhood as beginning at the moment of conception. The product of this conception, by definition of the legislation, would be entitled to Fourteenth Amendment protection as a person regardless of "health, defect, or condition of dependency." It is essential that you, as the duly elected representatives of your states and the citizens of this country, must be fully aware of the impact which can be realistically expected to result from Congressional passage of this proposed legislation. You must know that granting the conceptus the Constitutional protections of personhood disregarding the relative and critical factors of health, defect, and condition of dependency, will have an immediate and enduring effect on women's health care.

To declare rights for the conceptus equal to those of the woman will create competition for medical care since the health interest of the fetus is not always consistent with the health interests of the pregnant woman. In fact, the physician potentially could be required to make medical decisions not in the best interest of either woman or fetus and possibly to the detriment of both.

The majority of pregnancies in this country occur in circumstances where the woman is understandably concerned with maintaining her own health and producing the healthiest child possible. We, as physicians, offer care and advice to enhance the health and quality of life of the woman, both as an individual and as the bearer of children. In this role, the physician is committed to the best interests of the woman, who entrusts herself to his or her care. This proposed legislation would create unsolvable problems for us in meeting this commitment.

Some of the major advances in obstetrics over the past twenty years relate to our ability to evaluate the intrauterine status of the fetus and perform early delivery of the fetus when indicated. Many of these premature births relate to maternal disease. Toxemia is a disease of pregnant women characterized by high blood pressure, possible convulsions, coma, and even death. Prevention of the more severe effects of this disease involves early delivery, with concomitant risk to the baby. Failure to act in this situation for fear of abridging the rights of the fetus could result in death of mother and fetus. This bill, then, would create impossible dilemmas for the practicing physician trying to meet his or her ethical responsibilities to act in the best interest of the pregnant woman. Many diseases of pregnant women require procedures or medicines which pose a risk to the fetus. Examples include appendicitis and other abdominal surgery in the pregnant woman. Medications such as dilantin for the treatment of epilepsy and cortisone-like drugs for other conditions are necessary in the interest of the pregnant woman and pose an increased risk of fetal abnormalities. These are clear-cut instances in which the physician has traditionally acted in the best interest of the pregnant woman. The proposed legislation would restrict this freedom.

Previously, I referred not only to the concern pregnant women have for their health but also their desire to have healthy children. Inherent in this is the desire of many women not to have a defective or severely handicapped child. Fortunately, we now have the capability of identifying a number of these defects in early pregnancy and offering a pregnant woman a chance to make the critical decision as to whether or not she will bear a defective child. Such a situation is seen in Tay-Sachs disease. A child born with Tay-Sachs disease is doomed to die in early childhood. Are we to deny the woman the option to avoid this tragic chain of circumstances for her and the rest of her living family?

Women in today's society constitute an increasing part of our work force. As a result many are postponing childbearing and are still completing families after age 35. At this age, they are at increased risk that their pregnancy will have a genetic abnormality, Down's

Syndrome, and current practice mandates that we offer them the opportunity for screeing these unfortunate occurrences The proposed legislation would essentially nullify our current efforts at genetic screening programs.

Thus far I have spoken only to the impact of this legislation upon the pregnant woman. The woman who is not pregnant also has a vital and justified interest in the maintenance of good health which will be impacted by this legislation. For over 10 million women in this country, the exercise of self-determination includes management of their reproductive functions by means of the intrauterine device and the birth control pill. If the legislation as proposed were to pass, any known contraceptive which interferes with the development of the conceptus would be suspect. Consequently, I believe that it is realistic to assume that the IUD and the low dose oral contraceptive pills could be considered as abortifacients and therefore declared illegal. In fact, this objective was stated in testimony before the House Subcommittee on Health and the Environment just last month by proponents of this legislation. This Subcommittee, the Senate as a whole, and the people of this country must be made aware of the impact that removal of these popular and effective birth control methods would have. If this legislation is passed and if a state views the intrauterine device as an abortifacient, what will I as a physician do when a pelvic examination reveals that my patient has an IUD in place? Do I remove it? Do I request that she have it removed? What if she refuses? Do I report her to a law enforcement agency? Or am I indeed a party to a criminal act if I do not report her?

Mr. Chairman, these are just the highlights of our concerns about the problems which would be created by passage of this legislation. There are also complicated medical issues which would arise immediately, regardless of what approach the state legislatures might take. If the federal statute defines as human life any conceptus, regardless of health, defect or condition of dependency, we must consider how the medical profession will deal with the relatively frequent incidence of ectopic pregnancy, where the conceptus develops outside the uterus, or

the hydatidiform mole, which is a product of conception that cannot survive, or the spontaneous abortion.

Great progress has been made in improving the quality and manner of delivery of health care for women in this country. Maternal mortality and infant mortality are the lowest in the history of this nation. To introduce into this improved environment of health care a factor as threatening as that involved in a new definition of personhood is to push backward that history of progress.

I encourage you to consider not only the primary goal of this legislation, but also its impact; in fact, I believe that you will find, as we have found in the American College of Obstetricians and Gynecologists, that regardless of the issue of abortion, this legislation presents a range and depth of problems so complicated and so far-reaching as to obscure the basic intent of the legislation. State governments would be enabled to intrude into the most personal and private decisions of pregnant and non-pregnant women. As a physician, as a citizen, and as the President of the American College of Obstetricians and Gynecologists, I ask that you acknowledge and assess the fundamental medical changes and critical side effects inherent in this legislation.

It is heartening to be invited to testify. The emotions generated by the underlying debate have made it difficult to focus attention on the many other ramifications of this bill. This has indeed been an opportunity to expose the Subcommittee to the full measure and import of the issues surrounding this legislation in order that your votes will be assured to be informed votes.

---

## Prepared Statement of Dr. Mildred F. Jefferson

Mr. Chairman and other honorable members of the Subcommittee: I think it does not matter a great deal that I am a general surgeon on the staff of Boston University Medical Center and Assistant Clinical Professor of Surgery on the faculty of Boston University School of Medicine. Mentioning that my earned degrees include a Master of Science Degree from Tufts University and a

medical degree from Harvard Medical School might require adding that 23 institutions of higher learning across the country have awarded me honorary degrees in order to establish that I do not find the academic world a foreign land. My experience includes practice, research and teaching. I am a Diplomate of the American Board of Surgery, a member of the Boston Surgical Society, the Massachusetts Medical Society and the American Medical Association among other things. From the beginning of my medical education, I have been concerned with the complex problems that develop at the law-medicine interface.

For the past 10 years, I have been deeply involved in all aspects of the public policy debate on the life issues of abortion, infanticide and euthanasia. It has been my honor and privilege to be one of that dedicated band of men and women who have created the focus and direction of the right-to-life movement in the United States.

The central conflict in our public policy crisis is over the proposition that some lives are less valuable than others and that lives of less value can be sacrificed for the good of other concerned individuals or the society. When the U.S. Supreme Court gave the matter of getting rid of a baby to the private decision of a woman and doctor, the High Court stepped out of its responsibility to interpret the Constitution and acted as a super-legislature to create a new body of social law. As the final decision on abortion was left up to the doctor's medical judgment, the High Court gave to my profession an almost unlimited license to kill. In assuring the execution of the privilege, the High Court separated the biological and legal meanings of personhood and denied the protection of the Constitution to the member of the human family who needed it most--the unborn child. The mischievous effect of this social law has been to induce scientists to abandon scientific method to become social mechanics and to seduce doctors to forsake usual standards of professional practice to become social technicians.

With the obstetrician and mother becoming the worst enemy of the child, and the pediatrician becoming the assassin for the family, the state must be enabled to protect the life of the child, born and unborn. The Human Life Bill will make this possible.

As our nation could not exist in the last century half-slave and half-free, our nation cannot survive long into the next century destroying its own young and denying the humanity of its own. The protection of life must be the absolute priority of our society, not ever made secondary to the elitist notions that would assign a sliding scale of value to human lives.

Senator EAST. I would ask the witnesses if they would please be willing to respond in due course to written questions that might be presented to them. I do not mean immediately, but in due course we would appreciate that.

We shall have additional hearings beginning tomorrow at 1 p.m. in Dirksen 2228. Those hearings will be on the legal and constitutional implications of the bill.

We shall now stand adjourned.

[Whereupon, at 1:30 p.m., the hearing adjourned, to reconvene Thursday, May 21, 1981, at 1 p.m.]

# THE HUMAN LIFE BILL

THURSDAY, MAY 21, 1981

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The committee met, pursuant to notice, at 1 p.m., in room 2228, Dirksen Senate Office Building, Senator John P. East (chairman of the subcommittee) presiding.

Present: Senators Hatch and Baucus.

Staff present: James McClellan, staff director; Grover Rees, Craig Stern and James Sullivan, counsels; and Ken Kay, minority counsel.

## OPENING STATEMENT OF CHAIRMAN JOHN P. EAST

Senator EAST. This hearing will please come to order.

We shall commence this session of the Separation of Powers Subcommittee dealing with S. 158. To refresh your memory, we have already had three sessions dealing with the medical implications of this proposed bill. This afternoon, we begin two sessions, this being our first, dealing with the statutory and constitutional implications of this measure.

I welcome again my distinguished colleague, Senator Baucus, the ranking minority member on the subcommittee. We have both agreed that to expedite this hearing it would be best to let all members of the panel speak. Then we can come back and individually ask questions.

I would like to remind the audience as well as ourselves that we are under fairly severe time constraints here. The hearings are scheduled to run from 1 to 4. I will do everything I can to see that we are out of here by 4 o'clock because beyond then our minds and spirits will probably be so weakened we will not know what is going on anyway.

In the meantime, Senator Baucus and I are going to be plagued with having to run over and vote. That will make life a bit more complicated than usual, or perhaps will make it normal for the Senate.

Senator Baucus, I first would like to ask you if you have a statement to make?

Senator BAUCUS. Mr. Chairman, I do have a statement, but I will put it in the record. We all know why we are here, so we should proceed.

[The opening statement of Senator Baucus follows:]



84-581 O—81——11

## Opening Statement of Senator Max Baucus

Mr. Chairman, today we begin the first of four days of hearings on the constitutional, legal, and practical implications of S. 158.

S. 158 is a significant piece of legislation not only because it raises the controversial and complex issue of abortion. It also raisls significant constitutional issues of first impression. I, therefore, belilve it is extremely important that this Subcommittee proceed with great care as it analyzes the constitutional, legal, and practical aspects of this bill.

I wish at this time to reemphasize what I view to be the four basic questions raised by S. 158:

1. Did the Supreme Court in Roe v. Wade hold that the judiciary could not answer the question of when an actual human life begins or that government could not answer the question?

2. Even if the Court only addressed the limits of the judiciary, can Congress find consensus today among experts in medicine, philosophy or theology on the question of when an actual human life begins.

3. Even if Congress can find a consensus on the question of when an actual human life begins, does the Constitution permit Congress to define the term "personhood" by statute or can the term "personhood" only be defined by the Supreme Court or by constitutional amendment?

4. Even if Congress can by statute legislate the definition of the term "personhood", does the Constitution permit Congress to eliminate lower federal court jurisdiction over cases involving constitutional rights?

During our first three days of hearings on this legislation, we have focused primarily on question number two. Today we begin our exploration of the other three questions.

TO HELP US WITH THIS ANALYSIS, WE HAVE FIVE DISTINGUISHED MEMBERS OF THE CONGRESS AND FOUR MEMBERS OF THE LEGAL COMMUNITY. I VERY MUCH APPRECIATE THEIR WILLINGNESS TO JOIN US IN THESE DELIBERATIONS AND LOOK FORWARD TO HEARING THEIR VIEWS.

AS THE SUBCOMMITTEE ON SEPARATION OF POWERS WE HAVE A SPECIAL RESPONSIBILITY TO ATTEMPT TO PRESERVE THE DELICATE BALANCE BETWEEN CONGRESS AND THE COURTS. ALL MEMBERS OF THIS SUBCOMMITTEE SHOULD SATISFY THEMSELVES THAT S. 158 REPRESENTS RESPONSIBLE CONGRESSIONAL ACTION. I'M SURE THAT THE NEXT FOUR DAYS OF HEARINGS WILL GREATLY ASSIST US IN THAT EFFORT.

THANK YOU VERY MUCH.

Senator EAST. In keeping with his good spirit, I would like to encourage the witnesses to make your statements as concise as you can, rather than simply reading them. All written material will be made a part of the record. It will be a great help to us, to the cost of running this operation, and will make for more fruitful discussion if we can be concise in our remarks. Summarize them and then we will have more time to get into the discussion.

We have two panels this afternoon. One is the Honorable Robert Packwood, the U.S. Senator from Oregon; Senator Daniel Patrick Moynihan from New York; Congressman Mazzoli from Kentucky; the Honorable Charles Dougherty from Pennsylvania, Fourth District; and the Honorable Millicent Fenwick, Member of Congress from the Fifth District of New Jersey.

Senator Packwood, a very distinguished colleague of ours from the State of Oregon, we welcome you. Would you like to make your statement?

## STATEMENT OF HON. BOB PACKWOOD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator PACKWOOD. Mr. Chairman, Senator Baucus, I am pleased to have this opportunity to appear before your subcommittee today on the subject of abortion.

I think it is essential to make it perfectly clear from the outset of my testimony that this bill is about abortion. While the testimony on when life starts may have been intellectually invigorating, it begged the true purpose of this bill and the true motivation of its supporters.

Congressman Mazzoli, a chairman of the prolife caucus, says it very well in his testimony which will soon follow when he says: "In essence, the caucus supports the enactment of the Right to Life Act as an interim step until a Human Life Amendment is adopted."

Congressman Hyde has said essentially the same thing: S. 158 will ban abortions.

Stephen Galebach, in the pamphlet he authored entitled "A Human Life Statute," reiterates the same thing. S. 158 is a means to outlaw abortion in lieu of a constitutional amendment.

Therefore, the issue, Mr. Chairman, is not when does life start. The issue, stated clearly, is when does society deem an abortion to be a homicide?

S. 158, and these hearings, in my mind, are designed to conclude that abortion from the moment of conception is murder.

Now, having established the true purpose of these hearings, two key questions must be answered: One, should abortions be banned in this country; two, is S. 158 a legal and proper method to achieve that goal?

Let me address myself to the second issue first: Is S. 158 a proper vehicle to achieve that end, that is, to reverse the Supreme Court decision legalizing abortion?

In its decision legalizing abortion, the Supreme Court clearly said that at least during the first trimester of pregnancy, a woman has a constitutional right to decide for herself without hindrance or help from anyone, including the Government, whether or not she wants to have an abortion.

If S. 158 passes, it would allow not only the States to declare abortion from the moment of conception murder, but it would allow the Federal Government to do the same thing if we wanted to make abortion a Federal crime. The Court would then be faced with the constitutional issue of whether or not the constitutional right of a woman to have an abortion can be overridden by a statute making abortion murder.

I doubt that the Supreme Court would find the statute constitutional, but I will not dwell longer on this subject.

You have seen the letter from the six former U.S. Attorneys General opposing S. 158, and another letter from 12 renowned constitutional scholars—interestingly some prochoice, some antiabortion, some of whom disagree with the Supreme Court's original decision, and some of whom agree with it—all indicating that this statute is an unconstitutional way to reverse a Supreme Court decision. The panel of constitutional scholars will address that issue much more fully than I.

Therefore, let me address myself to the other and, I think, the more fundamental question: Is it wise public policy to outlaw all abortions?

First, let us examine what has been the abortion policy of this country throughout its history. Abortion before quickening was not a crime at common law in England. We carried that common law to the United States, adopted it as ours, and when we broke from England, that law remained as ours.

When our Founding Fathers deliberated at Philadelphia and brought forth our Constitution, abortion before quickening was legal. They chose to leave it so.

In the 19th century, States chose to outlaw abortions for justifiable medical, but, in my mind, unjustifiable moral reasons. By the mid-20th century, any medical justification for prohibiting abortion had disappeared.

In the 1950's and 1960's, we began to challenge the moral underpinnings banning abortions. In the late 1960's, a few States legal-

ized abortion. Then came the momentous Supreme Court decision legalizing abortion for all women throughout the entire country.

Today, there is admittedly a difference of opinion whether abortion should be legalized or outlawed. The difference are sharp and passionate.

Over the course of these hearings, I hope you will hear testimony from religious leaders of all faiths, which will indicate the sharp divisions, sometimes even within faiths, on the issue of abortion.

The one statement that can be made without fear of contradiction is that there is no consensus on this subject.

One thing is clear, however. The overwhelming bulk of the American people do not think abortion is murder. The American public disapproves of murder. They would not be likely to support abortion if they thought it was murder.

The American Medical Association, certainly an organization familiar with and concerned about human life, supports a woman's right to have an abortion. They would not to do so if they thought it was the wanton taking of human life. Dozens of other medical organizations echo the views of the A.M.A.

The American Bar Association, certainly an organization familiar with, yet with even a reverence for the law, would not endorse the right of a woman to choose an abortion if they thought it was murder.

The dozens and dozens of religious organizations that have endorsed a woman's right to choose would not do so if they thought it was murder.

Last, I cannot believe that the woman who ultimately has to make the painful decision herself to have an abortion feels that she is committing murder.

I would suggest to you, Mr. Chairman, that it is not only unwise but unworkable to 'try to impose your idea of morality on this country by legislation when there is no agreement on your conclusions.

Every generation witnesses a new group of citizens who believe themselves the keepers of the faith. It is not a disease unique to America. The difference is that in America we have seen and experienced the dangers of moralists who are so convinced they are right that they choose to impose their morality on us.

There is a growing force in this country, fueled by a Cotton Mather mentality, that wishes to impose on this country a Cotton Mather morality. From the perspective of one who is a practicing politician, I hope that we will always remember that passion can obscure judgment.

We should remember that governing officials in dictatorships and democracies find it easy and convenient to bend to transitory public opinion and popular prejudices which would subjugate individual liberties.

Those of us in public office should always remember that we can never err enough on the side of protecting individual liberty and freedom. We who have been elected to a position of public trust should be willing at all costs to withstand the buffets of a temporary storm that would trammel or even extinguish our freedom for the alleged common good.

Mr. Chairman, the danger to the liberties of all Americans is most threatened by those who want to compel conformity of thought and deed. Conversely, our liberties are most secured by a decent respect for diversity, and most especially on those subjects upon which there is no consensus.

God did not speak to any one of us and say, "You are right and those who disagree with you are wrong." If any one of us thinks that God had ordained us to speak for him, we are wrong. Worse, if we are in a position of power and we believe we speak for God, we become dangerous.

For, indeed, if I am right and you are wrong, then it is just a short step to the end justifies the means. I do not need to tell you, Mr. Chairman, who has taught political science, what that philosophy means to your liberties, and mine, and all Americans.

Thank you.

Senator EAST. Thank you, Senator Packwood.

Senator Moynihan, we welcome you. We were encouraging our witnesses to summarize their remarks as concisely as they could. Their statements, of course, will be made a part of the permanent record following their oral presentation.

We are going to allow all panelists to speak. Then Mr. Baucus and I would be able to follow up with questions.

## STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator MOYNIHAN. Mr. Chairman, I thank you for the opportunity to be here. My remarks, which will not require a length of time, will address themselves to the constitutional issue of S. 158, as I understand it, both as a Senator and someone whose profession has been that of a professor of government at Harvard University and other such institutions, as you have been a professor of government, sir.

I wish to say to this distinguished panel that in my view this legislation constitutes a direct assault upon the constitutional processes and concepts of the U.S. Government.

From the beginning of our country, and most famously incorporated in the *Marbury* v. *Madison* decision of Chief Justice Marshall, we have held that it is for the Court to decide what the Constitution says, that the Congress can set in motion a process for amending the Constitution, but with respect to the interpretation of the words of the Constitution, the Court is the supreme branch of the Government.

Sir, this was tested. Our commitment to this idea was tested in a most dramatic and extended and prolonged way in 1894. The Supreme Court, in its wisdom, held in the *Pollock* v. *Farmer's Loan and Trust Company* that the income tax was, in fact, a direct tax as understood in the Constitution and therefore had to be apportioned among the States. It could not be directly applied to individuals.

This was clearly wrong. The Court had been holding otherwise for a century. It was thwarting a major political judgment of the time, which was the United States should have an income tax.

Yet a succession of Presidents, of majority leaders in the Senate, Speakers in the House, and chairmen of the Finance Committee, of

which I am a member, urged to pass a bill saying the Supreme Court is wrong and we define the income tax to be a direct tax, said they would not do that. That would violate the processes of the Constitution. That would tell the Court what the words of the Constitution mean. That would open up to Congress power to change anything.

They patiently waited 20 years until the 16th amendment was adopted that said that an income tax was, in fact, constitutional.

Mr. Chairman, let me just raise for you the possibilities that we open with such a proposal as we have here.

Take the first amendment. The first amendment of the Constitution says: "Congress shall make no law respecting an establishment of religion."

If we follow the precedent of S. 158, what would be the possibility of a law being enacted in the Congress that says any State or municipality that provides tax exemption to a church building is, in fact, participating in the establishment of religion and that is unconstitutional? Defining tax exemption as the establishment of religion is perfectly logical if you can define what these words mean.

The first amendment guarantees freedom of speech. What if we were to pass a law saying that does not mean freedom to write what books you might like and only means speech when you talk? You can stand on a street corner and talk, but you may not write any book you wish or any letter you choose because we here defined speech to mean only talk involving the larynx.

The Constitution guarantees freedom of the press. What if we were to pass a law that says the press means something with a printing press? It does not mean television. It does not mean radio. It does not mean photo offset.

That is the kind of Pandora's box you open. Find any word you like in the Constitution and change its meaning by passing a law. This legislation would tell the Court what is a person, and would commence for the first time in our history a serious invasion by the legislative branch of the judicial branch.

I cannot, as a Senator or as a student of government, support it. I hope very much that we will return to well-established and effective ways of working the will of the Congress which are well-known and not this assault on the constitutional processes.

I regret having to say that to a panel which I respect so deeply, but I feel it strongly. The issue here is the preservation of the constitutional processes of the United States.

Senator EAST. Thank you, Senator Moynihan.

[The prepared statement of Senator Moynihan follows:]

PREPARED STATEMENT OF SENATOR DANIEL PATRICK MOYNIHAN

As a legislator, I have considered at length the specific provisions of S. 158. After much deliberation, I find that I cannot support this bill which I hold to assault fundamental constitutional concepts and processes. I would like to enumerate briefly what I consider the most compelling arguments against it.

S. 158 defines a fetus as a person, and thus subject to the guarantees of the Fourteenth Amendment. Whether this is so in fact is irrelevant to the issue at question. The Supreme Court, obviously contrary to fact, held in Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394 (1896) that a corporation falls within the constitutional category of "person" in the Fourteenth Amendment. The Supreme Court held in Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973) that a fetus is not a person for the purposes of the Fourteenth Amendment and is thus not subject to the Fourteenth Amendment's guarantee of equal protection of the laws. This leads to the central question raised by the Human Life Statute. Is it within Congress's constitutionally-prescribed power to declare that a fetus is a person after the Supreme Court has declared that it is not? In other words, can an Act of Congress overturn the Supreme Court's interpretation of the Constitution? I believe the answer is, unequivocally, that it is not.

Congress may, and often does, overturn Supreme Court decisions by changing the law. But these decisions are interpretations of statutes, not of the words of the Constitution. This distinction is crucial, for the Supreme Court has time and again declared that it is fundamentally a function of the judiciary to declare what the Constitution says and who is subject to which of its guarantees. I venture to say that most schoolchildren know this, and can cite the source of the doctrine that it is the Supreme Court that interprets the Constitution. For there may well be no more famous case in American jurisprudence than Marbury v. Madison, 1 Cranch 137, and few more famous dicta than Chief Justice Marshall's declaration in Marbury that "(i)t is emphatically the province

and duty of the judicial department to say what the law is." (1 Cranch 137, 177). In our own time, the Court has elaborated this, declaring in Cooper v. Aaron that "the federal judiciary is supreme in the exposition of the law of the Constitution," 358 U.S. 1, 18), and in United States v. Nixon that the power of interpretation rests with the Supreme Court (418 U.S. 683, 705).

And the Supreme Court has found that a fetus is not a person for the purpose of the Fourteenth Amendment. Under our system of government, only changing the Constitution can change that determination. The process for altering the Constitution is explicitly spelled out by Article V of the Constitution. It may not be done by statute. It must be done by amendment.

Supporters of the Human Life Statute cite Katzenbach v. Morgan, 384 U.S. 641, as evidence of the bill's constitutionality. I disagree. I find compelling the arguments made by Charles Alan Wright, William B. Bates Professor of Law at the University of Texas and Thomas I. Emerson, Stirling Professor of Law, Emeritus, at Yale University. These two men are as dissimilar in political view as they are alike in professional eminence. Permit me to quote from correspondence each has had with this Subcommittee. Professor Wright states:

> It has seemed clear to me since Oregon v. Mitchell, 400 U.S. 112, that Morgan is to be confined to the racial discrimination area from which it comes and that there is to be no extension of the rationale from that decision. 400 U.S. at 129 (opinion of Black, J.) 296 (opinion of Stewart, J.).
>
> In the Oregon case Justice Harlan made a statement that seems to me wholly applicable to S. 158. 'Congress is subject to none of the institutional restraints imposed on judicial decisionmaking; it is controlled only by the political process. In Article V, the Framers expressed the view that the political restraints on Congress alone were an insufficient control over the process of constitution making. The concurrence of each House and of three-fourths of the States was needed for the political check to be adequate. To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with constitutional structure.'

Professor Emerson takes a similar view:

> ...(T)he language of Justice Brennan in Katzenbach v. Morgan can give no comfort to the proponents of S. 158. Justice Brennan made it entirely clear that his views of the power of Congress under Section 5 did not authorize that body to abrogate the constitutional rights

> of individuals under the Fourteenth Amendment as previously secured to them by Supreme Court decisions. Using a footnote, apparently on the theory that the proposition was so obvious as not to require elaboration, he said,
>
> 'We emphasize that Congress's power under Section 5 is limited to adoption measures to enforce the guarantees of the Amendment; Section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.' 384 U.S. at 651.

The Supreme Court's interpretation of the Constitution has not always met with Congressional (or popular) approval. But this does not diminish Congressional responsibility to respect the established method of "correcting" a Supreme Court decision: amendment.

There are many instances of Congressional disagreement with a Supreme Court decision. As a member of the Senate Finance Committee, the one I know best is Congressional reaction to an 1895 decision that found the federal income tax law of 1894 unconstitutional (Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429). Records of the period show that several Congressmen considered legislation to overturn the Court's decision that a direct income tax violated the Constitution. Despite the strongest of feelings, Congress ultimately decided that the only responsible way -- indeed, the only permissible way -- to overturn the Court's decision was to amend the Constitution. Only with passage of the Sixteenth Amendment, some twenty years later, did an income tax become constitutional.

The amendment process is lengthy. It is cumbersome. Its outcome, as we have seen with the Equal Rights Amendment, is far from guaranteed. But it is the only one legitimately available to us. To proceed in any other way to change a Supreme Court interpretation of the Constitution is to undermine the Constitution.

This is not the view of one Senator. It is a view shared by six former Attorney Generals, who communicated their opposition to S. 158 to the Judiciary Committee. It is shared by the twelve legal scholars who wrote a joint letter to the Committee and by the eighty law professors who have written to Senator Baucus, the ranking Democrat on this Subcommittee. It is shared by the legal experts of the Congressional Research Service. It is even shared by the

legal counsel of Catholic Charities. I can think of only 2 scholars who support this bill, Professors Stephen Galebach and John Noonan. Professor Galebach has written about S. 158 at length, most notably in the Human Life Review. I do not find his arguments persuasive, and, indeed, Professor Emerson dismisses the Galebach interpretation as "in error on all counts." As I am hardly a legal scholar, I cannot judge which of these men is, ultimately, right. But I do suggest that the near unanimity of legal opinion on this subject is not to be dismissed lightly.

I do not wish to consider whether abortion is a desirable or even defensible policy. This is a personal judgment unrelated to consideration of the Human Life Statute. But that bill raises a corrollary policy question which, while also personal, is often overlooked. Even if S. 158 were constitutional, and Congress could enact it without problem, would Congress want to enact a bill that very well may make criminal the use of abortifacient birth control devices, such as the IUD and the so-called Morning-After pill? I have seen no conclusive proof that S. 158 would make the use of abortifacients illegal. But I think it does, and so does the American Life Lobby, which took this view in a letter to Congress. I do not think that Congress wants to, or even ought to, prohibit birth control devices. This, I think, is something we ought to consider carefully.

But I must return to the central issue before us: the Human Life Statute is a fundamental assault on Constitutional processes. We must not allow that to occur.

Senator EAST. We have with us two distinguished colleagues from the House side: Congressman Dougherty and Congressman Mazzoli. We welcome you both.

Congressman Dougherty, if you will kick off for us, we would appreciate that. The written statements will be made a part of the record following your oral presentation.

## STATEMENT OF HON. CHARLES F. DOUGHERTY, A U.S. REPRESENTATIVE FROM THE STATE OF PENNSYLVANIA

Mr. DOUGHERTY. Thank you, Mr. Chairman and Senator Baucus. Thank you for extending us the opportunity to appear before you today on behalf of the Congressional Pro-Life Caucus which we are pleased to co-chair along with Senators Tom Eagleton and Jesse Helms.

I commend the chairman and the members of the subcommittee for holding hearings on what we consider to be a very crucial question in American society today.

By way of introduction, the Pro-Life Caucus is a bipartisan, bicameral organization, including 14 Members of the U.S. Senate and 50 Members of the House, which was formed during this Congress to bring about the coordination and control which we believe are essential in realizing legitimate pro-life legislative goals. We are an informal, member-controlled support group.

On April 9, the caucus voted to endorse the language of H.R. 3225, the Right to Life Act of 1981. However, we also voted unanimously to reaffirm our commitmment to the passage of a human life constitutional amendment.

In essence the caucus supports enactment of the Right to Life Act as an interim step until a human life amendment is adopted.

Mr. Chairman, before reaching its decision to endorse the language of the Right to Life Act, the caucus met on four occasions and heard from representatives from major right-to-life organizations. It was the information gathered through these meetings which prompted us to endorse a revised version of H.R. 900 and S. 158.

Mr. Chairman, the spirit of the original act is still the same: To declare quite simply that the word person as used in the 14th amendment to the Constitution of the United States includes the unborn. Thus, they are entitled to the same 14th amendment protections as are all other persons in this country.

Appended to this statement is a legal analysis of the human life bill so today we will just summarize our feelings on the legal and constitutional aspects of this legislation.

We believe the human life bill can only be properly understood against the backdrop of the Supreme Court's decision in *Roe* v. *Wade* and subsequent decisions.

The human life bill, Mr. Chairman, raises two very distinct and very basic questions. The first: Is the fetus a human life?

Let me expand upon that. Is the fetus a human life? Despite comments to the contrary about Members trying to legislate morality, we believe that this is a very, very fundamental and basic question which we must address.

The second is: Is this life a person entitled to be protected by the Constitution of the United States?

Mr. Chairman, the first question of whether or not a fetus is a human life is a question for the scientists. We submit that the second question is a question properly belonging to us as legislators.

This committee has heard a number of distinguised scientists speak to the first question. We come before you today as legislators fulfilling our responsibility to enforce the 14th amendment. We state that all human life, including the unborn, must be guaranteed the 14th amendment protections.

As I said, we have appended a legal analysis of the human life bill to our testimony which we believe clarifies some of the difficulties in this aea. We leave discussion of these legal controversies to the experts who will follow us in these hearings today.

At this time, Mr. Chairman, I would like to turn our comments over to my colleague, Representative Mazzoli of Kentucky, who chairs the caucus in the House with me.

Senator EAST. Congressman, we welcome you.

## STATEMENT OF HON. ROMANO L. MAZZOLI, A U.S. REPRESENTATIVE FROM THE STATE OF KENTUCKY

Mr. MAZZOLI. Thank you very much, Mr. Chairman, and Senator Baucus, who had the eminent good sense to begin his fine career in the House of Representatives. It is good to see you again.

Senator Packwood and Senator Moynihan, it is very nice to be with you.

I have just a few comments because I think the question-and-answer session might be the most useful part of this exercise, Mr. Chairman.

First, perhaps in a very brief answer to our colleague from Oregon who indicated that this was a transitory matter, with great respect to him as one of our leading Senators, I do not think the issue of human life and when it starts and ends and who can take it is a transitory matter. Indeed, I think it is a matter which has existed from the beginning of time and will continue to exist so long as we are on this Earth.

While I cannot say that some people who are involved do not take the Cotton Mather route, which I assume is one of being extraordinarily zealous and, in a sense, rigid and doctrinaire, there are many of us, my good friend, who feel that this is an issue on which we do not make any judgments, we do not point any fingers, and we do not issue any reproaches. It is an issue we feel strongly about because it is an issue of the beginning and the end of human life.

As a matter of fact, I am quite uncomfortable in the company of those with whom I might agree who do take that route. I would suggest there are relatively few of those. I think the greater number are those who feel this is a very difficult issue.

Having said that, let me proceed by saying, Mr. Chairman, as my colleague, Mr. Dougherty, has said, the Pro-Life Caucus endorsed this bill, a version of this bill, only after quite a lengthy series of hearings with scholars and with people involved in this total issue.

We think the human life statute is one step in a series of steps which would lead, hopefully, to the enactment of a constitutional amendment to ban abortions.

The bill defines life and person only insofar as they would pertain to the 14th amendment's protections of human life. A State could, as we understand this matter, refuse to pass legislation to implement this particular statute. Or they could, indeed, pass legislation. It would be up to the assembly of the individual State to do so.

We believe there is a likelihood, candidly, that the States would take advantage of this and would pass some kinds of legislation. We believe that is justification enough to urge this committee to take action on this statute.

In the past Congress has placed restrictions on the use of tax dollars for abortion as an interim step. We think this would be

another interim step which the Congress has the authority to pass if it has the disposition to do so.

We suggest four relatively minor changes in the bill. One is we think it should be renamed. The bill for which the caucus went on record, H.R. 3225, is called the Right to Life Act of 1981 to distinguish it from the human life amendment. There might be some confusion if the title is "The Human Life Statute."

The caucus draft contains a preamble specifically reaffirming a commitment to the human life constitutional amendment.

The caucus draft also contains, Mr. Chairman, a stronger finding of fact than existed in the bill before us, and the caucus draft, H.R. 3225, contains an expedited Supreme Court review procedure.

Mr. Chairman, I have some additional comments which you indicated would be part of the record, but I would just like to commend you and your panel for holding the hearings. This is not an easy subject matter to get into. As we have heard earlier, it is one on which quite passionate positions can be taken, but I think the level of discourse should help us to emerge from these hearings with a better view of the subject matter.

It seems to me that Mr. Dougherty and I are coming before you as legislators to fulfill our responsibilities, as we interpret them, to enforce the 14th amendment as it relates to States. We hope that your hearings will result in the enactment of a human life bill to provide that interim protection until we can provide the ultimate protection by way of a constitutional amendment.

I thank you.

Senator EAST. Thank you, Congressmen.

[The prepared statement of Representatives Mazzoli and Dougherty and legal rationale for human life bill follow:]

PREPARED STATEMENT OF REPRESENTATIVES
ROMANO L. MAZZOLI AND CHARLES F. DOUGHERTY

Mr. Chairman and Distinguished Subcommittee Members,

Thank you for extending us the opportunity to appear before you today on behalf of the Congressional Pro-Life Caucus which we are pleased to co-chair, along with Senators Tom Eagleton and Jesse Helms.

By way of introduction, the Pro-Life Caucus is a bi-partisan, bi-cameral organization, which was formed this Congress to bring about the coordination and control which we believe are essential in realizing legitimate Pro-Life legislative goals.

We are an informal, Member-controlled, "support" group.

On April 9, the Caucus voted to endorse the language of H. R. 3225, the Right to Life Act of 1981. However, we also voted, unanimously, to reaffirm our commitment to the passage of a Human Life Constitutional Amendment.

In essence, the Caucus supports enactment of the Right to Life Act as an interim step until a Human Life Amendment is adopted.

H. R. 3225 differs from H. R. 900/S. 158 in four ways:

-- the title of the bill has changed to the Right to Life Act to avoid confusion;
-- the bill contains a preamble reaffirming our commitment to passage of a Human Life Constitutional Amendment;
-- it contains a stronger finding of fact; and
-- the bill contains an expedited Supreme Court review provision.

Before reaching its decision to endorse the language in H. R. 3225, the Caucus met on four occasions and heard from representatives of the major Right to Life organizations. It was the information gained through those meetings which prompted the Caucus' endorsement of a revised version of H. R. 900/S. 158.

However, the spirit of the original act is still the same: to declare that the word person, as used in the 14th

Amendment, includes the unborn and, thus, that they are entitled to the same 14th Amendment protections as all other persons enjoy.

Appended to this statement is a legal analysis of a Human Life bill so today we will just summarize the legal and Constitutional aspects of this legislation.

The Human Life Bill can only be properly understood against the backdrop of the Supreme Court's decision in Roe v. Wade and subsequent decisions.

In Roe v. Wade the states were said to have no compelling interest to protect fetal life until viability, which the Court set at roughly 24-28 weeks of gestation. Even after viability, the power of the states to regulate abortion was greatly limited.

Abortions, according to the Court, must be allowed when deemed to be necessary to protect the mother's life or health. "Health" was construed by the Court as a medical judgment to "be exercised in light of all factors -- physical, emotional, psychological, familial, and the women's age -- relevant to the well-being of the patient." (Doe v. Bolton).

Moreover, in subsequent decisions, the Court further limited the ability of states to protect viable fetal life by giving the one who performs the abortion the exclusive right to determine whether the child to be aborted is viable.

Thus, current abortion policy recognizes one set of interests throughout pregnancy: the interests of the mother. The Court has effectively forbidden states to consider another set of interests: those of the child.

Furthermore, this case rests on the Court's unwillingness or inability to decide the critical question of when human life begins.

It said in Roe v. Wade: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."

This decision has been criticized by figures ranging from President Reagan to former Watergate Special Prosecutor Archibald Cox.

At a news conference earlier this year, President Reagan said: "I think what is necessary in this whole problem, and has been the least talked of, is determining when and what is a human being. Once you have determined this, the Constitution already protects the right of human life."

Professor Cox has faulted the Roe v. Wade decision for not taking the humanity of the unborn into account. He wrote: "the opinion fails even to consider what I would suppose to be the most compelling interest of the state in prohibiting abortion: the interest in maintaining that respect for human life which has always been at the center of Western civilization."

In an appendix to this testimony, we have set out legal arguments in support of Congress' power under the Fourteenth Amendment to make a determination that live begins at conception.

The Human Life Bill is the means by which Congress can exercise this Fourteenth Amendment power. It represents a position somewhere between existing abortion policy -- which is virtually abortion on demand -- and that policy which would obtain should a Human Life Amendment prohibiting abortion be ratified.

At present, the right of privacy of the woman is paramount. Under a Human Life Amendment, the right to life of the unborn child would be paramount.

Under the Human Life Bill, the right of life would be restored without abrogating the right of privacy. States could once more take both sets of rights into account when formulating abortion policy.

It should be emphasized again that, as Pro-Life legislators, we do not consider the Human Life Bill a satisfactory resolution of the abortion problem. In our opinion, nothing short of a Constitutional Amendment will do.

But, we do consider the Human Life Bill to be a step in the right direction -- in the direction of securing legal

protection for all human beings, regardless of age, race, health, sex or condition of dependency.

In part because this legislative proposal is new and only now being examined closely and debated, its provisions are not fully understood.

For example, it has been suggested that this legislation would make abortion a crime and subject the victims of rape or incest to criminal penalties if they aborted their pregnancies or submitted to procedures designed to insure they would not become pregnant.

Some have gone as far as to allege that this statute would make abortion tantamount to homicide.

It needs to be noted, the Human Life Bill would not criminalize anything. It would merely give states a solid Constitutional grounds upon which to base statutes outlawing surgical abortions.

Prior to the 1973 Supreme Court decisions, all 50 states regarded abortion as a crime. Yet, not one state classified abortion as murder. Moreover, any law enacted pursuant to the Human Life Bill would be subject to judicial review.

Fears that the bill would outlaw the IUD and other birth control devices similarly do not stand up to analysis. No state anti-abortion law which was on the books prior to 1973 banned the sale, distribution or use of the IUD.

The Human Life Bill is, thus, neither a Constitutional Amendment nor a criminal statute.

It is a Congressional declaration of legal personhood for unborn children. It finds that human life begins at conception or fertilization.

The Human Life Bill raises two distinct and basic questions: Is the fetus a human life? Is this life a person entitled to be protected?

The first is a question for scientists. We submit that the second is a question properly for legislators.

This Committee has heard a number of distinguished scientists speak to the first question.

We come before you as legislators fulfilling our responsibility to enforce the 14th Amendment. We state that all human life, including the unborn, must be guaranteed 14th Amendment protections.

[From the Congressional Record, Apr. 9, 1981]

LEGAL RATIONALE, FOR HUMAN LIFE BILL

(By Hon. Charles F. Dougherty of Pennsylvania, in the House of Representatives, Friday, Apr. 10, 1981)

Mr. DOUGHERTY. Mr. Speaker, this week the Congressional Prolife Caucus voted to endorse a revised version of H.R. 900, the human life statute, which is being reintroduced today by Congressman Ron Mazzoli, Congressman Henry Hyde, myself, and a number of our distinguished colleagues in the House.

Aware of the intense interest in this legislative initiative, we are submitting for the Record a legal analysis of the bill which will provide needed clarification.

We would also invite our colleagues to join us in cosponsoring this interim step to protect the lives of the unborn until such time as we can secure the enactment of a human life amendment to the Constitution.

The analysis follows:

"LEGAL RATIONALE FOR HUMAN LIFE BILL"

"Congress's authority under the Constitution to enact a Human Life Bill depends on two questions. First, does Congress have power to investigate and determine when human life begins? Second, if Congress determines that human life exists from conception, may Congress enforce the Fourteenth Amendment in accordance with this determination, by declaring that unborn children are persons for purposes of enforcing the obligation of States under the Fourteenth Amendment not to deprive persons of life without due process of law?

"The Fourteenth Amendment already protects human life from the action of States, by providing, 'nor shall any State deprive any person of life, liberty or property without due process of law.' Today unborn children enjoy no protection under this provision, because no branch of the Federal Government has determined whether they are living human beings. So long as their status as human beings remains unresolved, the Supreme Court will not protect them as persons.

"The Supreme Court has refused to determine whether unborn children are human life, on grounds that the issue is 'sensitive and difficult,' that there is a 'wide divergence of thinking' on it, and that the judiciary 'is not in a position to speculate as to the answer.' *Roe* v. *Wade*, 410 U.S. 113, 159-60 (1973).

"It makes no sense for our nation to continue with its present policy toward abortion without seeking an answer to the fundamental question of when human life begins. For difficult questions such as this, for which the courts do not consider themselves competent to provide an answer, it often falls to the Congress to make a political decision for the country. The courts have traditionally deferred to Congress's power to decide questions of policy which are 'delicate' and 'complex,' which are 'of a kind for which the judiciary has neither aptitude, facilities nor responsibility,' which are 'confided by the Constitution to the political departments of government, the Executive and Legislative.' *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948). *See Baker* v. *Carr*, 369 U.S. 186, 217 (1962); *Coleman* v. *Miller*, 307 U.S. 433, 454-55 (1939).

"Congress has power under the Constitution to investigate and determine when human life begins, just as it has power to decide countless other policy questions involving tough decisions on unclear facts and conflicting values. Life-and-death decisions of the most difficult nature come before Congress frequently—decisions whether to legalize particular drugs that may save some lives but endanger others; whether to require automobile safety devices that may save the lives of some but at great expense and inconvenience to others; whether, in extreme circumstances of international conflict, to declare war. The list could go on without end. No court is qualified to make such decisions. That task falls to Congress. And that is precisely the case in determining when human life begins.

"Congress's power to resolve difficult policy questions is especially clear when those questions are related to the enforcement of rights guaranteed by the Fourteenth Amendment. Section 5 of the Fourteeneth Amendment provides. 'The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.' When the courts are not capable of resolving a difficult question which is fundamental to the application of a provision of the Amendment, that provision can be effectively enforced only if Congress addresses the question.

"Although Supreme Court Justices have differed over the proper scope of Congress's enforcement power, it is clear that Congress may make findings of fact that are relevant to the application of the Amendment's terms to concrete situations. Justice Harlan, who took perhaps the narrowest view of any modern Justice toward Congress's power to interpret the Fourteenth Amendment, acknowledged a legitimate role for Congress in enforcing the terms of the Amendment:

" 'To the extent legislative facts are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are, of course, entitled to due respect.' *Katzenbach* v. *Morgan*, 384 U.S. 641, 668 (1966) (Harlan, J., dissenting).

"The majority opinion in *Katzenbach* v. *Morgan* gives Congress even broader power to define the meaning of Fourteenth Amendment terms. The Supreme Court majority in that case gave an affirmative answer to the following question:

" 'Without regard to whether the judiciary would find that the equal protection clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the State law by legislation under § 5 of the Fourteenth Amendment?' 382 U.S. at 649.

"By either view of Congress power, Congress can appropriately investigate the legislative facts available from scientific evidence on the beginnings of human life. Based on this evidence, in light of Congress beliefs as the value of human life in all forms and external manifestations, Congress can declare its finding of when human life begins and from what point human beings should be protected under the law.

"Congress may declare human life to be protected from a specified point even if some uncertainty exists. President Reagan, in his press conference of March 6, 1981, expressed the crucial insight that if we are uncertain whether something is a living human being, we must give the benefit of the doubt to life;

" 'Until we determine and make to the best of our ability, a determination of when life begins . . . I think that everything in our society calls for opting that [unborn children] might be alive.'

"Supreme Court precedents support this common sense view. Congress can use its power to enforce the Fourteenth Amendment whenever it perceives a likelihood, a danger, or a risk, that Fourteenth Amendment rights might be violated. *City of Rome* v. *United States*, 100 S.Ct. 1548, 1562 (1980); *South Carolina* v. *Katzenbach*, 393 U.S. 301, 326 (1966).

"If Congress determines unborn children to be living human beings, it follows from the intent of the framers of the Fourteenth Amendment, that Congress has constitutional power to declare unborn children to be persons for purposes of securing and enforcing their rights under the Fourteenth Amendment. The author and primary sponsor of Section 1 of the Fourteenth Amendment, Congressman John A. Bingham of Ohio, spoke of the right to equal protection and the right to life, liberty, and property for 'every human being.' Congressional Globe, 39th Cong., 1st Sess. 1089 (1866). Senator Jacob M. Howard of Michigan, who sponsored the Amendment on the floor of the Senate, spoke of its provisions as protecting the rights of 'common humanity.' Congressional Globe, 39th Cong., 1st Sess. 2766 (1866).

These statements reflect the intent of the framers to overcome a Supreme Court decision that had created a distinction between human beings and persons entitled to protection under the Constitution. That decision was *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857). The framers of the Fourteenth Amendment made it clear that no distinction is to be drawn between "person" and "human being." Since the ratification of the Fourteenth Amendment, the term "person" has been expanded to include more than just human beings. See e.g., *Gulf, C. & S.F. Ry.* v. *Ellis*, 165 U.S. 150, 154 (1897) (holding that corporations are persons for purposes of the Fourteenth Amendment). But that term has never been restricted by the Supreme Court to include less than every living human being.

The Supreme Court in *Roe* v. *Wade*, of course, found that "person" did not include fetuses which the Court did not know, and could not determine, to be human life. 410 U.S. at 157–60. The Court did not, however, find any indication that the Fourteenth Amendment was intended to exclude the unborn. The Court did not say whether a determination that life exists from conception would have led it to conclude that unborn children are persons. But it is obvious that such a determination should lead the Court to precisely that conclusion. The intent of the framers of

the Fourteenth Amendment is compelling justification in itself for Congress to enforce the Amendment by declaring every human being to be a person within the scope of the Amendment's protection of life.

This justification is further confirmed by the values that formed the basis of our country at its beginning, and that guided the leaders who overcame the *Dred Scott* decision to establish equal rights under the law for all human beings. The Declaration of Independence holds it to be a self-evident truth that "all men are created equal" and that all "are endowed by their Creator with certain inalienable rights," including the right to life. If all human beings are created equal, there can be no doubt that constitutional protections of the right to life must apply equally from the point when they are created.

Opponents of slavery, during and after the War Between the States, emphasize the importance of protecting all human beings under the law, Senator Charles Sumner of Massachusetts said: "In the eye of the Constitution every human being within this sphere * * * is a person." Congressional Globe, 37th Cong., 2d Sess. 1449 (March 31, 1862). Congressman Bingham equated "person" with "human being" for purposes of protecting civil rights. Congressional Globe, 37th Cong., 2d Sess. 1638-40 (April 11, 1862). And again, Congressman Bingham recognized "[t]he great truth that all men are created equal * * *" Id. at 1640-41. This fundamental principle, repeated time and again at crucial points in our nation's history, points to only one conclusion: that all human beings are equally entitled to protection of their right to life, under the Fourteenth Amendment, from the time they come into being. Under the compelling force of this principle, if Congress finds unborn children to be living human beings, it follows that Congress can delare them to be persons for purposes of enforcing their rights under the Fourteenth amendment.

The only way to avoid this conclusion is to say that some human beings are not equally worthy of legal protection of their lives. But if we begin to divorce the meaning of person from the definition of human life, we will have to decide which human beings are persons. Any attempt to define what is a "meaningful" life, to decide which human beings are wanted or unwanted, to differentiate between a baby in the womb and one already born, will lead to purely arbitrary decisions and also to grave danger for the weakest and most easily negelected members of the human race. Any such attempt to play God by judging the value of innocent human lives is contrary to our fundamental beliefs as a nation and would have to be rejected by this Congress.

It is unreasonable to assume that the Supreme Court's definition of "person" in *Roe* v. *Wade* is so inflexible that it cannot change in response to a legislative determination that unborn children are human beings. Cf. N.Y. Times, March 21, 1981, p. 22 (Editorial). Such an assumption depends on the unacceptable notion that some human beings can be held to be non-persons under the law. The Supreme Court has never stated that it simply does not care whether unborn children are human beings. Congress should not presume that the Court would refuse to protect all human beings as persons, including those not yet born, if the Court were presented with a congressional determination that life begins at conception.

Because there can be no valid distinction between "person" and "human being," the judicial determination of personhood rests inescapably on the legislative fact question of what is human life. Congress's power to determine when human life begins is at the same time a power to inform the judiciary whether unborn children are persons.[1]

There may be legitimate differences of opinion whether the Human Life Bill will be binding on the Supreme Court, as suggested by the majority opinion in *Katzenbach* v. *Morgan*, or will only serve to inform the judiciary of a legislative determination which is entitled to due deference but not binding force, under Justice Harlan's dissenting view in *Morgan* quoted above. Even under Justice Harlan's relatively narrow view of congressional enforcement power, Congress at the very least has authority to make a determination of when life begins, to define "person" accordingly, and to leave it to the Supreme Court to make a judicial determination informed by the legislative facts.

There could hardly be a more appropriate instance than the Human Life Bill for Congress to exercise its power to enforce the Fourteenth Amendment. The question

---

[1] A misleading statement concerning the *Roe* v. *Wade* opinion has appeared in Tribe & Ely, "Let There Be Life." N.Y. Times, March 17, 1981, p. A17. Professors Tribe and Ely say that "the Government," according to *Roe* v. *Wade*, may not override the rights of a pregnant woman by adopting one theory life. In fact *Roe* v. *Wade* said only that the State of Texas may not define life. 410 U.S. at 162. No one disagrees, that *States* lack power to expand the scope of the Fourteenth Amendment right to life. but Congress stands in a different position from the States since Congress has expressed power to enforce the Fourteenth Amendment and the right to life contained therein.

of the beginning of life is one which Congress is competent to decide and the courts admittedly are not. The legislative facts on the beginning of life are directly relevant to the judicial determination of personhood. In light of the relative competence of Congress and the courts to determine when life begins, the degree of deference properly due to Congress's determination should be great indeed. Far from setting a broad precedent, the Human Life Bill would assert the power of Congress only to influence those few judicial determinations that turn fundamentally on questions of legislative fact which the courts are unable to decide.

No Supreme Court opinion, either majority or dissent, has ever denied that Congress may use its enforcement power under the Fourteenth Amendment to determine legislative facts and influence judicial determinations when the factual matter is so closely related to the judicial determination as human life is to personhood. While Congress may well lack power to restrict constitutional rights by defining some human beings as non-persons, it certainly has power to expand rights by declaring that all human being are persons.

Congress's declaration that unborn children are human beings and persons will present the Supreme Court with an entirely different question than it faced in defining "person" in *Roe* v. *Wade*. When the Court gives due reference to Congress's determination, it should arrive at a different answer to that question from its answer in *Roe* v. *Wade*.

Senator EAST. Senator Hatch, we certainly welcome you. Senator Baucus and I forwent any opening statement in that we had been here previously. Four panelists have so far spoken. We were then going to begin the discussion.

We certainly welcome you here. If you would like to make a statement, we would be delighted to have you do so. Do not feel precluded from doing so simply because we did not. We were addressing the importance of time with these good gentlemen. I know they are under tight time constraints also.

Senator HATCH. I agree, Mr. Chairman.

Senator EAST. Senator Baucus and I had thought we would rotate on a 10-minute basis. Without objection, it will be so ordered.

I will then proceed.

First, again I thank you for coming. I appreciate the spirit in which you come in terms of contributing to the dialog on an incredibly sensitive and difficult issue in which emotions run high.

As I have learned in the short time I have been here, the U.S. Senate and high school are the only two institutions that run on a bell system. I am going to propose that we Senators shall remove ourselves, go vote, and then we shall return.

Senator PACKWOOD. I wonder if you might check if there are any other votes back to back before we vote.

Senator MOYNIHAN. We are going to go over and vote for more nuclear weapons and nerve gas systems. We do not want to miss that.

Senator EAST. We better not bring that up here. We have enough to say grace over right now.

Pending a phone call over there, let me proceed.

First, Senator Packwood, if I might address a comment or two to you. I do not wish to be personal, but I am somewhat resistant to the implications of your remarks that those supporting this measure, including the chairman, approach this in a Cotton Mather mentality, being well aware of the implications of what Cotton Mather has come to represent to at least some Americans.

I do not approach it in that spirit. Again, I am somewhat resistant to the implication that I do.

Speaking of imposing values—and you admit it is an issue over which there is not consensus and on which there is great diversity

of opinion—on the issue of the matter of imposing value which troubles you, I would contend that *Roe* v. *Wade* is an imposition of a universal national standard that does not allow for the deliberative process to arrive at it, and the building of consensus.

Indeed, since you raised the point on the bill itself, it would return the abortion question to the State level and allow for a great diversity of approach to the issue. Hence, if Cotton Matherism is the standard, I would consider *Roe* v. *Wade* a greater offender than S. 158.

Perhaps it does not frame the issue well to put it in terms of the Cotton Mather standard. However, you raised it. I can simply reassure you, in case you were troubled on that matter, it is not in that spirit that I or others are approaching this issue. I would first like to clarify that point.

Second, concerning a phrase you hear a great deal in discussing this bill, I would like to clarify that it does not decree that abortion is murder. I consider that rhetorical overkill.

This bill, as I understand it and as I understand the experts who are behind it, would return the matter to the States. Prior to *Roe* v. *Wade,* the States never made abortion murder. They never charged a woman with murder. They never charged an abortionist with murder.

The bill itself does not make abortion murder. I think that ought to be clarified. Now what the States might conceivably do, granted, I cannot guarantee. But on the basis of history, one could not argue that there would be a pell-mell rush to make the women who might have an abortion a murderess, or the person perpetrating the abortion, the physician involved, the abortionist, a murderer.

I will put it another way. I might relate it to the effort to restore a little more balance in the American federal system. I have greater confidence in State and local government than you do.

In any case, in my judgment, you inflame and obscure the point. No one is talking about murder here. If we were, I would say it is a terrible thing and we ought to reconsider what we are doing.

I did not want to clarify both of those points because I do not think it sets the stage for an intelligent dialog or genuine deliberation.

My whole quarrel with *Roe* v. *Wade* is we never ever had a public debate on this issue. We were not ever able to do this. The Court precipitated the crisis when they destroyed all State legislation in this area and threw this thing into the public arena.

Let us admit it. If in *Roe* v. *Wade* they had held the other way, that the unborn were protected from the moment of conception, there would have been a political movement in this country to change that result, just as there was with *Dred Scott.*

All we are seeing now is an effort to get this issue discussed in the public arena. I do not agree that we are Cotton Mathers. I do not agree that we are trying to impose some irrational Ayatollah Khomeini standard upon this country. We are not talking about murder.

As one person involved, since the remarks were directed at me, I am going to be very adamant not to engage in rhetorical overkill with people on the opposite side of this issue. Hence, I am going to respond accordingly to your remarks.

We will let you respond to that, but I would propose we go vote. We are standing in recess.

[The subcommittee stood in recess. During the recess, Senator Moynihan called a hearing to order, which follows:]

Senator MOYNIHAN. I see that Senator Packwood is here. I wonder if this would be a good opportunity for a dialog between our distinguished guests from the other side and Senator Packwood.

There are no other members of the committee. I am not a member and I do not assume any such capacity, but I think you might want to speak to one another for a moment.

Senator PACKWOOD. I would like to make a very quick statement because I am going to leave. It is ironic, but I am going to the floor to manage our half of the debate on the Hyde amendment, which starts at 2:30 and takes me from this.

I would respond for the record only to two questions that the chairman put. One was that *Roe* v. *Wade* destroyed diversity between the States, which, indeed, it did. It said that a woman has a constitutional right to have an abortion. If the States try to abridge that right, that shall no longer be allowed by the States. It did give us a national uniformity on a constitutional right.

The same might be said for *Brown* v. *Board of Education*. We used to allow States to discriminate on the basis of race in education. If we wanted to continue to allow diversity in the States, I suppose you could say we should repeal *Brown* v. *Board of Education* so that we could have the diversity.

There are certain fundamental rights that are held by individuals as citizens of the United States and States cannot abridge them. The right of a woman to have an abortion is one.

Second, as to whether or not prior to *Roe* v. *Wade* states called abortion murder, by and large they did not because a fetus was not a person in the sense that this bill now grants personhood. As you could not murder a nonperson, abortion was a crime, but it was not murder. It was not homicide.

This bill would say that a fetus is a person from the moment of conception, and if it is a person, then States would be free to declare the act of abortion murder if they chose. They could not and did not before because the fetus was not a person.

With that for the record, I must go.

Senator MOYNIHAN. I wonder if Congressman Dougherty would not want to comment or to respond.

Mr. DOUGHERTY. Yes, and I would also like to say, Senator, that Congressman Mazzoli had to leave, too, to get back to Kentucky.

I am not an attorney. I happen to be a school teacher.

Senator MOYNIHAN. May I just say that not being an attorney has never restrained anybody in the U.S. Congress.

Mr. DOUGHERTY. Let me just say I will not make any comments about attorneys.

I would like to say though that in *Roe* v. *Wade*, as I understand it, the Supreme Court very clearly said that they could not define whether an unborn child was a human being or not.

I think the guts of this discussion today is that the Court said we do not know whether an unborn child is a human being. We cannot define it because it is a difficult, sensitive issue to define.

What we are saying in the Human Life Bill is, OK, you did not decide. We think we have a responsibility to decide. In passing the Human Life Bill, we are saying that the unborn child is a person, a human being, and as such, it is entitled to the due process law of protection of the 14th amendment.

We can argue case history or we can get the lawyers to argue case history back and forth, but I think the key point here when we take away all the smoke that is raised is that very fundamental question: Is an unborn child a human being? If the unborn child is a human being, then, in my opinion, it is entitled to equal protection of the law. That is what we see as our responsibility under the 14th amendment.

Senator MOYNIHAN. I wonder if Congresswoman Fenwick would not want to speak to her colleague's point of view?

Ms. FENWICK. Yes, indeed, I would.

The Supreme Court said: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary at this point in the development of man's knowledge is not in a position to speculate as to the answer."

By adopting one theory of life the States could not override, the Supreme Court went on to say, the rights of a pregnant woman.

In other words, noting the division of opinion among those best qualified to judge such a solemn and important question, and I would put first the religious and moral

guides that a human being may have here on this earth, and the scientific, medical, and legal opinion all divided, the Supreme Court of the United States was not arrogant enough to decide that where these three branches best versed in those principles which ought to guide our conduct—they were not so arrogant as to say they could decide.

Neither, Senator, should we so be.

Mr. DOUGHERTY. I would just say that I cannot agree with that. Simply because the Supreme Court refuses to take a position or make a definition, to say that their failure or their refusal to define something precludes the right and the responsibility of the Congress to define something just does not follow. It does not make sense.

Senator MOYNIHAN. Would you admit, and I think you would because you obviously are an open person in these matters——

Mr. DOUGHERTY. That is a setup, Senator.

Senator MOYNIHAN. The way you and Congressman Mazzoli spoke was respectful of those who disagree with you in a way which is not always the case on either side of this argument. I, for one, would like to tell you how much I appreciate it.

Would you grant that there is at least the possibility that a prior issue in this matter is the one of constitutional procedure?

For example, I could give you a specific. I have spent a fair amount of time reading the annals of Congress, which is our only record for the first Congress, but that is when we adopted the Bill of Rights. In trying to find out what they had on their mind, you have to go back and that is about as much as you have. These are notes taken by a private stenographer and later published.

The day after the first amendment guaranteeing freedom of religion was adopted, in both the House and Senate, a petition was made to the President, President Washington, to have a proclamation of a national thanksgiving.

You could not read this proclamation—which I would like to put in the record if we are in formal session, and if not, I will do so later—about the Lord and also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of nations and beseech him to pardon our national and other transgressions—this is profoundly a Christian statement. It was written by a Christian minister, I do not doubt, It is suffused with Christian ideals.

It would be historically defensible, if not accurate--I mean you could make the case without being absurd—to pass a law around here one day that says when the first amendment says you are guaranteed freedom of religion, that means the Christian religion because that is what they had in mind.

A lot of people would say wait. I thought the Supreme Court would decide what religion is. The Navaho would take very strong exception to that.

However, we could that, could we not, sir?

Mr. DOUGHERTY. I would disagree with you, Senator, most respectfully. You would know better than I because you have done all the constitutional readings, but I would say to you, first, I do not think the Supreme Court has said——

Senator MOYNIHAN. No, I have not done all of them.

Mr. DOUGHERTY. I do not think the Supreme court has said that we do not know how to define freedom of religion. I think the words that were expressed in *Roe* v. *Wade* may be clear in this instance that they would not define human life.

I think the second point to make is that one of the changes being recommended by the Pro-Life Caucus is for the immediate review, if challenged, by the Supreme Court of the United States.

In other words, in the amended version which we have drafted and authored in the House, H.R. 3225, we provide that notwithstanding any other provision of law, no inferior Federal court, and so on, can deal with this subject, provided, however, that nothing in this section shall deprive the Supreme Court of the United States of authority to render appropriate relief in any case.

Then the next section, section five, says: "Any party may appeal to the Supreme Court for an interlocutory or final judgment, decree, or order of any court of the United States," and so on. "The Supreme Court shall advance on its docket and expedite the disposition of such an appeal."

In effect, Senator, what we are saying is rather than get hung up on your view of what is constitutional and my view of what is constitutional, we have tried to address it in a responsible manner.

In effect, we have said that the immediate review of the bill would be done by the Supreme Court of the United States and that they would expedite disposition.

Senator MOYNIHAN. I acknowledge that provision and I acknowledge your openness on it. I think we have a difference of view, but it is not perhaps an irresolvable one.

Would you forgive me? I have to go and vote, too. Would one of you assume the Chair?

Mr. DOUGHERTY. Senator, that would be a real privilege, but I do not think it would be appropriate.

Senator MOYNIHAN. Then just turn around to the other side of the table and carry on the seminar.

Mr. DOUGHERTY. I do want to say, Senator Moynihan, if I may, that you and I will be on the same side of the tuition tax credit bill.

Senator EAST. If I could have your attention, we shall reconvene. Having had three votes in the interim, we are hoping that we will not have any at least for an hour. We will proceed to the matters at hand.

I had recessed the subcommittee at the time we departed. I understand that a colleague intervened in that period of time, which is all right although it is out of the ordinary. However, that distinguished colleague is out of the ordinary.

Since we must keep official records, I would like the record to show that what transpired in that interim while we were recessed is simply gratuitous and not a part of the official record.

Our apologies to you. I must apologize to the audience for the Senate's keeping you waiting. We appreciate your patience.

I am delighted to have my colleague, Senator Baucus, back.

Congresswoman Fenwick, Congressman Dougherty, my apologies for having to keep you waiting.

Congresswoman Fenwick, I thought it might be appropriate to let you go ahead and make your statement. Then we can get back to the questions.

## STATEMENT OF HON. MILLICENT FENWICK, A U.S. REPRESENTATIVE FROM THE STATE OF NEW JERSEY

Mrs. FENWICK. Thank you, Mr. Chairman.

I have a prepared statement, but perhaps in the interests of time, I had better just leave it because I, too, have a 3 o'clock appointment in the House.

Senator EAST. As the others have been doing, if you could simply paraphrase your remarks, that would be helpful and the full statement will be made a part of the record following your oral presentation.

Mrs. FENWICK. I would like to state at the outset, Mr. Chairman, if I may, that I think we are dealing here with a tragic and very important subject.

One of the things that most disturbs me is the use of the word inconvenience. It seems to pop up so often in discussions of this kind. I do not think anything can be called an inconvenience that causes human beings, women, to tear themselves apart and risk their lives. You do not do that for an inconvenience. It has saddened me in the House to hear people sometimes refer to the desire to terminate a pregnancy as a desire to get rid of a little inconvenience.

When I was in Chile, according to the head of medical service, 35 percent of the beds in the hospital were occupied by women dying or recovering from hemorrhage or infection of self-induced abortions because they were too poor and had no money to go to those who would perform them for money.

In other words, I think we are dealing with something which ought to be one of the great joys and mysteries and miracles of life transformed into a tragedy for too many people, a tragedy that

turns them desperate to do things that no human being in their right mind would do. We see it over and over again.

However, Mr. Chairman, I would like also to say that for those who object on principle, I have the highest respect. I am a public servant. People who belong to the Right to Life movement come down here in January, hiring buses that they can ill afford to pay for, and getting up at 4 o'clock in the morning, to speak about a principle that is important to them. As a public servant, I have a duty to listen and I do. I have been listening for many years because we faced this in our State.

It is not an easy decision, I think, for anyone to arrive at. Just as the Supreme Court was not arrogant enough to decide that it could decide, in view of the divided opinion—theological, medical, and legal—so, too, I think we just hesitate to decide such an important thing as that instant when the fertilized ovum, I think it is now called a zygote, becomes a human being, a person.

I suppose all of us are influenced by the Bible which describes almighty God taking the dust of the Earth, fashioning it into the shape of a man, and breathing into his nostrils the breath of life, upon which that clay became a living soul. So it says in the Bible.

I do believe that that is the moment when the immortal soul comes into that little form. Maybe I am wrong.

I remember every day what Lincoln said: "To do the right as God gives us to know the right." I am not arrogant enough to think that I have arrived at the ultimately correct conclusion. I just have to do my best.

All of us down here, all of us involved in this very painful and tragic situation are trying our best to do the right as God gives us to know the right. What else can we do?

I have struggled with this, I assure you. I have high regard for the Right to Life people. I welcome the fact that they are so concerned. I, frankly, cannot say the same about the Hyde amendment which is concerned with money. It does not have the same appeal to me that a question of principle has.

When they speak of taxes not being used for something of which they disapprove, I think of the Quakers for whom every bullet and every uniform is an offense and who are prepared to scrub floors rather than take part, and still pay their taxes.

We should allow freedom of choice to those people who for religious reasons will not participate in a procedure they believe to be morally wrong. So we should protect the rights of people in hospitals, the rights of nurses who refuse to take part. This is a moral question and the State must preserve their right to choose when there is this division among reputable people. That is what this country is all about, I think.

Before the Supreme Court decision, we had in my State a most tragic event. A 16-year-old girl informed her mother that she was expecting a child. The mother told her they would face it together. She took the child to a motel in Pennsylvania to one of those butchers who proliferate whenever we have illegal procedures of this kind. The child died, the girl died. The butcher was held for murder and the mother as accessory to murder.

This was published in our newspapers and all of us knew what kind of a family situation that must have created.

I do not know, Senator, and I tell you in all honesty that I am not here because I know I am right. I do not have enough arrogance to think that like King Solomon almighty God has told me so.

However, I do believe that we have the decision of the Supreme Court and we should rest there. I think it is wrong to try to change a decision of the Supreme Court taken on grounds of constitutionality and try to reverse it by law.

As those Right to Life people have shown us, we should try to stick to a principle which is if a Supreme Court decision has been taken on the grounds of a constitutional right, it must be reversed by a constitutional amendment. I think that, too, is valid.

There is more, but I can see that you are anxious to speak and I know that both of us are under time constraints.

Thank you very much, Mr. Chairman.

Senator EAST. Thank you, Congresswoman.

[The prepared statement of Congresswoman Fenwick follows:]

## Prepared Statement of Representative Millicent Fenwick

Mr. Chairman and Members of the Subcommittee, I thank you for this opportunity to testify about S. 158 and the House companion bill, H.R. 900.

Few questions, in all my life in government, have been as important as the question of legalized abortion. Although I sincerely respect those who feel that abortion is morally wrong, I cannot agree with them. When legal, medical, and religious opinion is so deeply divided on both sides, I do not think it is proper for the government to either force or prohibit abortions. For this reason, I support the 1973 Supreme Court decision.

Of the many votes I have cast in the House of Representatives on the issue of abortion, all have centered on the question of Federal funding for abortion. And the question is whether or not a medical procedure that is legal, safe, and available to those who can afford it, shall be available to the poor. Today discussion centers around a different proposal, one that has more far-reaching ramifications.

The purpose of S. 158 and H.R. 900 is "To provide that human life shall be deemed to exist from conception." On the "strong likelihood that human life exists from conception," the legislation seeks to extend the provision of the Fourteenth Amendment to the fetus at the moment of conception. The effect of this will give the States the power to regulate, limit, or prohibit the performance of abortions. Mr. Chairman, this legislative approach raises a number of questions that concern me a great deal.

The 1973 Supreme Court decision of Roe v. Wade ruled that a woman's right to privacy under the Fourteenth Amendment includes the right to terminate a pregnancy. The Court recognized the durational nature of the pregnancy, and established certain limiting conditions. In the first trimester, the rights of the mother are preeminent; the decision to terminate a pregnancy is strictly between the mother and her doctor. Subsequently, the State's "compelling interest" in protecting the mother's health allows the State to regulate the abortion procedure in considering such matters as where abortions may be performed. Only during the third trimester

does the State's interest in protecting the potential life of the fetus allow abortions to be prohibited, except when the life of the mother is in danger. At no time does the right of the fetus' potential life outweigh that of the pregnant woman's.

Section Five of the Fourteenth Amendment provides Congress with the power to enforce the rights insured in the previous sections of the same amendment. It does not, however, allow Congress the right to pass laws which reverse a Supreme Court decision. By permitting the States to prohibit abortions, this legislative proposal can deny the rights of the pregnant woman as decided in Roe v. Wade. S. 158 and H.R. 900 would require a simple majority in the House and Senate, but a Supreme Court decision interpreting the Constitution may only be overturned by a constitutional amendment requiring passage by two-thirds of the Congress and three-fourths of the States.

It is very important to understand the remarks of the Supreme Court in its 1973 decision on the issue of the beginning of life. "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any concensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." Furthermore, the Court stated that "by adopting one theory of life the States could not override the rights of the pregnant woman." Finally, the Court did not suggest that any other branch of government should decide when a fetus becomes a person. Quite the contrary, the Roe opinion declared that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."

I am also concerned about the potential of this proposed legislation to go further than outlawing abortion. If abortion is illegal, it is likely to assume that criminal penalties would follow. What crime would be charged? Homicide? Manslaughter? Murder? In addition, the use of those birth control devices such as the IUD which interfere with the implantation of the fertilized egg -- now declared a person -- may also be found illegal. Or, taken one step further, what about medical procedures which may

cause spontaneous abortion, such as amniocentesis, certain medications, and radiation? What about miscarriages caused by a mother's intentional or reckless disregard for the health of the fetus? Shall we require the police to investigate these? Would any of these result in charges being brought against the mother and her doctor? The answer to all of these questions is unknown. Certainly nothing in S. 158 or H.R. 900 precludes any of these possibilities.

That the Supreme Court is the final arbiter and interpreter of the Constitution was established in 1803 in the landmark case of Marbury v. Madison. This decision was subsequently backed up by others, and is crucial to the separation of powers. Any attempt by Congress to overturn a Supreme Court ruling by any other means than a Constitutional amendment strikes at the very heart of the balance of powers within our government.

The question of when life begins has been the subject of much testimony before this Subcommittee, and lively discussion elsewhere. I think it is clear that there is no concensus either from a scientific, religious, or philosophical point of view. Although I understand several experts have testified before this Subcommittee that life begins at conception, the National Academy of Sciences passed a resolution on April 28, 1981 which stated that science could not provide the answer to the question of when life begins. According to the National Academy, "Defining the time at which the developing embryo becomes a 'person' must remain a matter of moral or religious values." It has not been scientifically decided.

On the issue of abortion, different religions and religious sects have come to different conclusions. They differ also as to the time when a potential life becomes a human being. Although some religions consider the moment of fertilization as the beginning of human life, others believe that only upon drawing breath, outside the womb, is the child actually a person. The point is, however, that there is no concensus on this question -- and I doubt if there ever will be.

In conclusion, Mr. Chairman, I feel that regardless of one's views on abortion, the legislative approach of S. 158 and H.R. 900 is most unwise. I am worried not only about the constitutional

problems which affect the separation and balance of powers, but also about the other potential problems I have mentioned in my testimony.

Again, Mr. Chairman, I thank you for the opportunity to testify, and would be happy to answer any questions you may have.

Senator EAST. It is a great honor to be with you again. Congresswoman Fenwick and I served on the Republican Platform Committee together in 1976. That was a great experience and I treasure it very much.

If it is agreeable with my distinguished colleague, I think I have maybe a few minutes remaining of my original 10 minutes during which I would like to comment on your remarks, Congresswoman Fenwick. Then I shall turn it over to my good friend, Senator Baucus.

In terms of the tone, the way you state your remarks—I greatly admired you for that kind of approach in Kansas City in 1976—I agree with you in every way in terms of the approach that we have to take on this issue.

I would be the first to say, and have said it repeatedly throughout these hearings, that no one has a monopoly on virtue and wisdom in this area.

If I might just redirect the discussion here, what has troubled me, Congresswoman, is that it is so complex, it is so difficult, and no one has a monopoly on virtue and wisdom.

The trouble has been that in *Roe* v. *Wade*, we had a decision imposed upon us in which the American people were not a part of the dialog.

One of the great messages of the Federalist Papers was that in representative government when you had major policy questions, you would try to build a consensus through the deliberative process.

As I noted earlier before we were interrupted, if *Roe* v. *Wade* had ruled the other way, that life was to be protected from the time of conception, those who wanted a more liberal policy on abortion, understandably, and I would support them, would have had every right to go out in the political process to try to change that policy by whatever legitimate methods they might find.

The approach here—and I somewhat sense that with Senator Packwood—is that those who might challenge *Roe* v. *Wade* are in some way or other less tolerant than those who defend it. I know you do not mean that.

What I am trying to do and what the Congress is being asked to do, in my judgment, is something they should have been allowed to do to begin with. If we were going to remove abortion from State control, which *Roe* v. *Wade* did, and if we were going to move it into the Federal arena, I would prefer that Congress, through this very kind of legislation, find an appropriate policy as opposed to having the Supreme Court impose it in the way they have.

The spirit here, as it is with you, is one of trying to find an appropriate way out of the result of *Roe* v. *Wade*, which, quite frankly, many people disagree with.

I might be more inclined to accept it if it had been a decision arrived at in the legislative body over a period of time through public discussion, but the deliberative process of the legislative chamber was circumvented by *Roe* v. *Wade*. Now we are being asked in this constitutional crisis that has been precipitated by the Court to try to find some way out.

Let me just add this, Congresswoman, and then I will let you make your response. I see a similarity here with the *Dred Scott* case. In the *Dred Scott* case, the Supreme Court held that the slave, the black, was not a citizen. Now, probably many people in that day and age would have said that is it. They have decided the issue. There is no change that can be made.

Here the Supreme Court has held that the unborn is not a person. There is a similarity there. All we are trying to do is explore the alternatives we have.

As to why one might prefer legislation to the constitutional amendment, I would perhaps fall back on this argument among some others. In my judgment, when trying to find a solution to a problem of this kind, it is better to take the most modest approach. If it could be a regulatory change, one would do that. If it could be accomplished through statutory change, we would do it that way.

To repair to constitutional amendments is really the last resort. To me, this is a very modest, fair, reasonable approach. It is just exploring the possibility of doing this by legislative action. We will get into the details of it later, but *Roe* v. *Wade*, as we see it, invites us as the legislative body to come in and to try to assist in finding some kind of prudent and reasonable policy judgment here.

Mrs. FENWICK. Senator, that terrible decision about slaves not being people was reversed with a civil war and a constitutional amendment. That was how that terrible decision was reversed.

We did not go to a referendum on that amendment. Nor did we go to a referendum on *Brown* v. *Oklahoma*. The Supreme Court decides on the Constitution as it is written. It does not always require a civil war and a terrible, bloody confrontation. If you want to reverse it, you have a peaceful way. The peaceful, just, and constitutional way is by amendment, it seems to me.

Senator EAST. We will be getting into that. However, I would say, Congresswoman, that the constitutional lawyers will acknowledge that if a problem can be resolved through a statute, if that is appropriate under the circumstances of a case, it is preferable to take that course of action as opposed to resorting to the more extreme remedy of a constitutional amendment.

On a hierarchy of approaches, to use a statute to solve a problem that can be solved by a statute as opposed to going to a constitutional amendment is an eminently responsible and reasonable approach to take.

Again, we can get into why we feel through *Roe* v. *Wade* there is that option. Some may disagree. The Supreme Court may ultimately disagree. However, all we are trying to do is explore this option because we think it is a reasonable one.

So, we all come back to the very excellent point that you make so eloquently; namely, that we are groping to try to find some sort of reasonable policy solution to this very difficult and complex issue over which there is enormous division of opinion.

However, I am personally resistant to the notion that only the Supreme Court and only *Roe* v. *Wade* is the definitive answer to it. We are beginning the process of exploration, as Congressman Dougherty and Mazzoli have suggested. They look upon this as an interim step. That is their view. They look upon it as later coming to a constitutional amendment. Everybody in this room would have a very different approach to it.

The healthy thing about it is we are now discussing it for the first time since 1973 in the national arena. I think that is a healthy contribution whatever comes out of all of this.

Ms. FENWICK. Senator, so few people speak of the suffering of human beings though. That is something that is left out so often in what I have read of the discussion. Nobody seems to think what happens to human beings here on Earth trying to live. The suffering is terrible.

I get letters and I am sure you do, too, from distraught people and families torn apart by this kind of thing. We are making a problem for people that will not go away. No matter what you do, it will not go away. You put it somewhere else, Senator, and people will suffer terribly in the course of it. That makes me tremble.

However, I know what you mean. If God spoke from Heaven today and said this is right, people might have to suffer because we would have heard the word. However, in the absence of that word, I hope we will stay with something that is according to the best opinion.

I must go, Senator. Thank you.

Senator EAST. Thank you. We appreciate your comments.

Senator Baucus?

Senator BAUCUS. Mr. Chairman, I think this discussion has been very illuminating, particularly the points raised by Congresswoman Fenwick.

Senator Packwood stated the issue fairly and accurately when he stated that this is a very difficult question and that most Americans anguish over it and wrestle with it.

Most Americans are neither extreme at one end or at the other. Those Americans who do not like the decision of *Roe* v. *Wade* are trying to find a way to remedy it.

As you pointed out, Mr. Chairman, if the *Roe* v. *Wade* decision had been decided the other way, no doubt those who tend to be more prochoice in their attitudes would certainly have tried to find some way to change the decision as well.

The difficulty though is we do have three separate, distinct branches of Government. I think Senator Moynihan very eloquently stated the principles of *Marbury* v. *Madison.* When the Supreme Court interprets a provision of the Constitution, generally that is the last word unless that decision is overturned by a constitutional amendment.

Obviously, those who are inclined to overturn that decision quickly are trying to find another way. I am sure that is why Senator Helms and you, Mr. Chairman, are interested in this bill. The constitutional amendment process seems to take a long time.

Nevertheless, the more the Congress utilizes the statutory process to overturn Supreme Court decisions, the less there is a mean-

ingful distinction between the Supreme Court and the Congress. Those two branches of the Government begin to merge.

I think the principle of *Marbury* v. *Madison* is a sound principle and this bill would significantly undermine that principle.

It is my personal view that if this bill were to be enacted and challenged in the Supreme Court, the Supreme Court would rule that it was unconstitutional.

But the question of when life begins and the degree to which States or Congress should be permitted to act in this area are very difficult questions.

There is one point that I would like to clear up. As I understand the intent of this bill is to put the state of the law back to what it was prior to *Roe* v. *Wade*.

However, this statute would have the effect of prohibiting States from taking any State action which would interfere with the development of the fertilized egg.

The crucial point, in my judgment, is the bill would have the effect, contrary to the state of the law prior to *Roe* v. *Wade*, of prohibiting States from taking any action which would have the effect of allowing abortions or sanctioning abortions. It would prevent States from funding any facility that distributed IUD's. That is different than the state of the law prior to *Roe* v. *Wade*.

Congressman, let me ask you one question. You state that this bill is an interim step prior to the enactment of a constitutional amendment.

I am curious. In your view, if this bill were to become law, why do you think a constitutional amendment is necessary?

Mr. DOUGHERTY. I would suggest, Senator, that it would depend upon what happens after the bill is enacted. One of the provisions we are recommending in the House version is an immediate review by the Supreme Court, and the Supreme Court alone, on the question of constitutionality.

It would seem to me that this would be an opportunity, if the Supreme Court were to in some way modify *Roe* v. *Wade*, or in some way to hold this——

Senator BAUCUS. You are just nervous about the question of whether this bill is constitutional?

Mr. DOUGHERTY. No, no. What I am saying to you is that we see this as basically a States rights approach for allowing State legislatures to do some things. The human life amendment would address the entire country. The passage of this bill is an interim step, but it is not the final point for us. We would still push for a human life amendment after the enactment of this bill.

Senator BAUCUS. That is, under the human life amendment, States would not only be prohibited from taking any State action with respect to abortion, but they would also be prohibited from allowing any private action with respect to abortion.

Mr. DOUGHERTY. That is correct.

Senator BAUCUS. That is a critical distinction.

Mr. DOUGHERTY. As the amendments are drafted, except where the life of the mother would be endangered.

Senator BAUCUS. Would you agree that S. 158, without any additional legislation, would prevent any State from using its funds to finance abortions?

Mr. DOUGHERTY. I would say to you that a State would be in a position to make that judgment if it so chose. Other States would not.

Senator BAUCUS. I am talking about State funds. In your judgment, if this bill were to be enacted would the bill prevent States from using State funds to finance abortions?

Mr. DOUGHERTY. No.

Senator BAUCUS. Why not?

Mr. DOUGHERTY. The way I read the bill, in effect, is that a State has an opportunity to enact whatever legislation it feels is necessary.

Senator BAUCUS. Let us be clear what we are talking about here. I am trying to make the distinction between State action and private action.

Mr. DOUGHERTY. Right.

Senator BAUCUS. I am reading from the piece from Stephen Galebach that is called "A Human Life Statute." On page 23, he states: "Thus, a statute such as the one proposed here preventing States from continuing to fund abortions * * *." Therefore, he is stating that the statute does prevent States from continuing to fund abortions. It has that effect. It prevents State action.

Mr. DOUGHERTY. Yes.

Senator BAUCUS. It does not prevent States from legislating with respect to private action.

Mr. DOUGHERTY. That is correct.

Senator BAUCUS. In answer to my question, you are stating that you agree with me.

Mr. DOUGHERTY. Yes, that is true.

Senator BAUCUS. Would you agree that that was not the state of the law prior to *Roe* v. *Wade*?

Mr. DOUGHERTY. Yes, I would agree with that.

Senator BAUCUS. That is, prior to *Roe* v. *Wade*, States were not prevented from using their funds to finance abortion?

Mr. DOUGHERTY. I would agree with you, Senator, but I do not think that is relevant. In effect, what we are saying is that we are looking at today and not what used to be.

Senator BAUCUS. I am just trying to determine what effect the statute would have if it becomes law. That is what I am trying to determine.

Would you agree that if S. 158 becomes law that States would be prohibited from funding clinics that distribute IUD's or morning-after pills?

Mr. DOUGHERTY. I think that would be defined by the State law, and that State law would be subject to challenge.

Senator BAUCUS. Probably the statute would prevent that, too, don't you think; that is, if this bill were to become law and if it would prohibit States from funding abortions, probably it would also prohibit States from funding clinics that distribute IUD's and morning-after pills. Wouldn't that also constitute State action that interfered with the development of the fertilized egg?

Mr. DOUGHERTY. You are saying probably, Senator. I would say that I think that would depend upon what the State legislature chose to do and whether or not it was challenged in the court.

Senator BAUCUS. Again I make the distinction between State action and private action.

Mr. DOUGHERTY. I realize the distinction you are making, Senator. The point I am trying to make is that State legislatures have certain prerogatives. If they chose to pass a law that did not do that, there would obviously be a court challenge to it. What I am suggesting is we can say probably they would or probably they would not. I think you are talking about the variety of actions that 50 different State legislatures would take.

I would say that the State of Pennsylvania, which I represent, would do everything it could to see that funds were cut off for abortion, all kinds of abortions, and support for abortion.

I would suggest that California's State legislature would go in exactly the other direction and do everything it could to broadly interpret the law to the benefit of providing support for abortions.

I do not think you and I are in a position to interpret what 50 State legislatures are going to do, probably or probably not.

Senator BAUCUS. That is obviously correct. Nobody can predict what the States are going to do generally, but, still, I think that constitutional scholars will all agree that with respect to State action, not private action, if this bill becomes law, it would have the effect of prohibiting States from taking any State action that interfered with the development of the fertilized egg.

Mr. DOUGHERTY. In your absence, Senator, I made it very clear that I am not an attorney, let alone a constitutional lawyer. Quite frankly, I am really not addressing the point from what used to be. I do not think that is where we are.

We are looking at where we are going from here. In this bill, we are simply saying that an unborn is a human being and entitled to equal protection under the 14th amendment, pure and simple.

Now if you want to argue that we are dramatically changing what used to be before *Roe* v. *Wade,* you can argue it. I do not think it is something of great merit.

If you can say that we are going to allow the States to do this, the States to do that, or whatever, if you want to talk about outlawing the IUD and getting into the whole battle of contraception, I consider that a diversionary tactic. I do not think it addresses the gut issue.

The gut issue is that the Supreme Court of the United States did not define when human life begins. It did not define that an unborn child is a living person.

We interpret that to mean that we as Congressmen and Senators and Members of the Legislatures have an obligation to define when life begins to the best of our ability.

Senator BAUCUS. As a matter of principle, do you think it preferable for Congress to try to overturn Supreme Court decisions by statute or preferable to try to overturn Supreme Court decisions by constitutional amendment?

Mr. DOUGHERTY. Senator, I think the question is whether or not this is an attempt to overturn the Constitution. I think if you read the amendments that we offer in Congressman Mazzoli's prepared remarks, we are providing for an immediate review by the Supreme Court on the constitutionality question. We are providing for it to be done in an expedited manner.

What I am saying to you, I guess, is, that having been in this game for about 9 years, I knew that we can all use the Constitution to argue against something we do not want to see passed.

Having addressed the concern of whether or not this is violating the constitutional process, we wrote into the new draft of the bill the immediate review by the Supreme Court of this legislation.

Let us let the Court decide, Senator, whether it is constitutional or not, and let us address the merits of the bill. That is, is an unborn child a human being and entitled to equal protection of the law? That is what we are talking about. The constitutionality question will be resolved very quickly because you and I know that if President Reagan signs this bill, it will be challenged.

Senator BAUCUS. I think that is a pretty safe statement.

Mr. DOUGHERTY. Yes, it is a safe statement. The fact is, therefore, if it is a safe statement, and we have provided for an expedited review by the Court, the argument against whether we are violating the constitutional process will be resolved very quickly.

However, let us not get off the issue. The issue is the definition of person.

Senator BAUCUS. I do think we have a legislative responsibility not to enact statutes which are blatantly unconstitutional.

Mr. DOUGHERTY. I agree with you, Senator. I guess you and I would say that we disagree on whether this is blatantly unconstitutional or not. We have had that argument over busing amendments and many other things.

I spent 6 years in the State senate. We went all through the whole thing. Every time somebody was opposed to something, they would say it was a blatant violation of the constitutional process or they would say it was unconstitutional.

I am suggesting that we have, in our mind, a very serious responsibility here. We have provided for the constitutional question by providing for immediate review. We think we have responsibly addressed the question of constitutionality.

Senator BAUCUS. Thank you.

Senator EAST. Thank you, Congressman.

Mr. DOUGHERTY. Mr. Chairman, may I make just one point? I only do this in response to some of the comments my dear friend from New Jersey made when she talked about the agony of the person involved, the woman. I would just like to go on record saying that there is an agony involved for the unborn child, too.

I want to thank you, Mr. Chairman, for your courage and diligence in having these meetings.

Senator EAST. We appreciate your helping us and making a contribution.

The hour is pressing on. I would like our next panel to assemble.

Senator BAUCUS. Mr. Chairman, when I was on the floor, Senator Packwood told me he would very much like to be here, but he is in charge of the opposition to the amendment now pending on the floor and so is unable to be here.

Senator EAST. On the next panel will be Mr. Stephen Galebach, Mr. Lawrence Tribe, Mr. John T. Noonan, and Mr. William Van Alstyne.

Senator BAUCUS. Mr. Chairman, before we begin with this next panel, I would like to put a few letters in the record.

The first is a letter from Erwin Griswold, former Solicitor General of the United States. The second letter I would like to enter in the record is from Philip Kurland, professor of law at the University of Chicago Law School and long-time consultant to the Separation of Powers Subcommittee. The third letter is from Prof. Charles Alan Wright, a professor of law at the University of Texas at Austin.

Senator EAST. They will be a part of the record.

[The letters referred to above follow:]

JONES, DAY, REAVIS & POGUE

1981 MAY -6 PM 3:03 1735 EYE STREET, N.W.
WASHINGTON, D.C. 20006

TEL.(202) 861-3939
CABLE: ATTORNEYS WASHINGTON
TELEX-DOMESTIC 892410
TELEX-INTERNATIONAL 64363
TELECOPIER-(202) 466-8642

IN CLEVELAND
1700 UNION COMMERCE BUILDING 44115
(216) 696-3939
IN COLUMBUS
50 WEST BROAD STREET, 43215
(614) 469-3939
IN LOS ANGELES
2029 CENTURY PARK EAST 90067
(213) 553-3939

May 5, 1981

Hon. Max Baucus
Senate Office Building
Washington, D.C. 20510

Dear Senator Baucus,

Your letter of April 29th reached my office on May 1st, when I was out of town. This is the first opportunity I have had to respond.

Thank you for sending me a copy of S. 158, which I have read with interest. I have not had time to make a complete survey of the materials in the field, but I do have two preliminary views.

1. Section 2 of S. 158 undertakes to restrict the jurisdiction of inferior federal courts established under Article III of the Constitution. Although it is not wholly clear, I am inclined to think that this would be held to be unconstitutional, in the light of all of the circumstances, under general principles of the separation of powers. On the whole, it could be concluded that this is not really an effort to regulate the jurisdiction of the lower courts, but is rather a congressional effort to overturn a constitutional decision of the Supreme Court of the United States, making it virtually impossible for the issue to come before the Supreme Court by stifling access to the lower courts.

The Norris-LaGuardia Act might be cited to the contrary, but I think that situation is different. Congress was there making a genuine regulation of commerce when it restricted the jurisdiction of the lower federal courts. It was not attacking any decision of the Supreme Court or undertaking to overturn Supreme Court decisions.

2. With respect to section 1 of S. 158, I find the situation somewhat more difficult. We have little guidance as to the limits of the powers of Congress under section 5 of the Fourteenth Amendment. In some respects, the power may well be quite broad. Indeed, the similar power which would be given to Congress by the corresponding provision of the Equal Rights Amendment may well be the most serious objection to the latter amendment, because it would greatly expand the powers of Congress to legislate on matters which have been heretofore regarded as appropriate for state legislation. This question with respect to the Equal Rights Amendment has been fully discussed by Dean Frank R. Strong in "Contributions of ERA to Constitutional Exegesis," 14 Ga. L. Rev. 389 (1980).

The Fourteenth Amendment does contain a due process clause, and an equal protection clause, both applicable to the states; and it does contain, in section 5, a grant of power to Congress to enforce the provisions of the Amendment. How far this extends is a very difficult question.

However, the actual fact is that the Supreme Court has decided that question, including the constitutional question under the due process and equal protection clauses, as far as abortion is concerned. For the Congress to undertake to interfere with that decision, even under section 5 of the Fourteenth Amendment, would, in my view, be an inappropriate legislative interference with the judicial power, and thus a violation of the separation of powers, which is one of the two major premises of the United States Constitution -- the other being the appropriate division of powers between the states and the federal government.

Thank you for giving me the opportunity to comment on S. 158.

Very truly yours,

Erwin N. Griswold

---

PHILIP B. KURLAND

1981 APR 21 AM 11:42

608 WEST HARPER TOWER
THE UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS 60637
(312) 753-2444

17 April 1981

Senator Max Baucus
Committee on the Judiciary
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

I can give you my opinion in short compass of the constitutionality of S. 158, the so-called "Human Life Bill." I have little doubt that it cannot have the effect of changing the constitutional construction of the Fourteenth Amendment made in Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973). Whether the scientific basis for S. 158 is stronger than the scientific basis for Roe and Doe is irrelevant. The question is not a scientific one, but a constitutional one. The question is not whether the Supreme Court decisions are sound or unsound. The question is what is the meaning of the word "person" in the Due Process Clauses of the Fifth and Fourteenth Amendments. The Supreme Court has decided that a fetus is not a "person" within the meaning of those provisions. If that constitutional determination is to be overruled, it can be done only by the Supreme Court or by constitutional amendment.

It will be recalled that the Supreme Court, obviously contrary to fact, held in Santa Clara County v. Southern Pacific

R.R., 118 U.S. 394 (1896), and Minneapolis & St. L.R. Co. v. Beckwith, 129 U.S. 26 (1896), that a corporation falls within the constitutional category of "person" in the Equal Protection and Due Process Clauses of the Fourteenth Amendment. It may well be that the Court could change its mind on this point, although it has refused to do so. See, e.g., Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949), especially Mr. Justice Jackson's opinion at 574-76. But I have no doubt that the Congress could not, because of the factual deficiencies of the Court's conclusion, strip corporations of the protections of these Clauses. The penultimate authority on the construction of the Constitution is the Supreme Court. The ultimate authority is "we, the people," through the amending process provided by Article V of the Constitution.

When the Supreme Court held the federal income tax law of 1894 unconstitutional because it was a "direct" tax that had to be apportioned, Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), 158 U.S. 601 (1895), it did so in the face of a hundred years of decision to the contrary as to the meaning of a "direct" tax, which began with the Court's decision in Hylton v. United States, 3 Dall. 171 (1796). I have little doubt that the Court in Pollock was wrong on the basis of principle as well as precedent. But it was recognized that the corrective could not come by way of Congressional legislation. It took the Sixteenth Amendment to undo what the Court had done in Pollock, although the Court itself — with reference to taxes other than the income tax — appeared to retreat to the earlier construction of "direct" taxes. See, e.g., Nicol v. Ames, 173 U.S. 509 (1899); Knowlton v. Moore, 178 U.S. 41 (1900); Patton v. Brady, 184 U.S. 608 (1902); Thomas v. United States, 192 U. S. 363 (1904); Spreckels Sugar Refining Co. v. McClain, 192 U.S. 397 (1904); Flint v. Stone Tracy Co., 220 U.S. 107 (1911); Stanton v. Baltic Mining Co., 240 U.S. 103 (1916); Billings v. United States, 232 U.S. 261 (1914). Here, too, I think that a redefinition of "person" to include a fetus will have to come, if it is to come at all, by the constitutional amendment route.

Of course, the passage of S. 158 will give the Court an opportunity to reconsider its position. But I don't think it likely that it will do so short of a command by constitutional amendment to do so.

With all good wishes,

Sincerely yours,

Philip B. Kurland

PBK/s
cc: Craig Stern, Counsel

THE UNIVERSITY OF TEXAS AT AUSTIN
SCHOOL OF LAW
2500 Red River
AUSTIN, TEXAS 78705

1981 MAY -1 AM 9:56

April 28, 1981

The Honorable Max Baucus
United States Senate
Washington, D. C. 20510

Dear Senator Baucus:

This is in response to your letter of April 13th, asking about the constitutional issues raised by S. 158.

In the interim since your letter arrived I have, as you may be aware, joined with 11 other constitutional scholars in a letter to the Judiciary Committee in which we state our conclusion that Congress lacks authority to enact this bill. I think that there still is a purpose to be served in responding to your inquiry, however, so that I can state more fully my own views than is possible in a group statement that must necessarily be put in broad terms.

Before turning to S. 158 itself, I think it might be helpful to reveal my own biases and attitudes. I have very mixed feelings, and no fixed position, on whether abortion as a matter of choice should be permissible. I feel ill-equipped even to try to resolve that issue in my own mind, because I have the great handicap of being a man. I recall a remark that Father Drinan made when he was a visiting professor here 14 years ago. "If men had babies," he said, "abortion would have been a sacrament of the Church centuries ago." Of course the remark was lightly made, but I am skeptical about the ability of men to form judgments that concern an experience they can never have.

At the same time I'm quite unpersuaded by the opinion in Roe v. Wade. I say that with considerable reluctance, because I think that Justice Blackmun and the Court have been the unfortuante victims of intemperate criticism and even of vilification from many who disagree with that decision. I do not wish to be associated in any way with critics of that kind.

I judge the decision by the canons of constitutional scholarship, and by those tests I find it wanting. Even accepting that "a right of personal privacy * * * does exist under the Constitution," 410 U.S. at 152, the Court fails to demonstrate to my satisfaction what abortion has to do with privacy or why "the right of personal privacy includes the abortion decision." 410 U.S. at 154. If the right of privacy were defined as giving one "an unlimited right to do with one's body as one pleases," I could understand how abortion comes within it, but the Court expressly rejects -- and rightly in my judgment -- such a concept of privacy. 410 U.S. at 154.

I am also troubled by the Court's recognition that the state has an "important and legitimate interest in protecting the potentiality of

human life," 410 U.S. at 162, but that this does not become "compelling" until viability. 410 U.S. at 163-164. Viability seems to be of significance only because at that point the fetus "presumably has the capability of meaningful life outside the mother's womb." 410 U.S. at 163. Yet if, as the Roe case holds, at that point the state may bar abortion, it is immaterial that the fetus would be capable of life outside the womb, since this will not happen. Once the state's interest in protecting the potentiality of human life is recognized, I would have thought it would require the conclusion that the state can bar abortion at a point when the fetus does not have the capability of life outside the womb.

For these reasons, I find Roe unpersuasive. Nevertheless, Roe exists, it has been repeatedly reaffirmed and even extended, and I do not think Congress has authority by statute to overrule a constitutional decision of the Supreme Court. Whatever the arguments might have been if the matter were one of first impression, we have long since accepted the notion that "[i]t is emphatically the province and duty of the judicial department to say what the law is," Marbury v. Madison, 1 Cranch 137, 177, that the duty is now more specifically that of "this Court," United States v. Nixon, 418 U.S. 683, 705, and that "the federal judiciary is supreme in the exposition of the law of the Constitution * * *." Cooper v. Aaron, 358 U.S. 1, 18.

The argument in support of the constitutionality of S. 158 must rest heavily -- indeed I should say exclusively -- on Katzenbach v. Morgan, 384 U.S. 641. See the article by Mr. Galebach, A Human Life Statute, reprinted in 127 Cong.Rec. S288-S294 (daily ed. Jan. 19, 1981). I consider the Morgan case to have been incorrectly decided, but that is as much beside the point as are my similar doubts about Roe v. Wade. It has seemed clear to me since Oregon v. Mitchell, 400 U.S. 112, that Morgan is to be confined to the racial discrimination area from which it comes and that there is to be no extension of the rationale of that decision. 400 U.S. at 129 (opinion of Black, J.) 296 (opinion of Stewart, J.).

In the Oregon case Justice Harlan made a statement that seems to me wholly applicable to S. 158. "Congress is subject to none of the institutional restraints imposed on judicial decisionmaking; it is controlled only by the political process. In Article V, the Framers expressed the view that the political restraints on Congress alone were an insufficient control over the process of constitution making. The concurrence of two-thirds of each House and of three-fourths of the States was needed for the political check to be adequate. To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure."

Finally, I do not think that S. 158 is saved by the fact that the only operative section in the bill is a restriction on the jurisdiction of the lower federal courts. I think Congress has very sweeping power over the jurisdiction of the inferior courts. I reject as entirely unhistorical the notions that Congress is obliged to vest the entire judicial power in some federal court, or that congressional control of jurisdiction is limited to "prudent steps which help avoid case overloads." See Wright, Federal Courts § 10 (3d ed. 1976); 13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3526 (1975). At the same time I feel certain that Congress must exercise its power over federal jurisdiction, as it must its other powers, in a fashion consistent with constitutional limitations. If Congress were to provide that blacks shall not have access to the federal courts, the legislation would be patently unconstitutional. Certainly S. 158 is far from the extreme case that I have just hypothesized, but in my judgment it goes too far in disadvantaging a particular group and a particular side of an issue. Under such cases as Hunter v. Erickson, 393 U.S. 385, and United States v. Klein, 13 Wall. 128, I do not think Congress has authority to close the federal court door in suits arising

under laws that prohibit, limit, or regulate abortions, while allowing access to federal court for challenges to statutes that permit, facilitate, or aid in the financing of abortions.

I do not envy the Subcommittee on Separation of Powers the task on which it has embarked. The issue of abortion is intrinsically difficult, and is not made easier by the strong emotions it raises in many on both sides. I hope that this expression of my view will be of some help to you and your colleagues in your inquiry.

Sincerely,

Charles Alan Wright

Charles Alan Wright
William B. Bates Professor

Senator EAST. I wish to welcome these four very distinguished gentleman. Stephan Galebach is currently a member of Covington & Burling law firm here in Washington, D.C. He is a graduate of Harvard University Law School.

We have Mr. Lawrence H. Tribe, who teachers at the Harvard University Law School.

We have Mr. John T. Noonan of the University of California School of Law at Berkeley.

We have Mr. William Van Alstyne, who is a professor of law at Duke University School of Law at North Carolina. I am always deeply honored to have a North Carolinian here before a committee of the U.S. Senate.

I welcome you here, gentlemen. If it is suitable with you, we shall proceed first with Mr. Galebach and Mr. Noonan. There we can proceed with Mr. Van Alstyne and Mr. Tribe.

Once again, I would encourage people to make their statements as concise as they can. All written statements will be made a part of the record.

Mr. Galebach, we recognize you.

## STATEMENT OF STEPHEN H. GALEBACH, ATTORNEY, COVINGTON & BURLING, WASHINGTON, D.C.

Mr. GALEBACH. Mr. Chairman, Senator Baucus, I appreciate the opportunity to appear before you to testify about the constitutional questions presented by the human life bill.

I have submitted for the record of this hearing a copy of the law review article that I wrote concerning the constitutionality of a congressional declaration that human life begins at conception and that all human beings are persons within the meaning of the 14th amendment.

I have also submitted a written statement concerning the constitutionality of a withdrawal of the jurisdiction of lower Federal courts to issue declaratory judgments and injunctions in certain types of abortion cases. In order to avoid repetition, I will not recite what is set forth in those documents. My law review article, however, provides much of the legal support for the testimony I will give today.

The controversy over abortions is constitutionally difficult because it involves conflicting rights of the utmost importance. On the one hand, there is the woman's privacy right, as defined by the

Supreme Court, to decide whether or not to bear a child. On the other hand, once a child has been conceived, the woman's right to privacy cannot be considered in isolation from the right to life of every human being and the right and duty of Government to protect human life.

The conflict between these rights cannot be finally and fully resolved under the Constitution without first deciding whether unborn children are human beings.

In its 1973 abortion decision, the Supreme Court declared that it was unable to determine whether unborn children were human beings. The Court also held that unborn children were not persons within the meaning of the 14th amendment and that a woman's right to privacy took precedence over the State's right to protect potential life until a fetus had become viable.

The Supreme Court thus left unresolved the fundamental question of whether unborn children are human beings. The answer to this question necessarily influences the proper resolution of the abortion issue. However, if the Supreme Court is unable to decide when human life begins, who can make that decision? I submit that under the Constitution, Congress can make that decision.

The 5th and 14th amendments to the Constitution provide that no person may be deprived of life without due process of law. The 14th amendment expressly authorizes Congress to enforce its protections by appropriate legislation.

If Congress examines the question the Supreme Court was unable to answer and concludes that unborn children are human beings, then the Court's conclusion that they are not persons would be subject to change, and Congress would have the power to enforce the 14th amendment by declaring that unborn children are persons within the meaning of that amendment.

In my law review, I explained the constitutional justification of the human life bill in terms of two leading theories advanced by Supreme Court Justices concerning the power of Congress to enforce 14th amendment rights.

The first theory is found in Justice Brennan's majority opinion in the landmark case of *Katzenbach* v. *Morgan*. Under this theory, Congress has broad power to define the scope and meaning of the 14th amendment rights so long as it acts to expand those rights.

The second theory is found in Justice Harlan's dissenting opinion in *Katzenbach* v. *Morgan*. Justice Harlan took a narrower view of Congress power, allowing Congress to make legislative findings that influence constitutional determinations, but reserving to the Court the authority to make the ultimate constitutional decision.

The majority opinion in *Katzenbach* v. *Morgan* is controversial because it confers on Congress such broad power to redefine the 14th amendment rights and to force its view on the Supreme Court. There is serious question whether the Court would or should reaffirm such a broad precedent today.

However, the constitutionality of the human life bill does not depend on the validity of such a broad theory of Congress power. The narrow enforcement power described by Justice Harlan is sufficient to justify the human life bill.

For that reason, I would like to focus today on the applicability of Justice Harlan's theory to the human life bill. The key sentence in Justice Harlan's opinion in *Katzenbach* v. *Morgan* is as follows:

> To the extent "legislative facts" are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect.

According to this theory, congressional findings influence the Supreme Court, but do not necessarily control the Court's decisions. For example, in the 1965 and 1970 Voting Rights Acts, Congress influenced the Supreme Court to conclude that literacy tests for voting were racially discriminatory, even though in 1959 the Court held them not to be discriminatory. The Supreme Court was not persuaded, on the other hand, by Congress finding that equal protection requires the extension of voting rights to 18-year-olds in State elections.

Former Solicitor General Robert H. Bork has recognized the power of Congress, within narrow limits, to influence constitutional decisionmaking. In reference to the President's 1972 legislative proposals for busing, Professor Bork wrote that:

> The justices may be persuaded to a different view of a subject by the informed opinion of the legislature. At the very least, a deliberate judgment by Congress on constitutional matters is a powerful brief laid before the Court. A constitutional role of even such limited dimensions is not to be despised.

It is only rarely that Congress can contribute findings that will have such persuasive value as to change a constitutional determination. However, the issue of abortion presents what may well be the most appropriate issue for Congress to influence a constitutional interpretation by means of legislative findings.

The unique aspect of the abortion issue is that the Supreme Court has declared itself unable to decide the basic question of whether unborn children are human beings. Congress is well equipped, in Justice Harlan's words, to investigate and decide the issue.

If Congress finds that a live human being exists from conception, that finding will be entitled to due respect from the Supreme Court. The persuasive value of such a finding will depend on what value should be given to human life under the 14th amendment.

If all human lives are of equal value under the 14th amendment, then Congress finding that unborn children are human beings will necessarily mean that their lives are equally protected with other human lives.

The congressional finding will lack persuasive value only if the 14th amendment does not protect all human lives equally; that is, only if some human beings can by nonpersons under the amendment.

The Supreme Court has never decided whether all human beings are equally entitled to the protection of the 14th amendment's right to life. However, the legislative history of the 14th amendment speaks to this issue.

The proponents of slavery who framed that amendment repeatedly expressed their view that all human beings should be protected under the Constitution. The author of the 14th amendment, Congressman Jonathan Bingham of Ohio, spoke of the rights guaranteed by the amendment as applying to every human being. Sena-

tor Jacob M. Howard of Michigan, who sponsored the amendment on the floor of the Senate, spoke of its provisions as protecting the rights of common humanity.

In expressing these views, the framers were echoing the words of the Declaration of Independence that all men are created equal, and that all are endowed by their Creator with certain inalienable rights, among which is the right to life. In other words, any human life which has been created shares equally in the inalienable right to life.

Respect for the sanctity of all human life is thus a basic principle affirmed both at the founding of our Nation and at the framing of the 14th amendment. This basic principle underlying the 14th amendment leaves no room for an argument that some human beings are nonpersons under that amendment.

If fact, the framers of the amendment were reacting specifically against the Supreme Court's decision in the *Dred Scott* case, which held that black people were nonpersons under the law. The 14th amendment was framed after the Civil War for the purpose of insuring that never again in the United States would a class of human beings be treated as nonpersons under the Constitution.

In light of the overall purpose and specific statements of the framers of the 14th amendment, a congressional finding that unborn children are human beings will have strong persuasive value to show that they must be persons entitled to the 14th amendment's protection of life. At the very least, the Supreme Court will have to reexamine the question of personhood in light of Congress' findings on the beginnings of human life.

Of course, the Supreme Court has also said that the Constitution protects a woman's right to privacy. The human life bill does not address this right or deny its existence.

However, the Supreme Court will have to reevaluate the proper balance between the privacy right and the right to life of unborn children. The Supreme Court will still have the final say. The human life bill does not dictate what the result must be. All the bill does is ask the Court to look at the issue again in light of Congress' answer to the question that the Court said it could not resolve, namely, when does human life begin.

The Court's role as the final interpreter of the Constitution is not threatened by this approach. Congress is merely exercising its prerogative to inform the Court of its views in accordance with Justice Harlan's understanding of the appropriate role of Congress and the Court.

In order to avoid the force of this argument, critics of the human life bill have argued that the biological beginning of human life is an irrelevant question, and that the important and difficult question is what value should be given to human life and at what stage of development should value be given to an unborn human life.

These are two separate questions, and both are vitally important. The first question of when human life begins is the question that the Supreme Court said it was unable to answer. Congress can decide this question by legislative fact-finding in the exercise of its power to enforce the 14th amendment.

The second question, concerning the proper value to be given to human life, restates the important issue I have already discussed:

whether all human lives are to be valued equally under the 14th amendment, or whether some lives are less deserving of protection than others.

This question also was not answered by the Supreme Court in its 1973 abortion decision. The Court did not know whether unborn children were human lives. Therefore, it did not have to decide the value of their lives.

If Congress now informs the Court that unborn children are human beings, then the Court will have to address the question of how to value their lives. In answering this question, the justices will of course be guided by the legislative history of the 14th amendment and by our Nation's historic respect for the sanctity of all human life. The Court will also have before it Congress' finding in the human life bill that the 14th amendment is intended to protect all human beings.

In light of these factors, it is very difficult to see how the Court could avoid the conclusion that what is biologically a human being is also a life that should be protected under the 14th amendment. The only alternative to this conclusion is either to deny Congress' power to answer the question the Court left open as to the beginning of human life, or to hold that some human beings, namely the unborn, are nonpersons under the law.

Congress has a uniquely compelling justification to state its views on when human life begins, because the Supreme Court has declared itself unable to answer this question, and the question is fundamental to the proper resolution of the abortion issue. Since the Supreme Court rarely disqualifies itself from answering a question necessary to a proper interpretation of the Constitution, the human life bill need not set a broad precedent.

Some branch of government must be able to decide when life begins if the constitutional guarantees of life are to be given effect. When the Supreme Court declares that neither it nor State legislatures can decide when life begins, then Congress must see if it can fulfill that essential role as coenforcer of the 14th amendment. The Supreme Court has never denied that Congress can fulfill this role, and there is no reason to assume it will.

The ability of Government to identify and protect human life is important not only for unborn children but also for people already born. The dispute over the existence of actual or meaningful human life is not limited to unborn children.

Serious scholars have argued that certain individuals are less than fully human, and that as a result, they have no right to life. Such cases include children born with severe mental or physical handicaps and people with terminal illnesses or disabilities.

An article in a prominent medical journal has advocated that we revise our traditional notions of the sanctity of human life so as to allow euthanasia for babies born with severe mental or physical handicaps.

A State judge in New York has declared that the Government has a lesser interest in the life of a terminally ill comatose patient than in the life of a fetus.

My point for purposes of these hearings is not to argue that these views are wrong, but merely to show that some branch of Government must be able to decide, first, whether such unfortu-

nate individuals are human beings, and, second, whether their lives are equally worthy of the protection of the law.

It would make little sense for a category of human beings to go unprotected simply because no branch of government could decide whether they were human beings. Government cannot responsibly take the position that issues of life and death are too intensely personal to be resolved by the State.

If these decisions are left to the private consciences of individuals, if individuals are free to choose whether someone else shall live or die, then life ultimately has no protection.

However, our Constitution does not take such an irresponsible path. The Constitution protects life, and gives Congress power to enforce that protection. That is why the human life bill is in no sense a circumvention of the Constitution, but rather a fulfillment of it.

Thank you.

Senator EAST. Thank you, Mr. Galebach.

[The submissions of Mr. Galebach follow:]

# A Human Life Statute

*by Stephen H. Galebach*

*Published in the public interest by:*
The Human Life Foundation, Inc.
150 East 35th Street New York, N.Y. 10016

This article is a reprint of the lead article which appeared in

The Human Life Review
Winter, 1981

© 1981 by The Human Life Foundation, Inc.

*The Human Life Review* is a journal of fact and opinion published quarterly by the Human Life Foundation, Inc., an independent, non-profit foundation incorporated in the State of New York. Subscription rates: $12 per year; $3 per single copy.

Additional copies of this reprint are available at $1 per copy. Please enclose payment with order (Bulk rates: 25 copies $20; 100 copies $50).

**The Human Life Foundation**
**150 East 35th Street**
**New York, N.Y. 10016**

# A Human Life Statute

*Stephen H. Galebach*

*The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception.*

*Upon the basis of this finding, and in the exercise of the powers of the Congress, including its power under Section 5 of the Fourteenth Amendment to the Constitution of the United States, the Congress hereby declares that for the purpose of enforcing the obligation of the States under the Fourteenth Amendment not to deprive persons of life without due process of law, human life shall be deemed to exist from conception, without regard to race, age, health, defect, or condition of dependency; and for this purpose "person" shall include all human life as defined herein.*

DOES CONGRESS HAVE constitutional power to enact such a statute? If Congress were to enact a statute of this sort, should the Supreme Court uphold it?

The Supreme Court's 1973 abortion decision in *Roe* v. *Wade* has received trenchant criticism for its defective legal reasoning as well as its consequences.[1] For the growing number of citizens unwilling to tolerate the consequences of *Roe* v. *Wade*, the answer has appeared to lie in a constitutional amendment to protect unborn life. While such an amendment may well afford the surest protection for unborn children, it will require an extraordinary consensus and a protracted ratification effort.

Until the time when an amendment could be ratified, are there any interim answers that a simple majority of Congress could provide, consistent with the Constitution and with Supreme Court precedent? In fact there are. The Constitution was not designed to leave any form of human life unprotected. Nor do Supreme Court precedents, as we shall see, prevent or discourage Congress from acting in this area.

Both the Fifth Amendment and the Fourteenth Amendment protect human life. The Fifth Amendment protects life against acts of the federal government: "No person shall be . . . deprived of life, liberty, or property, without due process of law." In similar language the Fourteenth Amendment limits the action of states: "nor

**Stephen H. Galebach** (B. A. Yale '74) received his law degree from Harvard in 1979, where he was Note Editor of the *Harvard Law Review*; he clerked at the U. S. Circuit Court of Appeals in the District of Columbia, and has recently joined the Washington law firm of Covington & Burling.

shall any State deprive any person of life, liberty, or property, without due process of law."

These provisions reflect the belief, expressed in our Declaration of Independence, that the right to life is sacred and inalienable.[2] Whether unborn children enjoy those rights to life already contained in the Constitution depends on how life is defined. If life begins at conception, these rights logically extend to unborn children. If life begins only at birth, unborn children enjoy no protection from the Constitution as it now stands. The beginnings of life thus pose a crucial question for those branches of the federal government that enforce the Fifth and the Fourteenth Amendment.

## I. Determining When Life Begins

### A. An Inappropriate Task for the Courts

The judicial branch confronted the issue of when life begins in *Roe* v. *Wade*, when the state of Texas invoked the Fourteenth Amendment's protection of life as a justification for the state's anti-abortion statute. In rejecting this justification, the Supreme Court did not define unborn children as non-life or non-humans. Instead it refused to decide when human life begins and whether unborn children are human life. With this issue unresolved, the Court found nothing to indicate that unborn children are persons protected by the Fourteenth Amendment. Justice Blackmun concluded for the Court that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[3]

The Court's refusal to decide when life begins was central to the outcome of *Roe* v. *Wade*. Without a decision on this question, there was no way to show that Fourteenth Amendment protection logically extends to unborn children. Although the state of Texas asserted its own definition of when life begins, the Supreme Court held that the state had no authority to adopt "one theory of life."[4] With the Supreme Court and the state legislatures both unable to define when life begins, the state had no way to demonstrate that unborn children are human persons deserving protection. As a result, the state had no compelling interest sufficient to justify its anti-abortion statute. The Supreme Court therefore struck down the statute as an unjustified infringement of the mother's right of privacy to decide whether to "terminate her pregnancy," a right newly discovered in this case.[5]

The result of *Roe* v. *Wade* would have been entirely different,

however, if any branch of government had been able constitutionally to examine when life begins and to resolve the question in favor of unborn children. If in enforcing the Fourteenth Amendment, a branch of the federal government had been able to declare that the unborn are human persons, then any state could invoke that declaration as a compelling state interest for prohibiting abortions. The Supreme Court acknowledged this in *Roe* v. *Wade*: "If the suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."[6]

It may seem odd that the Supreme Court refused to address the issue of the beginnings of life, when that issue is so fundamental to the scope of the Fourteenth Amendment and to the state's power to prohibit abortions. But the Court explained its refusal, and its explanation is very important. On the beginnings of life, the Court observed, there is a "wide divergence of thinking." The question is "sensitive and difficult."[7] For such questions the judiciary has no suitable evidentiary standards to determine an answer. A judge could only "speculate" on this difficult question. In short, the question stands outside the scope of judicial competence: "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[8]

Thus the failure of the Fourteenth Amendment to afford protection for the unborn, under *Roe* v. *Wade*, results from the institutional limitations of the judicial branch. Without a decision that the unborn are human life, it is not clear that the Fourteenth Amendment protects unborn children. And the Supreme Court gave strong reasons for abstaining from this question. But this does not end the matter. The Constitution gives Congress, as well as the courts, a role in the enforcement of the Fourteenth Amendment. If the question of when life begins can be addressed by Congress, and if Congress has a legitimate role in enforcing the Fourteenth Amendment's protection of life, then Congress can resolve the fundamental issue from which the Supreme Court abstained in *Roe* v. *Wade*.

**B. An Appropriate Task for Congress**

The Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this

article."[9] In enforcing the Amendment's protection of life, as in many other matters, Congress does not suffer from the same institutional limitations as the judiciary. Resolving sensitive and difficult policy questions, deciding between conflicting interests, making speculative judgments where no judicial standards can offer guidance — these are functions inherent in Congress's role and appropriate for Congress to perform.

To decide when human life begins involves the sort of considerations that are appropriate for Congress but not the courts. Any attempt to resolve the issue, as the Court observed, involves the examination of inconclusive evidence and the weighing of divergent views. By the nature of their position, congressmen are often called upon to reflect the views of divergent constituencies on matters that cannot be resolved by conclusive evidence. Congress routinely weighs divergent views on questions that admit of no "correct" answer from a court's perspective: whether to tax one person to support another, whether to protect various species endangered by governmental or private activities, whether to require the use of safety precautions that protect people while causing them inconvenience. Legal standards provide no answers to these questions; in such matters, decisions "are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil."[10]

One can best appreciate the legislative nature of deciding when life begins by considering the issue as it confronts the decisionmaker. He must first examine the divergent views and conflicting evidence, mentioned by the *Roe* v. *Wade* opinion, to see if they provide an answer. If this step leaves him uncertain whether the unborn are human life, then he faces an especially delicate and complex issue of legislative policy: Should one extend protection if human life is *probably* at stake? Or only *possibly* at stake? What degree of possibility does one require before deciding to extend constitutional protection by deeming the unborn to be human life for purposes of the Fourteenth Amendment?

The legislative nature of this issue is further confirmed by the "political question" doctrine. The Supreme Court has developed this doctrine as a means to identify those issues that are appropriately resolved not by the courts, but rather by Congress, the President, or the states. Although the Court did not invoke the political question doctrine in refusing to decide when life begins, the Court's

reasoning could easily be explained by that doctrine. Political questions, according to Supreme Court precedent, are questions that are "delicate" and "complex," questions "of a kind for which the judiciary has neither aptitude, facilities nor responsibility."[11] Two of the major criteria for identifying a political question could be applied directly to the question of when life begins: "a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[12] Questions of this sort, the Court has said, are "wholly confided by our Constitution to the political departments of the government, Executive and Legislative."[13]

The political department most appropriate to decide when life begins is Congress. The enforcement clause of the Fourteenth Amendment expressly grants power to Congress. When a term of the Fourteenth Amendment cannot be defined by the judiciary in concrete application to a category of beings -- here the unborn -- then the definition of that term by Congress is appropriate legislation to enforce the Amendment.

If it appears strange that Congress should be able to play such a major role in formulating a national policy on the issue of abortions, that is only because the federal courts have gone to such great lengths to take control of this issue into their own hands. But when the courts have declared themselves incapable of resolving the beginnings of human life, it should be very hard for them to insist on taking this particular part of the abortion controversy out of Congress's hands and into their own. Before the Supreme Court stepped into this arena with its *Roe* opinion, former Justice Clark had recognized the legislative nature of the controversy:

> It is for the legislature to determine the proper balance, *i. e.*, that point between prevention of conception and viability of the fetus which would give the State the compelling subordinating interest so that it may regulate or prohibit abortion without violating the individual's constitutionally protected rights. [14]

The Supreme Court, moreover, has recently acknowledged that Congress has a proper role in protecting human life. In its 1980 decision on the public funding of abortions, the Court recognized the "legitimate congressional interest in protecting potential life."[15] If Congress has an interest in protecting potential human life, it certainly has a legitimate interest in protecting what it considers

likely to be *actual* human life. If Congress is to make fully-informed decisions to protect life, it must also have power to examine and answer such questions as what is actual life, what is potential life, what is likely to be actual life, and what protection should be extended to something that appears likely to be actual life.

If Congress decides that unborn children are human life for the purpose of the Fourteenth Amendment's protection of life, it follows logically that for this purpose they are "persons" as well. By common usage of language, any human being must be recognized as a person. The Supreme Court has interpreted "person" in the Fourteenth Amendment more broadly than common usage, to include corporations.[16]

Statements of the framers of the Fourteenth Amendment make it clear that "person" cannot include less than every human being. Congressman Bingham, author and sponsor of Section 1 of the Amendment, spoke of the right to equal protection and the right to life, liberty, and property for "every human being."[17] The framers had good reason to contemplate unborn children as part of the human race, since in the decade leading up to the Fourteenth Amendment, physicians responded to new evidence about conception by calling for protection of human life from that point.[19]

A determination that unborn children are human life, therefore, fully justifies the correlative determination that they are persons. The latter determination, however, collides with the Supreme Court's holding in *Roe* v. *Wade* that the unborn are not persons. But that holding makes sense only in light of the Court's inability to decide whether the unborn are human life. Informed by a congressional determination that life begins at conception, the Court might well reach a different conclusion. Still, the potential conflict raises serious constitutional questions. Does the *Roe* v. *Wade* holding as to "person" deprive Congress of power to pass contrary legislation? If Congress does pass legislation declaring unborn children to be human life and persons, should the Court defer to Congress's determination?

## II. Congress as Co-enforcer of the Fourteenth Amendment

Supreme Court decisions have recognized that the Court does not have the only say in applying the Fourteenth Amendment. Under its Section 5 enforcement power Congress can apply, and has applied Fourteenth Amendment terms in ways that differ from and even

contradict Supreme Court interpretations. The Court has consistently upheld such legislation in the past two decades, often giving sweeping approval to Congress's expansive role. The precise extent of Congress's power to apply the Fourteenth Amendment independent of the Court, and the degree of deference the Court gives to such congressional actions, have been central issues in a number of Supreme Court decisions.

Interplay between the Supreme Court and Congress on issues of interpretation and application of constitutional rights has arisen most prominently in the area of state tests for voter qualification. Of the leading cases on Congress's power to enforce the Fourteenth and Fifteenth Amendments, three cases have involved literacy tests for voting. Literacy tests have been challenged under the Fifteenth Amendment[20] as well as the Fourteenth; the enforcement power of Congress is the same under both amendments.[21]

Just as in the abortion area, the Supreme Court pronounced its constitutional interpretation concerning literacy tests before Congress took up the issue. In 1959 the Court held, in *Lassiter* v. *Northampton County Board of Elections*,[22] that literacy tests did not violate the Equal Protection Clause of the Fourteenth Amendment or abridge the right to vote on account of race contrary to the Fifteenth Amendment.[23] The *Lassiter* opinion expresses a clear judgment that literacy tests, considered in general, have no inherently discriminatory character: "Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show."[24] Only with evidence that a particular literacy test was actually employed to promote discrimination would the *Lassiter* Court find it to be a violation of the Fourteenth or Fifteenth Amendment.[25]

In the Voting Rights Act of 1965, however, Congress used its enforcement power to apply the Fourteenth and Fifteenth Amendments to state literacy tests in ways different from the Supreme Court in *Lassiter*. Section 4(a)-(d) of the Act suspended all voter qualification tests in those states or counties in which fewer than fifty percent of the voting-age residents registered or voted in the 1964 presidential election. For such states Congress found that literacy tests and similar voting qualifications abridged the right to vote on account of race.[26]

The Supreme Court upheld this part of the Act as an appropriate exercise of Congress's power to enforce the Fifteenth Amendment. In *South Carolina* v. *Katzenbach*[27] the Court held that Congress

had complied with the *Lassiter* holding by making extensive, detailed legislative findings that literacy tests have been used to promote discrimination in most of the areas covered by the Act.[28] For those areas in which Congress had not found direct evidence of discriminatory use of the tests, the Court was satisfied that Congress had inferred or could infer a "significant danger" of discrimination.[29] By striking down those literacy tests that had actually been employed to promote discrimination, Congress did not depart from the *Lassiter* interpretation of the Fifteenth Amendment.[30] The further application of Section 4(a)-(d) to the other areas, in which there was a "significant danger" that tests would be applied discriminatorily, represented a slight modification of the *Lassiter* standard; this application was appropriate as a preventive measure to combat discrimination.[31]

Another provision of the Act, however, represented a sharp departure from *Lassiter*'s interpretation of the Fourteenth Amendment. Section 4(e) struck down the use of English literacy tests in New York to exclude voters who had completed the sixth grade in Puerto Rican schools.[32] For this section Congress did not provide legislative fact-finding to show discriminatory application of New York's literacy test.[33] Without such evidence the *Lassiter* holding would of course indicate that New York's use of a literacy test was constitutionally valid. Congress could only strike down New York's use of the test by applying a standard different from *Lassiter*.

Nevertheless, in *Katzenbach* v. *Morgan*[34] the Supreme Court upheld Section 4(e). The Court held that Congress enjoys broad authority to interpret the provisions of the Fourteenth Amendment independent of the judicial branch. As the Court framed the issue: "*Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied,* could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment?"[35]

The *Morgan* opinion answered this question in the affirmative. The Court gave two equal and alternative reasons for holding that Congress could prohibit enforcement of the literacy test. First, Congress could have struck down the literacy requirement in order to help the Puerto Rican community gain sufficient political power to secure non-discriminatory treatment in the provision of public services. This rationale rests on the principle that Congress enjoys the

same broad powers under Section 5 that it exercises under the Necessary and Proper Clause.[36] Congress may take any action that is "plainly adapted" to the objective of securing the guarantees of the Fourteenth Amendment.[37] Under this rationale, Congress may strike down an act of a state that does not in itself violate the Fourteenth Amendment, so long as Congress's action tends to protect some Fourteenth Amendment right against infringement by the state.[38]

As a second rationale, the Court held that Congress could rationally conclude that New York's use of a literacy test was invidious discrimination not justified by any compelling interest of the state — and was therefore a violation of equal protection.[39] Unlike *South Carolina* v. *Katzenbach*, the *Morgan* opinion did not require any legislative findings of fact to show discriminatory use of the literacy test. Instead, the Court was willing to let Congress conclude that a literacy test by its nature, with no evidence of its actual effects, violates the Fourteenth Amendment. The Court did not even require Congress to express its reasons for reaching a conclusion opposite to the *Lassiter* holding: "it is enough that we perceive a basis upon which Congress *might* predicate a judgment that the application of New York's English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause."[40] The broadly deferential attitude of the majority in *Morgan* toward Congress evoked a dissent from Justices Harlan and Stewart, which will figure prominently in our later discussion.

Both rationales of the *Morgan* opinion appeared to give Congress authority virtually to overrule the *Lassiter* holding. The Court emphasized the broad discretion of Congress to determine what legislation is appropriate to carry out the ends of the Civil War amendments.[41] Citing historical evidence of the framers' intent, the Court observed that the Fourteenth Amendment primarily enlarges the power of Congress rather than the judiciary.[42] Commentators recognized *Morgan* as a broad endorsement of congressional power to interpret the substantive guarantees of the Fourteenth Amendment in ways that differ from or contradict prior interpretations of the Supreme Court.[43]

Four years after *Morgan*, Congress completed the process of undoing *Lassiter*. Title II of the Voting Rights Act Amendments of 1970 struck down all remaining state literacy tests.[44] The Supreme Court unanimously upheld Title II in *Oregon* v. *Mitchell*,[45] despite

the lack of specific evidence of discriminatory application of these tests by states that still used them.[46] The Court relied on evidence available to Congress, showing that literacy tests are likely to have racially discriminatory effects wherever in the nation they may be used.[47] To say that literacy tests are likely to be discriminatory anywhere in the country is essentially the same as to say they are discriminatory by nature — a direct contradiction of the *Lassiter* holding.

Although *Oregon* v. *Mitchell* endorsed a congressional interpretation of the Fourteenth Amendment at variance with the *Lassiter* holding, it left some uncertainty over the scope of Congress's power to apply the Amendment independent of the courts. The 1970 Voting Rights Act Amendments had also invoked Section 5 of the Amendment as a justification for Congress to lower the voting age in federal and state elections. A divided Supreme Court in *Oregon* v. *Mitchell* allowed Congress to lower the voting age for federal elections but not for state elections. Four justices opted for a very broad view of congressional power under Section 5 to strike down the states' 21-year-old voting age requirements; four justices espoused a narrower view; and Justice Black cast the deciding vote on grounds divorced from the Section 5 power. Justice Brennan, joined by Justices White and Marshall, endorsed a broad scope of congressional power, emphasizing "proper regard for the special function of Congress in making determinations of legislative fact."[48] Justice Stewart took the narrower view in an opinion which we shall discuss later.

The ambiguity left by the divided Court in *Oregon* v. *Mitchell* has been largely resolved quite recently. Last Term two Supreme Court decisions expressly followed the *Morgan* view of Congress's power to enforce the Fourteenth and Fifteenth Amendments. *Fullilove* v. *Klutznick* followed the *Morgan* view that Congress's enforcement power is as broad as the Necessary and Proper Clause.[49] *Fullilove* specifically endorsed the broad power of Congress "in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[50]

The other case last Term, *City of Rome* v. *United States*,[51] approved the *Morgan* holding in the context of Congress's equivalent power to enforce the Fifteenth Amendment. *City of Rome* especially illuminates the first rationale of *Morgan*. The case arose from the application of the Voting Rights Act of 1965 to prohibit electoral changes made by the city of Rome, Georgia.[52] There was

evidence that Rome's voting practices had racially discriminatory effects, but no evidence of any discriminatory intent.[53] For purposes of deciding the case, the Supreme Court assumed that the Fifteenth Amendment prohibits only purposeful discrimination and not actions with only discriminatory effects.[54]

Nevertheless, *City of Rome* held that Congress could prohibit Rome's changes in electoral practices. The Court acknowledged that Congress may enforce the Fifteenth Amendment by prohibiting practices that in themselves do not violate the Fifteenth Amendment. The Court required only that the prohibition of actions discriminatory in their effect be an "appropriate" and "proper" means to prevent the "risk of purposeful discrimination."[55] This reasoning builds on the first rationale of the *Morgan* opinion: Congress may strike at a constitutionally proper state action, in order to protect against a risk or likelihood of state infringement of a Fourteenth or Fifteenth Amendment right.

Supreme Court precedents, then, support a prominent role for Congress to enforce the Fourteenth Amendment in ways differing from the courts. Under the first rationale of *Morgan*, Congress was able in the *City of Rome* case to strike down electoral practices that a court could not have struck down without evidence of discriminatory intent. By following the second rationale of *Morgan*, Congress can also interpret the Fourteenth Amendment in ways that a court might not adopt.

Both rationales permit Congress to include unborn children within the protections of the Fourteenth Amendment, without regard to whether the judiciary would find them to be persons. The second rationale allows Congress to liberalize the scope of the term "person" if it has reason to do so. If Congress determines that life begins at conception, or that life possibly begins at conception, this presents a good reason — indeed, a compelling reason — to deem unborn children to be persons. For Congress to examine evidence and draw conclusions on a matter unresolved and unresolvable by the Supreme Court is among the strongest bases imaginable for acting under the second rationale of *Morgan*. If the Fourteenth Amendment primarily enlarges the power of Congress and not the judiciary, then it surely gives Congress power to interpret a matter as to which Congress is competent and the courts are not.

Congress could also take action to extend the Fourteenth Amendment's protection to unborn children under the first rationale of

*Morgan*. Even if Congress leaves undisturbed the *Roe* v. *Wade* holding that the Fourteenth Amendment protects only post-natal "persons," Congress can still protect the unborn under this rationale. First, Congress can examine the unanswered question of when life begins. Next, it can reasonably determine that at conception a life has come into being — a specific, individual life in terms of chromosomal structure and many consequential identifying characteristics. This individual life would probably proceed to enjoy the status of "person" with life protected by the Fourteenth Amendment *but for* the act of abortion. Therefore, in order to protect the unborn child against the risk that state action will prevent him or her from enjoying the right to post-natal life guaranteed by the Fourteenth Amendment, Congress may appropriately protect the unborn child's life between conception and birth. State-supported deprivation of unborn life may not be (for purposes of argument) a violation of the Fourteenth Amendment; but Congress can prohibit it in order to prevent the risk that individuals may be deprived by the state of an opportunity to enjoy a right to post-natal life guaranteed by the Fourteenth Amendment.

This line of reasoning from the first rationale of *Morgan* may appear at first glance too much like a debater's trick. But a concrete example helps to show the merit in this reasoning. Suppose that a state undertakes a program, in cooperation with expectant mothers, to eliminate a genetically identifiable group that is unwanted — for instance, children with Down's Syndrome (mongolism), to take an example not far removed from the realm of possibility. Under the holding of *Roe* v. *Wade*, the Fourteenth Amendment by its own force does not protect unborn mongoloid children. Thus the state might be able to identify all unborn mongoloid children through the use of amniocentesis techniques, and eliminate them by abortion. Could not Congress, then, declare unborn mongoloid children to be human life and persons under the Fourteenth Amendment, in order to protect them against the risk that their right to a life after birth may be deprived by state action?

It is difficult to deny that Congress has power to include unborn children within the scope of the Fourteenth Amendment's protection of life. For Congress to use this power would represent only a narrow and restrained exercise of Congress's authority to enforce the Fourteenth Amendment. To define "life" and "person" is only the first and smallest step that must be taken if any branch of the

federal government is rationally to determine what scope of human life falls within the protection of the Fourteenth Amendment. Indeed, in *Morgan* the Court expressed dissatisfaction with the idea of limiting Congress's enforcement power to the "insignificant role" of "merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment."[56] It is an even narrower role for Congress to inform the judiciary of the precise meaning of less general terms such as "life" and "person" in light of contemporary evidence on these matters.

Professor William Cohen has discussed whether Congress has power in "marginal cases" to enlarge the meaning of due process and equal protection, so long as it does not adopt interpretations or applications not reasonably within the scope of the constitutional terms.[57] He observes that Congress has especially solid justification to act on marginal questions of constitutional interpretation when they "involve drawing difficult lines that could best be drawn by legislatures."[58] Congress's power to adopt "arguable" interpretations expanding Fourteenth Amendment rights should not vary, he reasons, simply because the Supreme Court has expressed an opinion on the meaning of the constitutional term at issue: "Obviously, congressional power should neither depend upon whether Congress or the Court was first in the race to cope with the issue, nor vary with the voting breakdown when the Court finishes first."[59] Cohen concludes that theories which limit Congress to interpreting *only* in marginal cases are "not viable" — that Congress's enforcement power, in other words, should extend well *beyond* this narrow realm.[60]

The definition of "life" and "person" involves this sort of interpretation on the "margin." An interpretation of "life" and "person" that includes the unborn could not be held unwarranted by the language of the Fourteenth Amendment; the Constitution does not define either term. The framers of the Fourteenth Amendment did not try to specify concrete definitions of terms that are susceptible to varying interpretations. Instead, they chose "language capable of growth."[61] "Life" and "person" are among the most concrete and particular terms in the Fourteenth Amendment. Yet even these terms permit some degree of interpretation on the margin. Both terms are "capable of growing" to reflect a more liberal view of the scope of human existence.

The task of adjusting the meaning of "life" and "person" to accord



84-581 O—81——15

with changing evidence and views of life is properly a task for Congress. Not only is the line between life and non-life a difficult one, more appropriately drawn by the legislature than by the courts; it is also a line that the *Roe* v. *Wade* opinion itself explicitly declared the courts unable to draw. If Congress draws the line at conception, the courts have no independent basis on which to draw a line different from that drawn by Congress. Under the approach of *Katzenbach* v. *Morgan*, followed as recently as last Term by the Supreme Court, the Court's prior definition of "person" in *Roe* v. *Wade* poses no greater barrier to congressional enforcement action than the *Lassiter* holding posed to Congress's nationwide prohibition of literacy tests.

Our review of these Supreme Court precedents has mentioned dissents to the majority view. There is indeed a consistent minority view, first expressed by Justice Harlan's dissent in *Katzenbach* v. *Morgan*, next developed by Justice Stewart's opinion in *Oregon* v. *Mitchell*, and most recently espoused last Term by Justice Rehnquist. To arrive at a balanced assessment of the wisdom of congressional action to protect unborn life, we must pay close attention to these dissents as well as to the majority opinions.

The dissenting view emphasizes the distinction between the legislative and the judicial role. Justice Harlan maintained in *Katzenbach* v. *Morgan* that it was ultimately for the judicial branch to determine the substantive scope of the Fourteenth Amendment.[62] Justice Stewart objected in his *Oregon* v. *Mitchell* opinion that Congress does not have power to determine the substantive scope and application of the Equal Protection Clause.[63] And in *City of Rome* last Term, Justice Rehnquist argued that Congress cannot "effectively amend the Constitution" by interpreting the Fifteenth Amendment independently and escaping judicial review.[64]

At some points these dissents might be read as saying that Congress has no role whatever in interpreting the Fourteenth Amendment, that Congress is limited to providing remedies after the courts interpret the Amendment and identify violations of it. But the dissents do not go quite that far. Justice Harlan left open a legitimate though limited role for Congress to interpret the substantive scope of the Fourteenth Amendment: "To the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect."[65]

Justice Harlan's view, repeated in essence by Justices Stewart and Rehnquist, is that the judiciary must make the final determination of the constitutional issue in light of the congressional findings of fact. These findings may of course influence the Court, and may change its mind. But Justice Harlan's view requires facts sufficient to justify a new constitutional interpretation, not just sufficient to afford some slight rational basis to Congress's interpretation of Fourteenth Amendment terms.

In *Oregon* v. *Mitchell* it is safe to say that Congress could not provide facts sufficient to convince Justice Harlan or Justice Stewart that the 21-year-old voting age requirement violated the Equal Protection Clause.[66] Similarly in *City of Rome*, Congress came forth with no evidence to persuade Justice Rehnquist that the city had done anything in violation of the Fifteenth Amendment.[67] But in *South Carolina* v. *Katzenbach* Congress had set forth voluminous findings of fact that persuaded Justices Harlan and Stewart — among others — that literacy tests in some areas did violate the Fifteenth Amendment.[68] Similar evidence convinced both justices again in *Oregon* v. *Mitchell* that Congress could strike down all literacy tests because they were thought to be discriminatory, despite the *Lassiter* holding.

Justice Harlan's recognition of a congressional role in this area is based on his observation that "questions of equal protection and due process are based not on abstract logic, but on empirical foundations."[69] How strongly Congress will influence the Court by legislative fact-finding depends on the relative competence of Congress and the courts to decide the particular empirical question. Both Justice Harlan and Justice Stewart recognized some matters on which Congress was at least as competent as the courts to express an opinion. For such matters these justices not only held that Congress has power to declare its views, but also held that the courts should give great deference to Congress.

Justice Harlan, writing for the Court in *Glidden Co.* v. *Zdanok*,[70] allowed a congressional declaration to overturn two earlier Supreme Court decisions on a matter of constitutional interpretation. The earlier decisions had held that the United States Court of Claims and the United States Court of Customs and Patent Appeals were courts created under Article I rather than Article III of the Constitution.[71] Subsequent to those decisions, Congress examined

the historical evidence surrounding the creation of the two courts, and declared that they were created under Article III.

Justice Harlan's opinion in the *Glidden* case acknowledged Congress's competence to declare its views on this matter, even though the issue was one of "constitutional dimension" rather than statutory construction.[72] Deferring to Congress's declaration, Justice Harlan refused to follow the two earlier decisions because at the time they were decided, "the Court did not have the benefit of this congressional understanding."[73] To allow Congress to change the Court's mind did not violate Justice Harlan's theory of the judicial and legislative roles: "To give due weight to these congressional declarations is not of course to compromise the authority or responsibility of this Court as the ultimate expositor of the Constitution."[74]

Justice Stewart has endorsed the power of Congress to declare its interpretation of terms in the Thirteenth Amendment. This Amendment, which prohibits slavery and involuntary servitude, confers on Congress an enforcement power parallel to that conferred by the Fourteenth and Fifteenth Amendments.[75] Justice Stewart's opinion for the Court in *Jones* v. *Alfred H. Mayer Co.*[76] allowed Congress to enforce the Thirteenth Amendment by broadening the scope of its prohibitions to include particular acts of racial discrimination, on grounds that they are "badges and incidents" of slavery.[77] So long as its determinations are rational, Congress has authority to "determine what are the badges and the incidents of slavery" and to "translate that determination into effective legislation."[78]

The *Jones* decision had been accepted as binding precedent by all the justices, whether they take the broad or the narrow view of Congress's power to enforce the Civil War Amendments. In *Runyon* v. *McCrary*,[79] the justices disagreed over how far to extend *Jones*, but all the opinions in that case accepted *Jones* as binding precedent.[80] Last Term in a concurring opinion to *Fullilove* v. *Klutznick*, Justice Powell relied on *Jones* to show that Congress is competent to decide what types of racial discrimination come within the scope of the prohibitions of the Civil War Amendments.[81]

*Jones* establishes that Congress has some role in interpreting terms of the Thirteenth, Fourteenth and Fifteenth Amendments. Terms such as "slavery," "involuntary servitude," "life," and "person," are more concrete and particular than open-ended phrases such as "due process" and "equal protection." Yet even the more

concrete terms admit of some ambiguities. In areas of ambiguity Congress may give these terms a broader scope than the Supreme Court has given them. Thus *Jones* supports Congress's authority to interpret "on the margin," as the *least* that Congress is empowered to do in enforcing the Civil War amendments.

Our discuussion has already shown that the scope of "life" and "person" is an appropriate matter for Congress to interpret on the margin, in light of a determination of when life begins. For Congress to inform the courts of its determination of when life begins is appropriate under Justice Harlan's view of proper judicial and legislative roles. Indeed, a matter on which Congress is competent to decide and the courts are not is the most appropriate of all circumstances for Congress to express its judgment and for the courts to defer to Congress. Concerning such matters Justice Harlan has said: "I fully agree that judgments of the sort involved here are beyond the constitutional competence and constitutional authority of the judiciary . . . They are pre-eminently matters for legislative discretion, with judicial review, if it exists at all, reasonably limited."[82]

Because the question of when life begins is a matter for legislative discretion, and because the courts are not competent to resolve this matter, the courts should exercise great deference in reviewing any congressional declaration that the Fourteenth Amendment shall include unborn human persons in its protection of life against state action. Such deference would not compromise the Supreme Court's role as ultimate arbiter of the Constitution; it would simply comport with judicial limitations already recognized in *Roe* v. *Wade*. Thus, whether the Court follows the standard of the *Morgan* majority, or the stricter review standard of the minority, the result in this case is the same: the Supreme Court's interpretation of "person" in *Roe* v. *Wade* does not bar Congress from taking a different view based on its determination that human life begins or is likely to begin at conception.

When Congress has greater competence than the courts, Congress *should* take the lead in defining the content of Fourteenth Amendment rights.[83] Had Congress done so more frequently in the past, it could have alleviated some of the most troubling institutional problems in constitutional interpretation. For example, the Supreme Court's decision in *Brown* v. *Board of Education*[84] produced a result widely applauded today, but doubts still remain about the propriety of the Supreme Court's making the sociological judgments involved

in that decision. What if Congress had taken the lead to enforce the Fourteenth Amendment by declaring its judgment, based on legislative fact-finding, that separate schooling is inherently unequal and contrary to the Equal Protection Clause? Such action could have placed the issue in the branch of government best suited to resolve it. And would we really want to argue that the Supreme Court's endorsement of "separate but equal" in *Plessy* v. *Ferguson*[85] would have barred such action by Congress?

## III. Possible Objections to a Human Life Statute

Our examination of Supreme Court opinions, both majority and dissenting, suggests that Congress does have power to enforce the Fourteenth Amendment by enacting a statute similar to that set forth at the beginning of this article. There are additional arguments, however, that might be raised against such a statute. Several of them deserve close attention, though none is persuasive.

First, it might be argued that the same divergence of views that persuaded the Court in *Roe* v. *Wade* not to decide when life begins, also makes it impossible for Congress rationally to arrive at an answer. The crucial point, however, is that Congress does not need to be *certain* of an answer before it declares a national policy on when human life begins.

Throughout the cases on Congress's enforcement power, the Supreme Court has held that Congress need only predicate its action on a *danger* to Fourteenth or Fifteenth Amendment rights, on a *likelihood* that particular circumstances might constitute a violation of protected rights. *South Carolina* v. *Katzenbach* allowed Congress to strike down South Carolina's literacy test even though the record contained no evidence that South Carolina had applied its voter qualification tests in any discriminatory way.[86] Sufficient for the Court was Congress's inference from various facts that South Carolina *might* use its literacy test to discriminate.[87] In *Katzenbach* v. *Morgan* as well, there was no certainty that disenfranchisement of Puerto Ricans would deprive them of equal provision of government services; the mere likelihood of deprivation of rights was enough.[88] Last Term the *City of Rome* decision allowed Congress to prevent electoral changes that created only "the *risk* of purposeful discrimination."[89] In order to define the unborn as persons, therefore, Congress need only find a likelihood that life begins at conception.

This standard makes perfectly good sense. If Congress discerns a likelihood or possibility that human life may be endangered by state action, it should certainly be able to take immediate action, rather than wait until the state of knowledge advances to the point that we can say for certain that it really is human life that we have been eliminating. Congress has often taken action to protect life when the uncertainties were at least as great as in the matter of abortions. Regulating the use of new, relatively untested drugs, regulating or refusing to regulate the use of tobacco, requiring passive restraint devices in cars — all such actions involve a calculation of the risk that human life will be lost without federal action, combined with a rough weighing of how much we value the possible risk of loss of human life. In all these decisions the protection of life conflicts with the convenience of many people. Sometimes, as for instance with drugs, the protection of persons from possible harmful effects conflicts directly with the grave medical needs of other persons. Decisions related to possible risks to human life are not only appropriate for Congress, they are far *more* appropriate for Congress than for the courts.

Second, it might be argued that Congress may not decide anything about the beginnings of life because the issue is inherently religious. To enact a statute for purely religious reasons, the argument goes, is to violate the Establishment Clause of the First Amendment. Professor Tribe advanced this argument in 1973 in an attempt to provide a rationale for *Roe* v. *Wade*.[90] Even if the argument were good constitutional law, it is by no means clear that it would properly apply to the issue of abortion. Certainly one does not have to hold any religious beliefs in order to be able to examine biological evidence on the development of unborn children — or to look at an aborted child — and conclude that the unborn are likely to be human life.

The argument fails even more decisively as a general rule of constitutional law. Professor Tribe himself subsequently retracted it as a rationale for the abortion cases, recognizing that it would impede the free expression of religious beliefs in the political arena.[91] Finally, the Supreme Court settled the issue last Term when it ruled that legislation related to abortions does not violate the Establishment Clause just because it "happens to coincide or harmonize with the tenets of some or all religions."[92]

Third, one might argue that no branch of government should

decide when life begins or decide whether abortions are acceptable; these decisions should instead be left to private individuals. For a court to espouse this view, however, *would* represent a decision as to when life begins. No society that values human life could permit private individuals to have the final say on the taking of innocent life. A court that rules out any role for Congress, the executive and the judiciary in protecting the unborn cannot pretend to be taking a neutral stand. If no branch of the government decides that the unborn are worth protecting, then the government implicitly decides that they are *not* human life. Since a decision must inevitably be made, the real question is which branch of government should make the decision. The answer to this question, as we have already seen, is the Congress.

A fourth argument against congressional action on this issue might proceed from the so-called "ratchet theory." Justice Brennan's opinion for the Court in *Katzenbach* v. *Morgan* set up a ratchet-like standard: Congress may expand Fourteenth Amendment rights but not restrict them. The enforcement clause of each Civil War amendment, under this theory, "does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' "[93] The Court did not explain why Congress is so limited, except to assert: "We emphasize that Congress's power under § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."[94]

Some congressional actions to enforce Fourteenth Amendment protection for unborn children might be thought to run afoul of the ratchet theory by abrogating the right to privacy.[95] The most simple and straightforward action Congress could take in this area, however, would not present this difficulty. Congress could simply declare that "life" is deemed to commence at conception and that "person" includes all human life, for purposes of the Fourteenth Amendment's protection of life. In effect the Fourteenth Amendment would then read: no state shall deprive any person (including unborn children) of life (which begins at conception) . . . without due process of law.

By its terms this type of legislation would bring about an *expansion* of Fourteenth Amendment rights. Such legislation would exert a collateral effect on the right to privacy, but it would not abrogate or infringe that right as the Supreme Court has interpreted it. Con-

gress's action would impose limits only on what *states* may do — it would limit the ability of states to perform abortions in institutions owned or operated by states and their subdivisions, and it would restrict funding of abortions by states. The Supreme Court has already held, however, that statutory limitations on government funding of abortion do *not* infringe the right to privacy.[96] The privacy right to "terminate a pregnancy" does not require the government to fund or provide any abortions.[97] Thus a statute such as the one proposed here, preventing states from continuing to fund abortions, does not abrogate or infringe the right to privacy. Such legislation would not prevent women from obtaining abortions, since privately performed abortions are not state action. While it can be debated whether Congress *may* reach private action as well as state action when it enforces the Fourteenth Amendment,[98] it is clear that both the Fourteenth Amendment and the statute suggested here, by their direct terms, apply only to state action and not to private acts of abortion.

It is true, of course, that the suggested statute would create a situation in which states have a compelling state interest in the protection of unborn life, sufficient to justify anti-abortion statutes should states choose to enact them. Once the unborn child's status as human life and as a person is established by a branch of the government exercising power to enforce the Fourteenth Amendment, the states then have a constitutional standard of "life" and "person" to which they can refer. As the Supreme Court acknowledged in *Roe* v. *Wade*, the state then has a valid interest in protecting unborn life, and any challenge to a state's anti-abortion statute collapses.[99]

To create a situation in which states have a compelling interest in protecting human life, however, would not constitute an abrogation of the right to privacy by Congress. Any state might then choose to protect the unborn child's life at the expense of the right to privacy, but no state would be compelled by Congress's action to do so. In effect, the proposed statute would make it clear that the privacy right to "terminate a pregnancy" conflicts with the life of the unborn child. This is not in itself a contraction of rights, but merely a recognition of reality. The fact is that the decision to abort an unborn child *does* conflict with the life of the unborn child. If the Supreme Court chooses to recognize a right to privacy in deciding whether to "terminate a pregnancy," and Congress decides that

human life begins at conception, then of course the right to privacy will conflict with the right to life.

Some supporters of *Roe* v. *Wade* have acknowledged the underlying conflict between the two rights, and have recognized that the real constitutional issue comes down to a choice between them. Justice Douglas observed: "The interests of the mother and the fetus are opposed. On which side should the State throw its weight?"[100] In *Roe* v. *Wade*, however, the Court did not face the choice between these rights, because it refused to decide when life begins. Once Congress decides that life begins at conception, or is likely to begin at conception, the basic choice is squarely presented. The choice, whichever branch of government makes it, should not depend on the fortuity of which branch was first in the race to express its opinion.[101] Instead, the choice should turn on whether the life of the unborn child is more important than the right of the mother to decide whether or not to terminate her pregnancy. The proposed statute leaves this choice to the states, informed by Congress's judgment that unborn children are human life and human persons.

Whether the choice between these rights is eventually made by state legislatures, by Congress, or by courts, the fact remains that the statute suggested here does nothing more than expand the Fourteenth Amendment's protection of life to make it clear that indeed we do face a conflict of rights. A contraction of the scope of life under the Amendment — by congressional or judicial action — would of course be grounds for the utmost concern. But an *expansion* threatens only to err on the side of compassion and justice, as Senator Hatfield has well remarked: "It is difficult to bring to mind an advocate of justice whom history has condemned for a too 'liberal' view of the range of human life and personhood."[102]

A fifth possible objection to this statute is the argument that Congress may not delegate its power to the states. Congress does have unquestionable authority, however, to take many actions within its delegated powers, which indirectly result in giving the states powers they would not otherwise possess. Cases arising from the Commerce Clause provide an example. Such cases arise typically after the Supreme Court has declared a state unable to regulate a particular type of commerce because of the need for national uniformity. Congress then passes a statute declaring the particular subject matter to be of the type that states *may* regulate. As a result of the statute, the state can exert a power from which it otherwise

would be foreclosed. The Supreme Court interprets this not as Congress delegating its power, but rather as Congress removing an obstacle to the state's exercise of its constitutional powers.[103]

In the area of abortions, the state's exercise of its police power to protect health and safety is blocked by an obstacle consisting of the lack of any compelling state interest for outlawing abortions. This obstacle exists only because neither the state nor the courts in *Roe* v. *Wade* were competent to define when human life begins. Once Congress performs this task under its Fourteenth Amendment power, no obstacle any longer exists to prevent the state from exerting its police power. Congress has not delegated any of its power — the police power was not its to delegate in the first place — but it has removed an obstacle to state exercise of a state power, just as in the Commerce Clause cases. This result is fully consistent with precedent. Congress and the states "were not forbidden to cooperate or by doing so to achieve legislative consequences, particularly in the great fields of regulating commerce and taxation, which, to some extent at least, neither could accomplish in isolated exertion."[104]

As a sixth objection, it might be argued that a mere declaration is not appropriate action to enforce the Fourteenth Amendment. But Congress may indeed choose to achieve its ends by declaration. It need not exert the full scope of its available power to enforce declared rights directly; it can leave implementation instead to the courts through the institution of legal action by other parties. For example, Section 10 of the Voting Rights Act of 1965 merely declared Congress's belief that poll taxes violate the Constitution. Congress did not require states to discontinue the use of poll taxes, but instead left implementation to the courts and authorized the Attorney General to file suits as appropriate.[105]

Congress has good reason to act by declaration without further enforcement in the matter of protecting unborn life under the Fourteenth Amendment. The only reason that many states are today depriving unborn children of life — by funding or providing abortions on demand — is that no branch of government has successfully defined when life begins. Once Congress declares that life is deemed to commence at conception, one can reasonably expect many states not only to halt state action that deprives the unborn of life, but also to invoke the compelling state interest in the protection of unborn persons, in order to prohibit private abortions.

It is appropriate, therefore, for Congress initially to trust the good

faith of the states to implement a congressional declaration that "person" and "life" include the unborn. Congress could well choose to delay any further enforcement action until it sees the extent of state compliance. Such a restrained action by Congress is well within Congress's discretion to decide "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[106]

The reasonableness of such action can perhaps best be seen by leaving the issue of abortion for a moment to consider a hypothetical. Suppose a federal court were to repeat the holding of *Dred Scott* today and decide that members of the black race do not have rights enforceable in court. Would it be unreasonable for Congress simply to declare that blacks are persons under the Fourteenth Amendment? Congress would not *have* to take specific measures to insure state compliance; it could simply assume that the states will act in good faith once the judicially-created obstacle to justice is removed.

That Congress chooses not to use the full scope of its powers against a perceived constitutional violation does not in any way undermine the validity of a declaratory statute. It might be argued that the proposed statute is irrational because it defines life and person for purposes of protection of life by the Fourteenth Amendment's Due Process Clause, but not for purposes of the Equal Protection Clause or the protection of liberty and property in the Due Process Clause. Congress does have power, though, to act in piecemeal fashion. On the issue of abortion it may be especially appropriate to do so.

Imagine this problem from the perspective of a Congressman who believes there is a likelihood that life begins at conception, but who is not certain. He might not see any urgent need to protect property and liberty rights which the unborn child cannot yet enjoy and which do not have the same paramount importance as the right to life. Further, the Congressman might not wish to extend to unborn children a guarantee of equal protection, which has no concrete meaning and will turn out to mean whatever the courts say it means. On the other hand, his perception that unborn children are likely to be human life becomes a much more compelling and urgent guide for public policy when the issue is the protection of life itself. Any legislator might rationally decide to protect against the risk that a human being may be deprived of life, even while refusing to protect immediately against an equal risk that a human being may be

deprived of other rights. Further, he might choose to protect unborn children from state action under the Fourteenth Amendment, before addressing the issue of protection under the Fifth Amendment against federal governmental action.[107] In choosing this approach, the legislator would find firm support in statements by the Supreme Court that "a statute is not invalid under the Constitution because it might have gone farther than it did,"[108] that a legislature need not "strike at all evils at the same time,"[109] and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[110]

## IV. Conclusion

All the constitutional considerations suggest that Congress would be well within the bounds of its authority were it to pass a Fourteenth Amendment enforcement statute defining "person" and "life" to include the unborn. The relative competence of the courts and Congress to decide when life begins suggests that Congress not only *can* do this, but *should*. It is because of the courts' limitations as fact-finders and policy-makers that they have left the nation without any answer to the question of when life begins. Since Congress does not share these limitations, it is positioned to fill this gap by serving as the proper institution to reflect and express society's answer to this question. By taking this initiative Congress could put an end to the great anomaly of our country's abortion policy since *Roe* v. *Wade*, a national policy founded on a non-answer to the most fundamental question underlying *any* abortion policy.

We should not delude ourselves, however, that the constitutional merit of such legislation assures its survival in the courts. For the past decade federal judges have not been noted for their reluctance to stretch the law in favor of abortions. Better than a statute would be an amendment to insure that our Constitution recognizes the unborn as human life.

Even an ironclad guarantee of status for the unborn as human persons, however, would not be foolproof protection against judges who are not committed to the idea that the worth of innocent human life is inviolable. One court, for instance, was willing to accept a legislative definition of unborn children as human beings, but nevertheless concluded that the state does not have a strong interest in protecting unborn human life. The court argued quite openly that "population growth must be restricted, not enhanced

and thus the state interest in pronatalist statutes such as these is limited."[111] The same judge was willing to belittle the worth of human life in "a fetus likely to be born a mental or physical cripple."[112]

For a judge who employs such reasoning and refuses to acknowledge the equal worth of all human life, it is just as easy to circumvent a constitutional amendment as a statute declaring the unborn to be human. That is one good reason to insure that federal judges are men and women who either respect the limitations of the judicial role enough to refrain from imposing their views of population control or eugenics on the rest of us. At the same time we should not delay in enacting whatever legislation is within Congress's constitutional powers, to protect the lives of the unborn. Although we cannot hope to cure at once all the mischief caused by courts in the area of abortions, we must at least take those actions that currently lie within our power.

## NOTES

1. 410 U. S. 113 (1973). For a critique of the Court's reasoning by a commentator not opposed to abortions, see Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," 82 Yale L. J. 920 (1973) (Reprinted in *The Human Life Review*, Vol. 1, no. 1, Winter 1975). A stinging attack on the widespread taking of unborn life since *Roe* v. *Wade* has been delivered by the co-founder of the National Association for Repeal of Abortion Laws (now the National Abortion Rights Action League), see B. Nathanson, *Aborting America* (1979).

2. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration of Independence.

3. See *Roe* v. *Wade*, 410 U. S. at 157-58.

4. *Id.* at 162.

5. *Id.* at 152-54.

6. *Id.* at 156-57.

7. *Id.* at 160.

8. *Id.* at 159.

9. U. S. Const., amend. XIV, § 5.

10. *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948).

11. *Id.* The "dominant considerations" in the political question doctrine are "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination." *Coleman* v. *Miller*, 307 U. S. 433, 454-55 (1939).

12. *Baker* v. *Carr*, 369 U. S. 186, 217 (1962).

13. *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948).

14. Clark, "Religion, Morality, and Abortion: A Constitutional Appraisal," 2 Loyola U. of L. A. L. Rev. 1, 9 (1969).

15. *Harris* v. *McRae*, 100 S. Ct. 2671, 2692 (1980).

16. See, e. g., *Gulf, C. & S. F. Ry.* v. *Ellis*, 165 U. S. 150, 154 (1897).

17. Cong. Globe, 39th Cong., 1st. Sess. 1089 (1866) (statement of Cong. Bingham).

18. Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard). See also Cincinnati Commercial, Aug. 27, 1866, at 1, col. 3 (address of Cong. Bingham at Bowerstown, Ohio, Aug. 24, 1866).

19. See, e. g., 12 Transactions of A. M. A. 73-77 (1859). See J. Mohr, *Abortion in America: The*

*Origins and Evolution of National Policy, 1800-1900*, at 165 (1978); J. Noonan, *A Private Choice: Abortion in America in the Seventies*, 52 (1979) (quoting minutes of A. M. A. annual meeting of 1859).

20. The Fifteenth Amendment provides:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

21. See *Fullilove* v. *Klutznick*, 100 S. Ct. 2758, 2774 (1980); *City of Rome* v. *United States*, 100 S. Ct. 1548, 1578 n.1 (1980) (Rehnquist, J. dissenting); *United States* v. *Guest*, 383 U. S. 745, 784 (1966) (opinion of Brennan, J.).

22. 360 U. S. 45 (1959).

23. See *id.* at 50-53. Appellant also raised a Seventeenth Amendment argument against the literacy test, with equal lack of success. See *id.* at 46, 50.

24. *Id.* at 51.

25. See *id.* at 50, 53.

26. See 42 U. S. C. § 1973b(a)-(d) (1976). Most of the areas covered by this formula turned out to be in the South. The *Lassiter* case also involved a southern state, North Carolina.

27. 383 U. S. 301 (1966).

28. See *id.* at 310-15, 333-34.

29. See *id.* at 329.

30. See *id.* at 333-34.

31. See *City of Rome* v. *United States*, 100 S. Ct. 1548, 1561 (1980). See also *id.* at 1575 (Powell, J., dissenting).

32. See 42 U. S. C. § 1973b(e) (1976). Although the section speaks generally of American flag schools teaching in languages other than English, it refers in effect to Puerto Rican schools. The state that used a literacy test to exclude graduates of such schools was New York.

33. Because Section 4(e) was introduced as an amendment to the Voting Rights Act on the floor of the Senate, it was debated only briefly and was not considered in congressional hearings. See 111 Cong. Rec. 11027-28, 11068-74 (1965).

34. 384 U. S. 641 (1966).

35. *Id.* at 649 (emphasis added).

36. U. S. Const., art. I, § 8.

37. See *Katzenbach* v. *Morgan*, 384 U. S. at 650-53.

38. See *id.* at 652-53.

39. See *id.* at 653-56.

40. *Id.* at 656 (emphasis added).

41. See *id.* at 650-51.

42. See *id.* at 648 & n. 7. "It is the power of Congress which has been enlarged." *Id.* at 648 (quoting *Ex parte Virginia*, 100 U. S. 339, 345, 1880).

43. See, e. g., Cox, "The Supreme Court 1965 Term, Foreward: Constitutional Adjudication and the Promotion of Human Rights," 80 Harv. L. Rev. 91, 106-07 (1966); Burt, "Miranda and Title II: A Morganatic Marriage," 1969 Sup. Ct. Rev. 81, 81.

44. Pub. L. No. 91-285, 84 Stat. 314, 318 (1970).

45. 400 U. S. 112 (1970).

46. See *Oregon* v. *Mitchell*, 400 U. S. 112, 216 (1970) (opinion of Harlan, J.).

47. See *id.* at 131-34 (opinion of Black, J.); *id.* at 147 (opinion of Douglas, J.); *id.* at 233-36 (opinion of Brennan, White, & Marshall, J. J.); *id.* at 282-84 (opinion of Stewart & Blackmun, J. J., and Burger, C. J.). See also *Gaston County* v. *United States*, 395 U. S. 285 (1969).

48. *Oregon* v. *Mitchell*, 400 U. S. at 240 (opinion of Brennan, White, & Marshall, J. J.).

49. 100 S. Ct. 2758, 2774 (1980).

50. *Id.* (quoting *Katzenbach* v. *Morgan*, 384 U. S. at 651).

51. 100 S. Ct. 1548 (1980).

52. See *id.* at 1553-54.

53. See *id.* at 1559.

54. See *id.* at 1560.

55. *Id.* at 1562.

56. *Katzenbach* v. *Morgan*, 384 U. S. at 649.

57. Cohen, "Congressional Power to Interpret Due Process and Equal Protection," 27 Stan. L. Rev. 603, 618-19 (1975). Another commentator describes this congressional role as "interpretive filling-out

of the underlying constitutional guarantee." Monaghan, "The Supreme Court 1974 Term, Foreword: Constitutional Common Law," 89 Harv. L. Rev. 1, 23 (1975).

58. *Id.* at 619.

59. *Id.*

60. See *id.* at 620.

61. See Bickel, "The Original Understanding and the Segregation Decision," 69 Harv. L. Rev. 1, 63 (1955).

62. See *Katzenbach* v. *Morgan*, 384 U. S. at 667-68 (Harlan, J., dissenting).

63. See *Oregon* v. *Mitchell*, 400 U. S. at 295-96 (opinion of Stewart, J. & Burger, C. J.).

64. See *City of Rome* v. *United States*, 100 S. Ct. at 1577-79, 1584-85 (Rehnquist, J., dissenting).

65. *Katzenbach* v. *Morgan*, 384 U. S. at 668 (Harlan, J., dissenting).

66. See *Oregon* v. *Mitchell*, 500 U. S. at 205-07 (opinion of Harlan, J.); *id.* at 294 (opinion of Stewart, J.).

67. See *City of Rome* v. *United States*, 100 S. Ct. at 1581 (Rehnquist, J., dissenting).

68. Justice Harlan discussed the relevance of this evidence to the constitutional determination in his later *Morgan* dissent. See 384 U. S. at 667-68 (Harlan, J., dissenting).

69. *Katzenbach* v. *Morgan*, 384 U. S. at 668 (Harlan, J., dissenting).

70. 370 U. S. 530 (1962).

71. See *Ex parte Bakelite Corp.*, 279 U. S. 438 (1929); *Williams* v. *United States*, 289 U. S. 553 (1933).

72. See *Gludden Co.* v. *Zdanok*, 370 U. S. at 536-37, 541-43.

73. *Id.* at 542.

74. *Id.* at 542-3.

75. The Thirteenth Amendment reads as follows:

> "Section 1. Neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> "Section 2. Congress shall have power to enforce this article by appropriate legislation."

76. 392 U. S. 409 (1968).

77. See *id.* at 440-41.

78. *Id.* at 440.

79. 427 U. S. 160 (1976).

80. See *id.* at 170 (opinion of the Court); *id.* at 186-87 (Powell, J., concurring); *id.* at 189-91 (Stevens, J., concurring); *id.* at 208 n. 13 (White, J., joined by Rehnquist, J., dissenting).

81. See *Fullilove* v. *Klutznick*, 100 S. Ct. at 2786 (Powell, J., concurring).

82. *Oregon* v. *Mitchell*, 400 U. S. at 206-07 (opinion of Harlan, J.).

83. There are, of course, areas of constitutional interpretation apart from the Civil War amendments in which Congress has taken the lead and the courts have followed. One recurring example is found when Congress differs from the Supreme Court in interpreting the extent to which the Commerce Clause prohibits certain kinds of state regulation or taxation. See, e. g., *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 423 (1946). Compare *Leisy* v. *Hardin*, 135 U. S. 100 (1890) with *In re Rahrer*, 140 U. S. 545 (1891).

84. 347 U. S. 483 (1954).

85. 163 U. S. 537 (1896).

86. See Cox, "The Role of Congress in Constitutional Determinations," 40 U. Cin. L. Rev. 199, 227 n. 100 (1971).

87. See *South Carolina* v. *Katzenbach* 383 U. S. at 326.

88. See 384 U. S. at 652-53.

89. 100 S. Ct. at 156,' (emphasis added).

90. See L. Tribe, "The Supreme Court, 1972 Term, Foreword: Toward a Model of Roles in the Due Process of Life and Law," 87 Harv. L. Rev., 1, 18-25 (1973).

91. See L. Tribe, *American Constitutional Law* 928 (1978).

92. *Harris* v. *McRae*, 100 S. Ct. 2671, 2689 (1980) (quoting *McGowan* v. *Maryland*, 366 U. S. 420, 442 (1961)).

93. *Katzenbach* v. *Morgan*, 384 U. S. at 651 n. 10.

94. *Id.*

95. For example, if Congress enacted a federal criminal statute to prohibit abortion, its action would collide with the right to privacy. On one occasion Congress has taken action arguably contrary to the ratchet theory. In the Omnibus Crime Control and Prevention Act of 1967, Congress differed from the

Supreme Court's view that police interrogation of a person in their custody is inherently coercive. See S. Rep. No. 1097, 90th Cong., 2d Sess. 60-61 (1968). The Supreme Court has not reviewed this provision.

96. See *Harris* v. *McRae*, 100 S. Ct. 2671, 2685-89 (1980).

97. See *id.* at 2688-89.

98. See *United States* v. *Guest*, 383 U. S. 745 (1966); Frantz, "Congressional Power to Enforce the Fourteenth Amendment Against Private Acts," 73 Yale L. J. 1353 (1964).

99. See *Roe* v. *Wade*, 410 U. S. at 156-57.

100. *United States* v. *Vuitch*, 402 U. S. 62, 80 (1971) (Douglas, J., dissenting in part).

101. See Cohen, *supra* note 59 and accompanying text.

102. *Proposed Amendments to the U. S. Constitution to Protect Unborn Children: Hearings on S. J. Res. 119 & S. J. Res. 130 Before the Subcomm. on Constitutional Amendments of the Senate Judiciary Comm.*, 93d Cong., 2d Sess., pt. 1, at 6 (1974) (statement of Sen. Hatfield).

103. See *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408 (1946).

104. *Id.* at 439. See generally Koenig, "Federal and State Cooperation Under the Constitution," 36 Mich. L. Rev. 752 (1938).

105. See 42 U. S. C. § 1973h (1976).

106. *Katzenbach* v. *Morgan*, 348 U. S. at 651.

107. The Fifth Amendment does not confer power on Congress to enforce its terms, but Congress may well have power to influence judicial interpretations of the Fifth Amendment's protection of life by informing the judiciary of its view on the beginnings of life.

108. *Roschen* v. *Ward*, 279 U. S. 337, 339 (1929), quoted in *Katzenbach* v. *Morgan*, 384 U. S. at 657.

109. *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 610 (1935), quoted in *Katzenbach* v. *Morgan*, 384 U. S. at 657.

110. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955), quoted in *Katzenbach* v. *Morgan*, 384 U. S. at 657.

111. *Abele* v. *Markle*, 342 F. Supp. 800, 803-04 (D. Conn. 1972) (three-judge-court).

112. *Id.* at 804.



84-581 O—81——16

*[The syndicated newspaper column below appeared in mid February, shortly after the publication of Mr. Galebach's article in* The Human Life Review. *It is reprinted here with permission (©1981 by the Universal Press Syndicate, 4400 Johnson Drive, Fairway, Kansas 66205).]*

# BREAKTHROUGH

In the current *Human Life Review*, a young scholar has articulated an approach to the abortion question which is a dazzling constitutional insight. The original idea, author Stephen Galebach modestly admits, emanated from Prof. George Carey of Georgetown, the renowned political scientist. But the careful explication and the thorough constitutional analysis are the work of Galebach, a graduate of Yale and of Harvard Law School, where he served as notes editor of the *Harvard Law Review* before clerking with the U.S. Circuit Court of Appeals of the District of Columbia. His 28-page article has 102 footnotes, where you would probably need 70 times 102 footnotes to persuade the American Civil Liberties Union that the phrase "the unborn child" is only one half "unborn," the second half being "child."

But Galebach's arguments are purely legal. One could read his article straight through without finding any justification for concluding that Galebach himself opposes abortion. All he says, simply, is that if the people of the United States, acting through their representatives in Congress, wish to undo Roe vs. Wade, in which the Supreme Court ruled that state abortion statutes are unconstitutional limitations on a woman's right to privacy, all Congress has to do is pass a simple statute defining "life."

No one questions that, under the Constitution, human life is protected. Twice: once from any assault by Congress; again from any assault by the states. The Fifth Amendment reads in part, "No person shall be . . . deprived [by Congress] of life, liberty, or property, without due process of law." The 14th guarantees that no "State [shall] deprive any person of life, liberty, or property, without due process of law."

In Roe vs. Wade, the Supreme Court protected itself by the simple expedient of saying: People disagree about what constitutes "life." That's true. The court went on to explain that inasmuch as there are differences among doctors, philosophers and theologians on the question, when does human life begin, the court is not competent to asseverate when it begins.

Very well. But this does not mean that therefore no one is competent to judge that question. People disagree about how high taxes ought to be, whether a dam should be built here or there, whether we should declare war. The question, in short, is political. It is all very well to say — and most people would agree — that there are more important criteria than political criteria. But it is these that govern. We lived under a Constitution that, for four score years, permitted the institution of slavery. We know now that slavery was wrong; but we do not challenge that anyone, in the days before the Emancipation Proclamation, who attempted to steal another man's slave, was legally guilty of theft.

The court, in Roe vs. Wade, acknowledged as much. "If the suggestion of personhood is

**William F. Buckley, Jr.**

established, the appellant's case, of course, collapses; for the fetus's right to life would then be guaranteed specifically by the amendment."

Now, in the days since 1973 much thought has been given to the question whether life should be understood as existing from the point of conception; or even at some point between conception and birth. It is a fairly safe generality that increasing scientific testimony is to the effect that the fetus is in most significant biological senses an individual human life. But that isn't a legal argument. The court, in more recent decisions, has upheld the responsibility of Congress to interpret its own obligations under the 14th Amendment even to the point of gluttony. Thus it upheld a section of the Voting Rights Act that rules that voter qualification tests were illegal in those states or countries in which fewer than 50% of the voting-age residents registered or voted in the 1964 elections. Indeed the court has gone so far (when it upheld the illegalization of literacy tests in English) as to acknowledge Congress' power to pre-empt a possible or likely deprivation of a citizen's right. Few people, this side of the ACLU, are likely to opt that abortion does not affect a latent right.

Galebach's essay is a stunning breakthrough. Legislation has been submitted. Let us proceed to face the question.

# The Constitutionality of Withdrawal of Lower Federal Court Jurisdiction In the Human Life Bill

By Stephen H. Galebach

The Human Life Bill withdraws lower federal court jurisdiction to grant declaratory or injunctive relief in certain types of abortion cases.[1/] The jurisdiction of the Supreme Court is expressly left intact. The effect will be to make state courts the original forum for injunction and declaratory judgment cases concerning abortion, and to ensure that the Supreme Court will have the benefit of the views of the state courts when it exercises its ultimate power of appellate review over decisions of the highest state courts involving questions of federal law.

This allocation of jurisdiction between state and federal courts in abortion cases will serve important interests in our federal system. Before 1973 the states had power to determine, at least in the first instance, what protection should be extended to unborn children. By recognizing unborn children as persons, the Human Life Bill will give states a constitutional justification for protecting unborn children once again. State action to protect unborn children is likely to be controversial, however, and will almost certainly be challenged in the courts. It makes sense to allow state courts to have the initial opportunity to resolve these challenges without interference from lower federal court injunctions or declaratory judgments. State courts are best suited to interpret state statutes in a way that

---

1/ The jurisdiction of the federal courts to grant other types of relief would not be affected.

carries out the will of the legislature while conforming to the requirements of the Constitution. Federal courts have less flexibility in this area because their interpretation of the requirements of state statutes cannot be authoritative. Congress has recognized this problem in other contexts and has enacted legislation prohibiting lower federal courts from interfering in areas where important state interests are concerned. See 28 U.S.C. §§ 1341-42 (prohibiting lower federal court injunctions against state taxes and administrative rate orders). Even in the absence of such a statute, the Supreme Court has recognized that there are occasions when lower federal courts should defer to state court proceedings so as to avoid unnecessary federal-state conflict. See, e.g., Younger v. Harris, 401 U.S. 37 (1971) (requiring lower federal courts to abstain from issuing an injunction against a state criminal prosecution challenged on First Amendment grounds); and Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) (requiring lower federal courts to abstain from passing on a constitutional challenge to state administrative action so that state courts would have the initial opportunity to decide the issues presented by the challenge).

The lower federal courts have no monopoly of the wisdom required to interpret the Constitution. This is particularly so when the controversy concerns criminal laws protecting human life and family laws concerning the relationship between a woman, her unborn child, and perhaps the father or guardian of the unborn child. Matters of this kind have traditionally been resolved by the states, not by the federal government. Reserving such matters to state courts in the first instance will not jeopardize constitu-

tional rights, because, under Article VI of the Constitution (the Supremacy Clause), state courts are bound by the Constitution just like federal courts.[1/] The Supreme Court, moreover, will retain its power of appellate review over questions of constitutional interpretation. Its deliberations may well benefit from the opportunity to consider the views of state courts on matters traditionally resolved under state law.

The constitutionality of this measure cannot be seriously challenged under existing precedent. The power of Congress to limit the jurisdiction of lower federal courts has been sustained in every Supreme Court decision in which the issue was presented; and the Court has endorsed this power in the broadest terms. See, e.g., Palmore v. United States, 411 U.S. 389, 401 (1973) (Congress has the sole power of creating inferior federal courts and of "withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper and to the public good"); and Sheldon v. Sill, 8 How. (40 U.S.) 440 (1850) ("Congress may withhold from any court of its creation any of the enumerated controversies").

There is clear precedent for Congressional legislation to remove a particular class of controversies from

---

1/ This analysis assumes that state court systems can provide speedy adjudication of suits for injunctive and declaratory relief, with speedy review by means of interlocutory appeals if necessary. Speedy adjudication is of particular concern in the context of abortions, since an abortion delayed is an abortion denied, and an abortion performed is a human life irrevocably ended. If any states fail to provide such speedy review, it might be held under the reasoning of Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948) (see discussion below), that lower federal court jurisdiction was constitutionally required with respect to that particular state. As to other states the jurisdictional limitation would still be valid.

the federal courts. The Norris-La Guardia Act, for example, withdrew jurisdiction from the federal courts to issue injunctions in labor disputes. The Supreme Court sustained the constitutionality of the Act in Lauf v. E. G. Shinner & Co., 303 U.S. 323, 330 (1938).

Some distinguished judges and commentators have argued that there are limits to the power of Congress to define the jurisdiction of the lower federal courts. None of these theories has ever been endorsed by the Supreme Court. Nevertheless, it is worth noting that the Human Life Bill is consistent with most of the theories concerning possible limits to the scope of Congress' power to withdraw lower federal court jurisdiction.

In Martin v. Hunter's Lessee, 1 Wheat (14 U.S.) 304 (1816), Justice Story suggested that Congress must vest jurisdiction over every federal claim in some federal court -- either in a court of original or of appellate jurisdiction. The Supreme Court has consistently rejected this view. See Palmore v. United States, 411 U.S. 389, 401 n.9 (1973). But Justice Story's test is satisfied here in any event because the Human Life Bill maintains the Supreme Court's appellate jurisdiction over federal claims arising in abortion controversies.

Hart and Wechsler have argued that Congress may constitutionally remove lower federal court jurisdiction only when a state forum is available and there is an ultimate right of Supreme Court review. See Hart & Wechsler, The Federal Courts and the Federal System 309-65 (2d ed. 1973). This theory has merit as a policy matter, since it ensures an ultimate possibility of Supreme Court review for all federal claims; but the theory once again is not sup-

ported by existing Supreme Court precedent. Cf. Ex parte McCardle, 7 Wall (74 U.S.) 506 (1869) (broadly sustaining the constitutionality of legislation limiting the appellate jurisdiction of the Supreme Court). The Human Life Bill satisfies the Hart and Wechsler theory because state forums are available for abortion controversies and the Supreme Court retains the power of appellate review.[1/]

The United States Court of Appeals for the Second Circuit has suggested that Congress may not withdraw jurisdiction in a manner that deprives any person of life, liberty, or property without due process of law. See Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir), cert. denied, 335 U.S. 887 (1948). The suggestion was made in the context of a case arising from the Portal to Portal Act, which prohibited judicial review by all courts, whether state or federal. The Battaglia standard is satisfied by the Human Life Bill because state courts, subject to the Supreme Court's ultimate power of appellate review, provide an adequate guarantee that all due process rights will be protected.

Rotunda has argued that Congress may not by withdrawing jurisdiction "restrict substantive rights that it

1/ If state courts refused to resolve an abortion controversy, they could be ordered to do so by the Supreme Court. See, e.g., Testa v. Katt, 330 U.S. 387 (1947); and General Oil Co. v. Crain, 209 U.S. 211 (1908). A problem might arise, however, if an abortion case was brought against a federal official to enforce federal rights. State courts lack jurisdiction over such disputes. See Tarble's Case, 13 Wall. (80 U.S.) 397 (1871). Since the Human Life Bill withdraws jurisdiction only in cases arising out of state action -- enforcement of state laws and municipal ordinances -- the Bill will not deprive lower federal courts of jurisdiction over cases challenging actions of federal officers. Cf. Redish & Woods, Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis, 124 U.Pa.L.Rev. 45 (1975) (arguing that Congress may withdraw jurisdiction from lower federal courts except for cases involving actions of federal officers over which state courts do not have jurisdiction).

could not directly affect." See Rotunda, Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing, 64 Geo.L.J. 839, 842 (1976). While this argument is not without some force, it has no express Supreme Court support. For example, few would argue that the Norris-La Guardia Act did not have a major effect on substantive rights relating to labor disputes. Nonetheless, the Rotunda test is satisfied by the Human Life Bill. Requiring initial resort to state courts in abortion controversies directly affects only the procedures for resolving abortion controversies. The goal is to improve the ultimate decision on the merits by taking advantage of state court expertise in construing state laws and in evaluating difficult questions of criminal and family law. The Human Life Bill does not attempt to use power over jurisdiction as a means of coercing a particular decision on the merits. Cf. United States v. Klein, 13 Wall (80 U.S.) 128 (1872) (Congress cannot use a jurisdictional statute to compel a court to decide a case in a manner that violates the Constitution).

Finally, Eisenberg has argued that changed circumstances have now made it imperative that Congress vest lower federal courts with complete jurisdiction over all federal questions. See Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J.498 (1974). This extreme argument finds no support in the Constitution or in Supreme Court precedent, and it goes far beyond the limits urged by other scholars. To adopt this view, the Supreme Court would have to reverse over 150 years of precedent.

To be sure, Congress has not often exercised its power to remove a particular class of controversies from the jurisdiction of the lower federal courts. This restraint can probably be attributed to the great respect Congress properly has for the important role that the lower federal courts play in guaranteeing and enforcing constitutional rights. Widespread use of Congress' jurisdictional powers might impair that role. But when special considerations justify the use of state courts as the initial forum, Congress is not restrained by the Constitution or by Supreme Court precedent from restricting the jurisdiction of lower federal courts.

As pointed out above, Congress has strong reasons to provide that state courts should be the initial forum for cases involving abortions. There is no reason to distrust the good faith and judgment of state courts to resolve the issues that will arise when states enact and enforce anti-abortion legislation. Nor is there reason for Congress to believe that the Supreme Court's power of appellate review will not provide adequate protection for constitutional rights. State courts are fully capable of compiling an adequate factual record for Supreme Court review. Any final decision on the merits by the Supreme Court will guide the state courts in their adjudication of abortion cases. State courts have not attempted to evade federal abortion decrees in the past. There is no reason to believe they will do so in the future.

The limitations in the Human Life Bill on the jurisdiction of lower federal courts are therefore well within the constitutional powers of Congress.

Senator EAST. If it is suitable with the panelists, the original order here is Mr. Galebach, Mr. Tribe, Mr. Noonan, and Mr. Van Alstyne. If that is suitable with you, Mr. Noonan, we will then proceed with Mr. Tribe. In organizing this, the staff thought it would make a more coherent presentation.

Mr. Tribe, we turn to you and welcome you.

## STATEMENT OF LAURENCE H. TRIBE, PROFESSOR OF LAW, HARVARD UNIVERSITY, CAMBRIDGE, MASS.

Mr. TRIBE. Thank you very much, Senator.

Mr. Chairman, Senator Baucus, I appreciate the opportunity to be here today. I do want to abide by your suggestion that we not read our statement. Let me simply submit it for the record and highlight what I think are several fundamental propositions and several extraordinary misunderstandings in the view we have heard ably summarized by Mr. Galebach.

### RESPECT FOR CONSTITUTIONAL PROCESS UNITES DIVERSE FOES OF S. 158

I might begin by raising essentially a rhetorical question, although I think it is ultimately a genuine one. We have heard how divisive, complex, difficult, and troublesome the issue of abortion is. Surely it is not the kind of issue that generates consensus.

Yet, in the face of that, does it not seem remarkable that this is the one issue in this century that has generated consensus among six former Attorneys General of the United States, and among a dozen of the leading constitutional scholars in the United States, groups whose members hold the most diverse and varied views on the subject of abortion, but all of whose members have told this subcommittee that they are convinced that, however well-intended S. 158 is clearly unconstitutional?

If one wonders why it is that an issue so divisive would generate such consensus, it seems to me one is likely to conclude that there is a deep reason. The reason is respect for the constitutional process, a respect that transcends conflicting views about the abortion issue.

### STATUS OF FETUS UNDER ROE *v.* WADE A QUESTION OF LAW NOT FACT

With that as a preface, it seems to me useful to begin with the suggestion of the Chair that this is after all a modest approach. I would agree in general that it is intelligent and reasonable not simply to leap to a constitutional amendment the moment one is in distress about a decision of the Supreme Court. If there is a modest, reasonable legislative solution, by all means try it.

The question here is: Is there a reasonable, modest legislative solution? I am convinced that there is not. I am convinced that there is not because of the Supreme Court's decision in *Roe* v. *Wade*, which, right or wrong, has been fundamentally mischaracterized before this subcommittee.

The Court, it is true, expressed its inability to give a definitive answer to what it took to be an unanswerable question: When does human life begin?

Mr. Galebach says that some branch of Government must be able to decide this intimate moral question; but I have thought if we have learned anything in the modern era, it is that sometimes Government does not have an answer and cannot have an answer.

The fact that a question is profound and important does not mean that Government must tell us how to answer it. The whole point of the Supreme Court's decision in 1973 was not simply one of judicial incapacity, for right after the Court said that it was unable to answer the question of when human life begins, the Court explained that what it really meant was that no State, by adopting its own answer to that question—choosing one theory of life rather than another—could be permitted to override the fundamental right of the pregnant woman to give an answer for herself.

One may disagree with that view. One may disagree with the view that this fundamental question must be left to the woman. However, if one disagrees with that view, one is not disagreeing on a question of fact—What is the fetus? What is a human being?—but on a basic proposition of constitutional law.

The only way to undo a proposition of constitutional law announced by the Court is by constitutional amendment, not by legislative redefinition of constitutional language and not by waving the magic wand of section 5 of the 14th amendment and saying, "We will now inform the Court as to what the fertilized ovum is."

The Court was not in a deep, dark mystery on that question. It is not as though the Court labored under the misapprehensions of an Aristotle, believing that until some late point in pregnancy the fetus was inert, not alive. There was confusion about that.

I think it is instructive, in this connection, that the National Academy of Sciences at its 118th annual meeting adopted an extraordinary resolution, a resolution which stated that the bill now before this subcommittee purports to derive its conclusions from science, but it deals with a question to which science can provide no answer.

The question of when human life begins is a shorthand for a profound, tragic moral puzzle, one which the Supreme Court said was not for Government to decide.

### CONGRESS NO FREER THAN THE STATES TO OVERRIDE WOMAN'S RIGHT TO CHOOSE

Even if it were true somehow that under section 5 of the 14th amendment Congress had the power to give an answer which would then elicit due respect from the Supreme Court, what one has to remember is that Congress' answer would itself be no better than an answer a State legislature can give.

I find it extraordinary that in a period when so many are struggling to find new ways of restoring power and autonomy and responsibility to the States the thesis should be propounded in defense of S. 158 that the fundamental power of the States to preserve and protect human life and all persons is somehow inferior to the power of Congress under section 5 of the 14th amendment.

On the contrary, the Court has repeatedly held that, whatever the affirmative source of the authority, the Congress of the United States comes before the bar of justice with no greater claim over

matters of life and liberty than does any one of the 50 sovereign States of the Union

Thus the same standard that led the Supreme Court to say that it was a deprivation of a woman's liberty without due process of law for a State to impose its theory of life on a woman would surely lead the Court to say that it is an identical deprivation of such liberty for the Congress of the United States to impose upon a woman its own answer to the question of when life begins.

It seems to me that as mysterious and puzzling as the moral issues are, the legal issue is extraordinarily clear. It is for that reason that there is such an extraordinary convergence of otherwise disputatious and divergent scholars and chief law enforcement officers of this country in coming to a single view on the matter.

### INVALIDITY OF S. 158'S ATTEMPT TO BLOCK FEDERAL JUDICIAL ENFORCEMENT OF ROE *v.* WADE

Let me say a word or two about section 2 of S. 158 because that provision, I think, is also a concern to this subcommittee.

Section two would attempt to prevent lower Federal courts from issuing declaratory or injunctive relief to protect the rights that women were declared to have under *Roe* v. *Wade* under section 2 of the bill. Women seeking abortions could not obtain declaratory or injunctive relief to prevent the enforcement of a restrictive abortion law.

That provision, it seems to me, is as unconstitutional as section 1, redefining "person" under the 14th amendment. The purpose of section 2 is transparent. It is not simply to channel cases dealing with abortion to the State courts. In the words of Chairman East in a question and answer memorandum that I understand was released on April 23, the purpose, quite transparently and, I think, candidly stated, is to assure continued enforcement of a State law outlawing abortion until the Supreme Court itself has ruled on the constitutionality of S. 158. That is its purpose.

Its structure is completely asymmetrical. It does not take abortion questions out of the Federal courts. Rather, it enlists the Federal courts in an antiabortion crusade.

However well-meaning, however ultimately right, perhaps, morally, that is what it does. It does so because, for example, as Senator Baucus pointed out in his questions to Congressman Dougherty, S. 158 would define all fetuses as human beings, as persons from the moment of conception, and if it were to be upheld, it would obviously mean that the State cannot pay for terminating their lives, cannot subsidize abortion of any kind.

A guardian of a fetus or a father could go into Federal court and obtain an injunction to prevent the expenditure of public moneys on abortion. If, for example, a State were to pass various restrictions on abortion but provide a public abortion subsidy, the guardian or the father could go to Federal court to prevent the expenditure of public money on abortion, while the woman could not get similar relief from that Federal court. The deck would thus be completely stacked against her.

It seems to me quite clear that section 2 of the bill is not a housekeeping jurisdictional provision as such. It is essentially a provision designed to assure that until and unless the U.S. Su-

preme Court strikes this law down, the rights that women were deemed to have had under *Roe* v. *Wade* could not be protected injunctively or through declaratory relief.

### CONGRESS SHOULD NOT PASS S. 158 IF IT EXPECTS SUPREME COURT TO INVALIDATE THE LEGISLATION

It is no answer to say that, of course, if it is unconstitutional, as all those experts seem to say and as the six ex-Attorneys General seem to say, then quickly, by an expedited means, the Supreme Court will tell us so.

That kind of buckpassing, if I may say so, is not really worthy of this Congress. If it is the best judgment of Congress that this measure is not constitutional, as the Court has thus far construed the Constitution, then the only responsible path is constitutional amendment, not sending up a constitutional trial balloon that pro- and anti-*Roe* v. *Wade* scholars alike agree is certain be be shot down.

### S. 158 WOULD NOT RESTORE STATE AUTONOMY IN ABORTION CONTEXT

Let me close with a concern that I have that would persist even if this law were to be upheld, even if it were deemed to be constitutional.

I believe that S. 158 is inherently and unavoidably defective as measured by its own aims. I think the chairman stated the reasonable aims in a way that I found almost compelling when he said that we are simply trying to return to the States a matter that perhaps ought never to have been taken over by the Federal Government in the first place. If these matters are divisive, if they are unclear, why try to resolve them nationally? Why not decentralize?

However, observe that that is not, despite its intentions, what this law does. To begin with, on the matter of State and local funding for abortions, the law leaves States no choice. In Massachusetts and in California, the State constitutions require public funds to be expended without discrimination against abortion. Under this law, spending on abortion would be forbidden because that would, if this law were upheld, amount to State action which destroys the lives of persons.

To that degree at least, the matter is suddenly nationalized and not restored to its condition as it was in 1973.

Even more fundamentally, if I may just read from the bill for a moment, it says:

> For the purpose of enforcing the obligation of the States under the 14th amendment not to deprive persons of life without due process, human life shall be deemed to exist from conception.

This talks about the obligation of the States. I have heard it said repeatedly in support of S. 158 that it would be up to the State legislatures. If the State legislatures chose not to do anything about the destruction of fetuses—which this statute declares to be human persons from the moment of conception—that would be just fine, proponents of S. 158 assert.

I submit that this is not a responsible reading of the bill's language. If the Constitution says, as Mr. Galebach reminds us, that

"persons," once we have agreed that beings are "persons," may not simply be abandoned by the State to wanton slaughter, it would surely follow once we declared that the fetus was a "person" from the moment of conception without regard to "condition of dependency," that for the State to declare open season on fetuses, and to say we are not going to prosecute those who kill them, would be a deprivation of life without due process of law.

Moreover, there is nothing I can find in this bill, despite the stated intention of its supporters not to interfere with use of the IUD and the morning-after pill, to sustain a distinction between "persons," as fetuses would become if this bill were upheld—persons in the first week after the fertilization of the ovum, even before implantation in the uterine wall.

If a State were to say we just do not care about very early abortion and will not do anything about it, I submit that, if this law were upheld, it would be a snap, a trivial matter, to go into a Federal court and get an injunction to declare unconstitutional the discriminatory policy of nonprotection of the fetus immediately after the fertilization of the ovum.

It will be said that this is not the bill's purpose, but, as the Supreme Court of the United States reminded Congress not long ago in the snail darter case, *TVA* v. *Hill*, when the language of the statute is clear, the fact that Congress may not have intended that it go quite that far will not necessarily save it.

I make this point not because I am trying to pick the statute apart as a law professor. My point is that this and the other problems I have described as to the mismatch between S. 158's purposes and its likely effects all trace to the fact that Congress knows that it cannot simply say, "*Roe* v. *Wade* is hereby overruled."

So what does Congress do? The only way, short of an amendment, for Congress to achieve the result it seeks is by giving the status of personhood to the fertilized ovum. However, when it does that, it is caught in a hopeless dilemma.

On the other hand, Congress puts all the States in a straitjacket and requires them to treat even the use of a morning-after pill as the destruction of a human being—that is, homicide—or it invites the States to pack and choose among persons, that is, to decide that some persons are not worthy of protection.

I submit that is the kind of precedent that this Congress does not want—in effect to say it is OK for States to leave some persons utterly unprotected. There is a dilemma: Either, having declared fetuses to be persons without regard to dependency, the Congress places the States in a straitjacket far more severe even than that of *Roe* v. *Wade*; or Congress creates a draconian, nightmarish precedent of saying, "Now we recognize that personhood has been broadened, but we will allow States, if they wish, to leave some persons utterly unprotected."

## CONCLUSION

It seems to me this measure is clearly unconstitutional. That it would be so held by the Supreme Court is not a matter of guesswork. It is not a responsible thing, however well-intentioned, for this Congress to do. I would regard it as a very sad day were this

very serious, difficult issue to become the occasion for futile confrontation between the Congress and the Supreme Court, with a predictable outcome—one that would not enhance respect for either body, and one that would not advance the cause either of women or of unborn life.

Thank you.

Senator EAST. Thank you, Professor Tribe.

[The prepared statement of Professor Tribe follows:]

## Prepared Statement of Laurence H. Tribe

### Introduction

I am a professor of constitutional law at Harvard University and am the author of the treatise, American Constitutional Law (Foundation Press, 1978). I am honored to have been invited by the Subcommittee to testify on the constitutionality of S.158, a bill

> [t]o provide that human life shall be deemed to exist from conception.

My conclusion will come as no surprise to the Subcommittee inasmuch as I was among the twelve scholars* who signed a letter that was sent to Senators East and Baucus, Chairman and Ranking Minority Member of the Subcommittee, on April 21, 1981, stating:

> Our views about the correctness of the Supreme Court's 1973 abortion decision vary widely, but all of us are agreed that Congress has no constitutional authority either to overturn that decision by enacting a statute redefining such terms as 'person' or 'human life,' or selectively to restrict the jurisdiction of federal courts so as to prevent them from enforcing that decision fully. We thus regard S. 158 and H.R. 900 as an attempt to exercise unconstitutional power and a dangerous circumvention of the avenues that the Constitution itself provides for reversing Supreme Court interpretations of the Constitution.**

I should like to explain here why I hold these views, and then to answer any questions members of the Subcommittee may have about the matter.

---

* The other eleven were Paul Brest, John Hart Ely, Paul A. Freund, Erwin N. Griswold, Louis Henkin, Philip B. Kurland, Louis B. Schwartz, Telford Taylor, William Van Alstyne, Harry H. Wellington, and Charles Alan Wright.

** On May 1, 1981, a letter signed by six former United States Attorneys General was sent to Senators East and Baucus joining this statement. They are Herbert Brownell, Jr. (Atty. Gen., 1953-57); Nicholas Katzenbach (Atty. Gen., 1965-66); Ramsey Clark (Atty. Gen., 1967-68); Elliot L. Richardson (Atty. Gen., 1973); William B. Saxbe (Atty. Gen., 1973-74); Benjamin R. Civiletti (Atty. Gen., 1979-81).

The Constitutionality of Section 1

In Section 1 of S.158, Congress

> finds that present-day scientific evidence indicates a significant likelihood that actual human life exists from conception,

and that

> the fourteenth amendment to the Constitution of the United States was intended to protect all human beings.

Congress then

> declares that for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, human life should be deemed to exist from conception, without regard to race, sex, age, health, defect, or condition of dependancy; and for this purpose 'person' shall include all human life as defined herein.

In substance, Section 1 attempts to enshrine a congressional "theory of life" so as to "override the rights of the pregnant woman" under Roe v. Wade, 410 U.S. 113, 162 (1973) -- precisely what the Supreme Court in Roe held a state powerless to do.*

The fact that Section 1 might operate merely as an authorization for the states to restrict the rights of pregnant women rather than as a direct restriction mandated by Congress itself is immaterial, since the Due Process Clause of the Fifth Amendment forbids Congress either to do by itself what the Fourteenth Amendment would prohibit states from doing or to license the states to do what, absent congressional permission, they would be prohibited by the Fourteenth Amendment from doing.**

The only possible argument supporting the constitutionality of S.158, Section 1, is that Katzenbach v. Morgan, supra, somehow empowered Congress to restrict the rights of women, or to autho-

---

* See also Doe v. Israel, 482 F.2d 156 (1st Cir. 1973) (a state clearly acts unconstitutionally when it attempts to enforce abortion restrictions equivalent to those invalidated by Roe by enacting a measure declaring that "human life commences at the instant of conception"), cert. den., 416 U.S. 993 (1974).

** See Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Shapiro v. Thompson, 394 U.S. 618, 641-42 (1968); Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966).

rize states to do so, in circumstances where states would otherwise be constitutionally forbidden to take such action. Even if Morgan had not been considerably restricted by Oregon v. Mitchell, 400 U.S. 112 (1970); id. at 295-96 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in part and dissenting in part), that decision obviously would not endow Congress with blank-check authority to restrict one set of judicially-declared rights upon Congress' decision, by majority vote, to proclaim another set of "rights" into existence.

This is so for three reasons. First, however expansive may be Congress' power, under Section 5 of the Fourteenth Amendment, to make empirical determinations that might have eluded the courts or to create remedial structures that the courts may have been unprepared to require on their own, no corresponding power exists simply to reject, as a legislative matter, a legal conclusion reached by the Supreme Court as to the proper interpretation of constitutional language:

> It is emphatically the province and duty of the judicial department to say what the law is,

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), a duty in which "the federal judiciary is supreme," Cooper v. Aaron, 358 U.S. 1, 18 (1958), see also United States v. Nixon, 418 U.S. 683, 704-05 (1974), not least because:

> Congress is subject to none of the institutional restraints imposed on judicial decisionmaking; it is controlled only by the political process. In Article V, the Framers expressed the view that the political restraints on Congress alone were an insufficient control over the process of constitution making. The concurrence of two-thirds of each House and of three-fourths of the States was needed for the political check to be adequate. To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure.

Oregon v. Mitchell, supra, 400 U.S. at 205 (Harlan, J., concurring in part and dissenting in part).

Second, the premise of S.158, Section 1, viewed as a purported exercise of Section 5 power, is the extraordinary proposition that

the identification of human life or personhood, as a basis for justifying restraints upon the freedom, equality, and bodily integrity of a pregnant woman, is an empirical matter -- one which "present-day scientific evidence" might somehow resolve. Suffice it to say, however, that such questions as when "human life" exists, or what is a "person," call at bottom for normative judgments no less profound than those involved in defining "liberty" or "equality." In this context, therefore, one cannot escape the conclusion that identifying "human life" and defining "person" entail "question[s] to which science can provide no answer," as the National Academy of Sciences itself acknowledged in a Resolution passed on April 28, 1981, during its 118th Annual Meeting.* Congress cannot transform an issue of religion, morality, and law into one of fact by waving the magic wand of Section 5. The section empowering Congress "to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment no more authorizes Congress to transmute a matter of values into a matter of scientific observation than it authorizes Congress to announce a mathematical formula for human freedom.

Third, even if S.158, Section 1, were deemed to fall within the ambit of Congress' affirmative authority -- under Section 5 of the Fourteenth Amendment or otherwise -- it would still be subject to judicial invalidation as a clear violation of the Liberty Clause of the Fifth Amendment, a clause that restricts Congress in precisely the same manner that, and to precisely the same degree as, its counterpart clause in the Fourteenth Amendment restricts

---

* "It is the view of the National Academy of Sciences that the statement in Chapter 101, Section 1, of U. S. Senate Bill S158, 1981, cannot stand up to the scrutiny of science. This section reads 'The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception.' This statement purports to derive its conclusions from science, but it deals with a question to which science can provide no answer. The proposal in S158 that the term 'person' shall include 'all human life' has no basis within our scientific understanding. Defining the time at which the developing embryo becomes a 'person' must remain a matter of moral or religious values."

the states.* Any other approach would simultaneously denigrate the place of each state as

> a coordinate element in the system established by the Framers for governing our Federal Union,

National League of Cities v. Usery, 426 U.S. 833, 849 (1976), and jeopardize the personal rights and liberties whose fate the Framers wisely declined to leave entirely to a Congress unchecked by judicial review. See A. Hamilton, The Federalist No. 78; 12 The Papers of Thomas Jefferson 438, 440 (J. Boyd ed. 1958); 14 id. 659.

Nor could the delegation of judicially unchecked power to Congress over such rights and liberties be confined to cases in which the judiciary has candidly confessed, as it did in Roe v. Wade, supra, 410 U.S. at 159, its inability to give determinate meaning to constitutional terms like "life." For when Congress acts to override, or to invite states to override, the "liberty" of pregnant women, it does not merely "inform the judiciary," in the words of Senator Hatch (Cong. Rec., April 10, 1981, p. S3913), of its legislative findings and views. Congress is empowered only to make laws, not to lobby or advise the courts. And if a law made by Congress can redefine terms in this one area so as to entrust to majority vote or other governmental determination a matter that the Supreme Court has held individual women entitled to resolve for themselves, then Congress has equal power to effectuate such a divestment of personal rights in other areas as well -- regardless of the Supreme Court's degree of confidence or perplexity.

The only way to avoid that radical and profoundly threatening conclusion is to insist that any Act of Congress, even if that Act constitutes otherwise "appropriate legislation," be subject to judicial review for its consistency with the liberties secured by the Bill of Rights, under criteria no less demanding than those under which state legislation of similar effect would be scrutinized.

* See, e.g., United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 534-35 & n.7 (1973); id. at 538-45 (Douglas, J., concurring); Aptheker v. Secretary of State, 378 U.S. 500, 505-09, 514 (1964).

For these reasons, Section 1 seems to me clearly unconstitutional.

The Constitutionality of Section 2

In Section 2 -- which S.158, Section 3, expressly makes severable from Section 1 but the intent of which is, of course, illuminated in part by its juxtaposition with the latter -- Congress decrees that

> [n]otwithstanding any other provision of law, no inferior Federal court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in any case involving or arising from any State law or municipal ordinance that (1) protects the rights of human persons between conception and birth, or (2) prohibits, limits, or regulates (a) the performance of abortions, or (b) the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions.

This portion of S.158, too, seems to me unconstitutional -- despite Congress' sweeping authority, under Article I, Section 8, and Article III, Section 1, to regulate the jurisdiction of the inferior federal courts. Neither Congress' power over such jurisdiction, nor its equally "plenary power over bankruptcy," United States v. Kras, 409 U.S. 434, 441 (1973), prevented the Supreme Court from there scrutinizing the substantive validity, under the Due Process Clause of the Fifth Amendment, of an Act of Congress making a federal judicial discharge in voluntary bankruptcy unavailable to a litigant unable to pay the filing fee.*

The plain infirmity of Section 2 of S.158, as a matter of Fifth Amendment due process, is that it unmistakably disadvantages a particular group -- pregnant women seeking to exercise federal rights recognized by Roe v. Wade, supra -- by imposing on that

---

* That a narrowly divided Court in Kras upheld the filing fee requirement as reasonable, in part because intimate marital and reproductive rights were not at issue, 409 U.S. at 444-45, is immaterial to the fact that all nine Justices recognized the need to review the judicial door-closing rule enacted by Congress -- by applying established criteria of Fifth Amendment due process and equal protection.

group a more onerous and time-consuming path to the anticipatory vindication of its federal rights (i.e., a path exclusively through the state courts, with federal judicial review available, if at all, only in the Supreme Court) than the path S.158 leaves open to groups on the other side of the same issue -- such as fathers or guardians of fetuses seeking to prevent impending abortions allegedly supported by state funds or encouraged by a policy of non-enforcement of the murder laws in abortion cases. Cf. Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973). These latter groups are left entirely free by Section 2 of S.158 to seek and obtain timely anticipatory relief, declaratory and/or injunctive, from the very federal courts whose doors Section 2 closes to women invoking Roe v. Wade, and in the very cases in which those doors are closed to such women.

To tip the scales of legal redress in this way is to disadvantage a protected group in violation of the constitutional norm of equal treatment under law.* Moreover, to do so in a manner that in effect penalizes the exercise of a federal constitutional right itself violates that right.** And, finally, embedding such substantive discriminations and penalties in a jurisdictional regulation violates the separation-of-powers principle that Congress may not employ its jurisdiction-controlling authority as a mere "pretext," McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423

---

* See Hunter v. Erickson, 393 U.S. 385, 390-91 (1969)(unconstitutional to

> "disadvantage[] those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor,"

even where

> "the law on its face treats Negro and White, Jew and gentile in an identical manner").

** See Shapiro v. Thompson, supra, 394 U.S. at 631 (penalty on right to travel); United States v. Jackson, 390 U.S. 570, 583 (1968)(penalty on right to plead innocent and demand trial by jury); Griffin v. California, 380 U.S. 609, 614 (1965)(penalty on right to remain silent at trial).

(1819), for substituting its legal views for those of the federal judiciary.*

For all of these reasons, I am persuaded that S.158, Section 2, would, like Section 1, be an unconstitutional exercise of Congress' power -- an effort to circumvent the carefully guarded and deliberately resistant mechanism provided by Article V of the Constitution for amending the text so as to overcome those Supreme Court interpretations, and only those, with which a large majority of the Nation is unprepared to live.

## Conclusion

The Subcommittee may well wonder why, despite the enormous diversity of views held by ranking constitutional experts and leading law enforcement officials on the uniquely divisive subject of abortion, the issues posed by S.158 should have called forth such an unprecedented unison of voices -- not only among professors of constitutional law who are otherwise prone to disagree deeply on such matters but also among an extraordinarily distinguished and varied group of former Attorneys General of the United States, serving under Presidents as diverse as Eisenhower, Johnson, Nixon, Ford, and Carter. Why should S.158 be the first proposed Act of Congress in this century to inspire so unique an expression of agreement on a topic hardly known for its tendency to produce harmony and consensus?

The most likely reason, I submit, is that virtually all careful students of the Constitution -- those who write and teach about it, as well as those sworn to enforce it -- are likely to concur,

*See United States v. Klein, 80 U.S. (13 Wall.) 128, 145 (1872) (Congress' power to regulate Supreme Court jurisdiction is deployed unconstitutionally where

> "the language of the proviso shows that it does not intend to withhold appellate jurisdiction except as a means to an end" -

there,

> "to deny pardons granted by the President the effect which this court had adjudged them to have").

whatever their many differences, on the overarching value of taking the document seriously -- on the overriding danger and illegitimacy of toying with it, of using it as an end-run ploy, even in the noblest and most humane of causes.

I do not doubt that persons of good will, fully sharing the fidelity to the Constitution that I and those who share my views on S.158 think fundamental, might nonetheless come to a different conclusion about this bill. But whether any truly reasonable basis exists for such a conclusion -- or whether, as I believe, the constitutional invalidity of S.158 is the only plausible verdict to which a considered analysis can lead -- is another matter. Rarely can one say, with the conviction that the convergence of such disparate perspectives makes possible here, that a measure is too palpably unconstitutional to permit reasonable persons plausibly to argue the contrary. Believing this to be one of those rare cases, and believing that every member of this Subcommittee respects the integrity and importance of adherence to constitutional means of implementing whatever values we might hold, I am confident that S.158, however well-intentioned the measure may at the outset have been, will, in the end, be rejected by this body -- rejected as an unacceptable assault upon the Constitution itself.

Senator EAST. Professor Noonan?

## STATEMENT OF JOHN T. NOONAN, PROFESSOR, UNIVERSITY OF CALIFORNIA SCHOOL OF LAW, BERKELEY, CALIF.

Mr. NOONAN. Mr. Chairman, Senator Baucus, I will submit my written statement and simply highlight portions of it.

However, your sticking to the original order perhaps gives us a little more of the flavor of a dialog or debate among professors. I must say, as I heard my distinguished colleague, I was reminded of hearing him 5 years ago before Senator Bayh's Subcommittee on Constitutional Amendments where every amendment proposed has something wrong with it. Not one of them could do the job of protecting unborn life. Senator East and Senator Baucus, Professor Tribe, in his great concern for human life, had to advise that subcommittee that whatever they tried had a fatal flaw.

I will not bother to say much on his interpretation of the statute, except to say that his returning to the notion that it mandates a homicide provision, repeating the tack taken by Senator Packwood, is just so much nonsense. We have for centuries distinguished

between types of killing of human beings. We know very well there is one type of killing that we call murder. There is another type of killing which because of the circumstances we call manslaughter. There is a third type of killing which was always in the old textbooks under crimes against the person which was called abortion.

Of course, Senator Packwood or his staff slipped rather badly in saying that the common law did not ban abortion. Since the time there was a written common law set down, you can find that abortion was a serious crime.

So much on the interpretation of the law. Professor Tribe offered a few words on the jurisdictional status created by the bill. I will only offer a few words because that is all it is worth.

There is not single case where the courts and the Supreme Court have not recognized the power of the Congress to determine the jurisdiction of inferior Federal courts. The court did so fairly recently in the *Palmore* case. It is an acknowledged plenary power of Congress.

All the imaginings, all the subtleties that may be brought in to suggest that there is some limit on congressional power, I think, are the imaginings of law professors appropriate for examination in classrooms, but not for congressional consideration.

The serious question is whether this jurisdictional provision is warranted by experience. Here we have to look at the experience of the last 8 years.

For the last 8 years, the judges of the inferior Federal courts have behaved in a partisan and prejudiced fashion in championing the abortion liberty far beyond the requirements of the Supreme Court decision.

Professor Uddo has collected those cases in 53 Tulane Law Review in an article entitled "A Wink from the Bench," which refers to a famous episode boasted of by the plaintiff's counsel in *Roe* v. *Wade*, where a Federal judge actually winked from the bench to indicate to the plaintiff in *Roe* v. *Wade* that she was going to win her case.

Along the same lines, a case that would particularly interest this subcommittee is the *Hyde* case in New York where a single Federal district judge, in cavalier disregard of acticle 1 of the Constitution, in effect appropriated millions of dollars to be spent on abortions contrary to the express determination of this Congress.

If that sort of thing goes on, it is time for Congress to step in. We have the precedent of the Norris-LaGuardia Act where similar outrages were documented by Felix Frankfurter in regard to the Federal Courts' use of the labor injunction. That is a perfectly good precedent for action here in restricting the power and jurisdiction of the lower Federal courts.

I want to go on to the main provisions of the act. The source of the congressional power is a portion of the U.S. Constitution, the 14th amendment, section 5, that gives Congress the power to enforce by appropriate legislation the provisions of the 14th amendment.

It can be said of section 5 what Chief Justice Marshall said of the necessary and proper clause of article 1. First, the clause is placed among the powers of Congress, not among the limitations on those

powers. Second, its terms purport to enlarge, not to diminish the powers vested in the Government.

As early as 1879, in *Ex parte Virginia,* the Supreme Court interpreted that kind of power as an enlargement not of judicial power but of congressional power. As recently as last year in *Fullilove* v. *Klutznick*, the Federal funds to minority contractors case, Chief Justice Burger said that section 5 had been taken by the Court and equated with the broad powers expressed in the necessary and proper clause.

Here we have an express acknowledgment by the Supreme Court itself that you, the Congress, have been given a grant of power to enforce the provisions of the 14th amendment.

Now, that being the foundation for your action, is there any conflict with the other classic statement of the separation of powers in *Marbury* v. *Madison?*

You have heard from Senator Moynihan in particular, and again from Professor Tribe, that there is a direct attack upon the Constitution and our governmental processes in adopting this legislation. You would never believe from those statements that this method has been tried again, and again, and again, and that it is an old way of offering the judgment of the legislature to the Supreme Court.

Let me take three examples. One is a classic doctrine of the Supreme Court that States did not have power to regulate commerce between the States. The States, lacking that power, could not, as the Court put it, be regranted or reconvey the power by Congress, exactly what Professor Tribe says that Congress cannot do here. Congress could do nothing for the States which they could not do by themselves.

That was good in law in 1850 in *Cooley* v. *Wardens of Philadelphia,* and it was good in law for almost a century. Then in the teeth of that doctrine of the Court as to the power under the commerce clause, the Congress adopted the McCarran Act permitting the States to regulate insurance. In *Prudential Insurance Company* v. *Benjamin,* the Supreme Court followed the lead of Congress, reversed itself, and said that Congress could delegate this kind of power to the States.

A second example: I suppose one of the most fundamental questions is the nature of the courts. In the *Bakelite* case in the 1920's, a unanimous Supreme Court said that Congress could not determine what courts were article 3 courts and what courts were not constitutional courts. That was a constitutional judgment on which jurisdiction depended, which the Supreme Court alone was competent to decide.

Then some 30 years later in *Glidden* v. *Zdanok,* the Court looked to what Congress called an article 3 court and what it called not an article 3 court and followed the congressional determination as to what was a constitutional court and what was not. The very fundamental question of the nature of judicial power was determined by the Court looking at what Congress had done.

Finally, there are the series of cases that Mr. Galebach particularly relied on, the section 5 cases, where the Supreme Court, in *Lassiter* v. *Northampton Election Board,* had said that it was a reserved power of the States, reserved under article 1 of the Consti-

tution, that they determine the qualifications of their electors, including of course literacy.

Here was an express holding by the Supreme Court that it was within the power of the States alone to determine literacy requirements. Congress went right ahead, passed a law affecting literacy tests in a number of States, and 7 years after *Lassiter*, the Supreme Court, in *Katzenbach* v. *Morgan* deferred to the congressional determination.

That is less time than you are acting on this law. Seven years later an expressly contrary determination was made. A little after that, in *Oregon* v. *Mitchell*, although the Justices divided on every other issue, they upheld the general congressional suspension of literacy test.

As Archibald Cox has written, the case on the literacy test provides a vast expansion of congressional power in the area of upholding human rights.

It cannot be a question of reconciling what the Court itself does with *Marbury* v. *Madison*. The only question is the context. Is this an appropriate context in which Congress should act?

You have heard the context as to the doubt expressed by the Court itself. The Court could not speculate as to when life begins. There is a second doubt the Court expressed. In the beginning of its opinion, the Court expressed a doubt as to whether the power it was referring to to invalidate the abortion statutes lay in the 14th amendment or the 9th amendment. It left those as alternatives.

If the power lies in the ninth amendment, reserving unexpressed powers to the people, it is peculiarly appropriate, Senators, for the representatives of the people to exercise their experience and knowledge and judgment as to where those powers lie.

There is a third reason why this is an appropriate context. That is the Court's reasoning as to person. The entire burden of the Court's reasoning as to the meaning of person is that an unborn child cannot be an elector, and yet person is used as to elector in the Constitution; and an unborn child cannot be a Senator or a Representative, and yet person is used in that clause; nor can an unborn child be a fugitive slave, yet persons are talked about in that clause.

The Court said, in effect, it is ridiculous to take unborn children as persons because they cannot be persons in these contexts.

However, what the Court did not advert to was that each one of these clauses would be equally effective for showing that a corporation is not a person within the 14th amendment. Yet ever since *Santa Clara County* v. *Union Pacific Railway*, a very old case, the Court has consistently treated corporations as persons within the meaning of the 14th amendment.

It really is surprising if this the basis of the Court's finding the unborn are not persons that the Court has not gone on to reverse itself on corporations. Yet I doubt very much that it will do that.

The Court's reasoning shows doubt. It shows weakness. It was an unprecedently radical decision. It invalidated the statutes of every State in the Union. It gave us the most radical abortion law in the civilized world, a law that, in effect, makes abortion legal for the 9 months of pregnancy.

Also, it was an unprincipled decision, unprincipled in the sense that not even Professor Tribe or his colleagues have found a good principle on which to explain what the Court did. It has been criticized by critics of every persuasion.

When Professor Tribe refers to these people who signed his letter, he said they stand both ways. They do not stand both ways on abortion. As far as I know, all of the people whom he has cited have done nothing for the prolife cause, but they are critics of *Roe* v. *Wade* because of its lack of constitutional principle.

Finally, it was a most destructive decision. At the highest estimates of the proabortion lobby, the greatest number of unborn lives being taken in this country before *Roe* v. *Wade* was close to 1 million. Now, by Government report, we know the number of lives being taken every year is 1.5 million, a 50-percent increase of 500,000 live entities.

You are being asked now not to make a permanent solution. This cannot be permanent. You will need an amendment. You may need more than one amendment. However, you are being asked to do something to stop this slaughter.

Thank you.

Senator EAST. Thank you, Professor Noonan.

[The prepared statement of Professor Noonan follows:]

## Prepared Statement of Professor John T. Noonan, Jr.

The Constitutionality and Wisdom of the Act to Provide that Human Life Shall Be Deemed to Exist from Conception.

I. The Jurisdictional Provisions of the Act.

There can be no doubt that under Article III, section 1 of the Constitution, the judicial power of the United States is vested in the Supreme Court and "in such inferior Courts as the Congress may from time to time ordain and establish." As Justice White wrote in Palmore v. United States 411 U.S. 389 at 400-401 (1973), in an opinion joined by Chief Justice Burger and Justices Brennan, Stewart, Marshall, Blackmun, Powell, and Rehnquist, "The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress." Congress, he went on to say, was not constitutionally required to create Article III courts nor, if they were created, "required to invest them with all the jurisdiction it was authorized to bestow." Until 1875 "the state courts provided the only forum for vindicating many important federal claims." It needs no further argument to show that the restriction on the jurisdiction of the inferior federal courts — leaving unaffected the jurisdiction of the United States Supreme Court and the state courts — is constitutional.

The only question that can appropriately be raised is whether the restriction is wise. Here the experience of the last eight years must be referred to. The judges of the inferior federal courts have shown themselves in many instances to be zealous, partisan, and prejudiced champions of those seeking and those providing abortions. They have shown a marked insensitivity to values at stake besides the abortion liberty and a marked disregard for the constitutional restraints on judicial action in this area.

To give a few examples: A judge of the First Circuit Court of Appeals has compared the termination of childbearing capacity to "excision of benign tumors which would cause subsequent neurological problems."[1/] A judge of the Second Circuit Court of Appeals has interpreted Roe v. Wade to mean that

---

1/ Hathaway v. Worcester City Hospital 475 F.2d 701 (1st Cir. 1973) at 705 (per Frank Coffin, J.).

"abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative methods of dealing with pregnancy"; and this judge proceeded to divest abortion of the moral arguments and to treat it simply as an alternative to childbirth.[2/] A judge of the Eighth Circuit Court of Appeals imposed payment of the plaintiff's legal fees on the Mayor of St. Louis, because his refusal to allow elective abortion in St. Louis municipal hospitals was "a wanton disregard for the constitutional rights of the plaintiff." In this case, as the Supreme Court later decided, it was the Mayor who had the correct constitutional position.[3/] A federal district judge in Brooklyn mandated the federal funding of abortions in cavalier disregard of Article I of the Constitution reserving to Congress alone the power to draw money from the Treasury.[4/] A judge of the Fourth Circuit Court of Appeals interpreted Roe v. Wade to mean that the unborn child in the womb was not alive, even though the particular child in question had been born and lived and his death, due to wounds inflicted before his birth, was the subject of criminal investigation by the state of South Carolina.[5/]

The pattern of abusive, indeed outrageous partisanship has been amply documented by Professor Uddo in his article, "A Wink From the Bench: the Federal Courts and Abortion," Tulane Law Review 53 (1978) 398. His title refers to a famous incident, boasted of by Sarah Weddington, counsel for the plaintiff in Roe v. Wade, that when she was arguing the case before a three judge panel a member of the court "winked at me as if to say, 'It's going to be all right.'" The winks from the federal bench in abortion cases parallel the partisanship that federal judges showed in labor injunction cases before the enactment of the Norris LaGuardia Act; and just as that Act justifiably took from the federal judges the injunction power they had abused, so the proposed statute removes a jurisdiction which has been exploited in favor of one side in a two-sided controversy.[6/]

---

2/ Roe v. Norton 408 F. Supp. 660 (D. Conn. 1975) at 663, n.5 (per Jon O. Newman, J.).

3/ Doe v. Poelker 515 F.2d 541 (8th Cir. 1975) at 547-548 (per Donald Ross, J.), reversed, Poelker v. Doe 432 U.S. 519 (1977).

4/ See Harris v. McRae 100 S.Ct. 2671 (1980) reversing the judgment of Dooling, J.

5/ Floyd v. Anders 440 F. Supp. 535 (D. So. Car. 1977) at 539 (per Clement Haynsworth, J.).

6/ Cf. Frankfurter and Greene, The Labor Injunction (1930).

II. The Fact-finding and Definitional Provisions of the Act.

The Act does four things. It finds "a significant likelihood that actual human life exists from conception ." It finds that the Fourteenth Amendment was "intended to protect all human beings." It declares that for the purpose of enforcing the obligation of the States "not to deprive persons of life without due process of law," human life "shall be deemed to exist from conception." For the same purpose it declares that "person" shall include all human life as so defined. Are these findings and declarations within the power of Congress?

1. The Source of Congressional Power. The Fourteenth Amendment, section 5 declares, "The Congress shall have power to enforce, by appropriate legistation, the provisions of this article." The key terms of this constitutional grant of power are "appropriate legistation" and "enforce." In general, there must be said of this part of the Constitution what Chief Justice Marshall said in McCulloch v. Maryland of congressional power under the "Necessary and Proper Clause of Article I: "1st. The clause is placed among the powers of Congress, not among the limitations on those powers. 2nd. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted." 7/

The parallel in interpretation of Congress' power under section 5 and Congress' power under Article I has very recently been affirmed by Chief Justice Warren Burger in Fullilove v. Klutznick. The Court, he declared, had "equated the scope of this authority with the broad powers expressed in the Necessary and Proper Clause, U. S. Const., Act. 1, sec. 18, cl. 8." 8/ In the light of this interpretation, Congress has the power under section 5 to find facts, to adopt remedies, and to enact legislation it finds appropriate to secure the rights guaranteed by the Fourteenth Amendment.

It should be added that the enforcement of the Fourteenth Amendment by congressional action has solid historical roots. As the Supreme Court said unanimously in 1879 in Ex parte Virginia, the Thirteenth, Fourteenth, and Fifteenth Amendments "derive much of their force" from the sections conferring power on Congress. "It is not said that the judicial power of the government

---

7/ 4 Wheat. 316 (1819) at 418.
8/ 100 S. Ct. 2758 (1980) at 2774.

shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed . . . It is the power of Congress which has been enlarged." [9] Even if today the judicial branch has taken to itself a more active part in enforcing the Amendments, surely its more assertive role cannot deprive Congress of the power which the framers of the Amendment intended to confer, as the 1879 Court acknowledged, and which the Court in 1980 has recognized to be as broad as Article I's fundamental grant of power to make "all laws which shall be necessary and proper for carrying into Execution the foregoing Powers." [10]

2. The Power of Congress Where the Supreme Court is in Doubt. In Roe v. Wade the Supreme Court declared, "We need not resolve the difficult question of where life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus , the judiciary at this point in the development of man's knowledge, is not in a position to speculate as to the answer." [11] The Court went on to note the varying treatment of the unborn in the law of torts and property and concluded, "In view of all this, we do not agree that by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." [12] In short, the judiciary was in no position to answer, common and statutory law gave various answers, and a state did not have power to define life.

Congress, as a coordinate branch of the national government, is of course in a position very different from any State vis-a-vis the Supreme Court. In this area it is acting within the terms of power expressly conferred by the Fourteenth Amendment and expressly recognized by the Court itself. It is acting with better sources of information than the Court — for the Court took no biological evidence and no historical evidence. It is acting with a better ability than the Court to balance competing value considerations that go to the assessment of the facts. Further, Congress is performing an essential function in the enforcement of the Fourteenth Amendment; for if the judiciary is not "in a position to speculate" when life begins, the Fourteenth Amendment must fail, in a significant way, to be implemented, unless Congress draws on its power to supply an answer.

9/ 100 U.S. 339 (1879) at 345.
10/ U.S. Constitution, Article I, sec. 18, cl. 8.
11/ Roe v. Wade 410 113 (1973) at 159.
12/ Ibid. at 162.

3. The Power of Congress When the Supreme Court Has Made a Contrary Determination. The objection will be raised, however, that the Supreme Court has done more than acknowledge its incompetence to decide when life begins. The Court in Roe v. Wade has formally held that "the word 'person' as used in the Fourteenth Amendment, does not include the unborn."[13] Does not the proposed statute squarely conflict with this holding of the Court and, if it does so, is not the statute void?

It is clear that Congress will reach, if the proposed statute is enacted, a conclusion different from the Court's in Roe v. Wade on the meaning of person in the Fourteenth Amendment. It does not follow that the statute is void. It follows, rather, that the Court may, and should, change its mind, give deference to the congressional findings and declarations, and overrule Roe v. Wade.

In the area of the Fourteenth Amendment the Court has already provided just such an example of retreating from its own announced understanding of the Constitution in deference to congressional action taken after, and contrary to, the Court's announcement of what it found the Constitution to mean. In Lassiter v. Northampton Election Board 360 U.S. 45 (1959) the plaintiff complained that a literacy test for voting was unconstitutional. The Supreme Court, unanimously, held that Article 1, section 2 of the Constitution expressly reserves to the States the power to determine the qualifications of electors. Seven years later in Katzenbach v. Morgan 384 U.S. 641 (1966), the Court considered an Act of Congress eliminating literacy in English as a condition for voting. If the Court followed Lassiter, this Act of Congress was a clear infringement on a power constitutionally reserved to the States; and the Act was clearly contrary to the holding of the Court in Lassiter.

The Court, however, found Lassiter "inapposite." Speaking through Justice Brennan and quoting Ex parte Virginia of 1879, the Court held the congressional action a proper exercise of congressional power under section 5 of the Fourteenth Amendment. The act was "plainly adapted" to furthering the aims of the Equal Protection Clause by securing for Puerto Ricans in New York not only the right to vote but, indirectly, nondiscriminatory treatment in public schools, public housing, and law enforcement. The action of Congress, directly contrary

---

13/ Ibid. at 158.

to the interpretation of the Constitution by a unanimous Supreme Court, was upheld by the Court. In Oregon v. Mitchell 400 U. S. 112 (1970), while splitting on other issues, the Court unanimously upheld Congress' total elimination of literacy tests. Justice Black's opinion specifically deferred to the "substantial, if not overwhelming, evidence" on which Congress acted and to the exercise of Congressional power under section 5.[14/]

4. Congressional Action Affecting Personal Liberties. In Shapiro v. Thompson, a case involving the welfare residency requirement of California, it was said by way of dictum that even if Congress had consented to the residency requirement — which the Court held it had not — the requirement was invalid, because "Congress may not authorize the States to violate the Equal Protection Clause."[15/] Similarly in a footnote to Katzenbach v. Morgan, Justice Brennan declared that section 5 "grants Congress no power to restrict, abrogate or dilute" the guarantees of the Fourteenth Amendment.[16/] In a footnote to his dissent in Oregon v. Mitchell, Justice Brennan repeated this view, and added apropos of state statutes found to be based on unreasonable legislative findings, "Unless Congress were to unearth new evidence in its investigation, its identical findings on the same issue would be no more reasonable than those of the state legislature."[17/] The question is thus presented whether the proposed Act authorizes states to violate the Equal Protection Clause, dilutes or abrogates Fourteenth Amendment guarantees, or is based on the same evidence on which state legislatures acted unreasonably.

In recognizing the unborn as persons, so far as protection of their lives is concerned, the proposed Act treats no one unequally but gives equal protection to one class of humanity now unequally treated. It does not dilute a Fourteenth Amendment guarantee, but expands the rights of a whole class. It is based not on evidence before the state legislatures — what that evidence was we do not know — but on evidence freshly taken from leading geneticists and physicians.

Yet the question will be pressed, "Does not the Act dilute or abrogate the right to an abortion?" Necessarily, the expression of the rights of one

---

14/ 400 U.S. 112 at 134.
15/ 394 U.S. 618 (1969) at 641.
16/ 384 U.S. 641 at 651-652 n. 10.
17/ 400 U.S. 112 at 249 n. 31.

class of human beings has an impact on the rights of others. The elimination of literacy tests in this way "diluted" the voting rights of the literate. It is inescapable that congressional expression of the right to life will have an impact on the abortion right; but in the eyes of Congress, if it enacts this law, there will be a net gain for Fourteenth Amendment rights by the expansion and the attendant diminution.

Further, it must be noted that the correctness of Justice Brennan's footnotes has been questioned by a careful scholar of Constitutional law, Professor Archibald Cox. Professor Cox suggests that Congress is free to act where "the Court has formulated some corollary to a constitutional command upon a different view of contemporaneous conditions than the legislatures" and where "the problems of application quite genuinely involved investigation and evaluation of facts." There are, Cox adds, "areas in which Congress has at least some claims to superior competence while the Court has none." In these areas, Justice Brennan's footnotes "run against the demands of logical consistency." They run also, Cox observes, against evenhandedness.[18/] If Congress has been given power under the Constitution, that power is to be exercised as Congress finds "appropriate" to the furtherance of the guarantees of the Fourteenth Amendment.

A number of Justices have, indeed, signalled their disagreement with Justice Brennan's "dilution" test. Chief Justice Burger has proposed federal legislation to modify the Court-created role excluding tainted evidence. The constitutional basis for this legislation would be section 5.[19/] Such legislation would unquestionably dilute the rights of criminal defendants while it expanded the rights of government prosecutors and the victimized public.

Justices White, Blackmun, and Powell, concurring in Trafficante v. Metropolitan Life Insurance Co. 409 U.S. 205 at 212 (1972), admitted that they had great difficulty in seeing that the plaintiffs, tenants in nonintegrated housing, had a "case or controversy" with their landlord for his action in excluding others. But they were persuaded that Congress had the power to enactthe statute giving

---

18/ Cox, "The Role of Congress in Constitutional Determinations", 40 U. Cincinnati Law Rev. 199 (1971) at 253, 255.

19/ Bivens v. Six Unknown Named Agents 403 U.S. 388 (1971) at 421-424. Cf. Gunther, Constitutional Law: Cases and Materials (1975 ed.), 531.

them the right to sue, and the Justices invoked Katzenbach v. Morgan to explain their position. Here, in other words, was a fundamental requirement of federal jurisdiction which these judges permitted to be changed by evoking Congress' section 5 power. The power was used to expand the rights of the tenants and at the same time to dilute the rights of the landlord. Justices White, Blackmun and Powell accepted the balance struck by Congress.

In Welsh v. United States Justice White, in a dissent joined by Chief Justice Burger and Justice Stewart, took the position that Congress could provide statutory exemptions from the draft to religious objectors but not to others, thus striking a balance between its power to raise armies and the Free Exercise of Religion Clause. By analogy, these justices invoked Katzenbach v. Morgan "where we accepted the judgment of Congress as to what legislation was appropriate." 20/ In other words, in their view, a statute which balanced rights, giving them to some and not to others, was entirely analogous to the kind of legislative balance struck by Congress and sustained by the Court in Katzenbach.

5. Section 5 and Marbury v. Madison. The cornerstone of the judicial power, Chief Justice Marshall's opinion in Marbury v. Madison, announces that the Constitution "controls any legislative act repugnant to it" and imposes on the judges the duty to determine this repugnancy.21/ Does the proposed Act defy or subvert these fundamental principles?

Not in the least. Congress is not ousting the Court of jurisdiction, "overruling" the Court, or declaring its will superior to Constitution or Court. On the basis of hearings and fresh evidence, Congress is taking a position which in one important particular disagrees with the Court's interpretation of the Constitution in Roe v. Wade. Under the principles of Marbury v. Madison, it will be for the Court to decide whether, following such precedents as Katzenbach v. Morgan, it should now defer to Congress' interpretation.

To suppose that the statute proposed is a challenge to judicial review assumes a radical — I am inclined to say willful — misunderstanding of the functions of Court and Congress. A decision of the Supreme Court

---

20/ 398 U.S. 333 (1970) at 371.
21/ 1 Cranch 137 (1803).

interpreting the Constitution is neither infallible nor eternal nor unchangeable. The Court has often been wrong. The Court has often corrected itself.[22/] There is nothing in our constitutional theory that says the Court must remain forever in a mistaken position, and much contrary example to its so doing. The proposed Act is an invitation to the Court to correct its error itself.

The example of the Court correcting itself due to a section 5 exercise of power of Congress has been given. There are other examples of similar interaction between Congress and Court. Here are two. In Ex parte Bakelite Corp. 179 U.S. 438 (1929), the Supreme Court unanimously held that the Court of Customs Appeals was not a court within the meaning of Article III of the Constitution. The Court declared it to be a mistake to say that the character of the court depended on the intention of Congress and reserved to itself the right to say what power Congress had exercised. In Glidden Co. v. Zdanok 370 U.S. 530 (1962), the Court, 7-2, abandoned this approach and declared that "we may not disregard Congress' declaration that they [the courts in question] were created under Article III." Stressing that this deference to congressional findings did not "compromise the authority or responsibility of this Court as the expositor of the Constitution," Justice Harlan for the Court in fact followed the congressional lead to correct the old error.[23/]

It was once settled constitutional doctrine that if the States could not regulate interstate commerce, Congress could not give them power to do so. The classic case on this point, Cooley v. Wardens of Philadelphia 12 How. 299 (1851), was one of the great unshakable landmarks of constitutional interpretation by the Supreme Court. It declared in ringing terms, "If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot re-grant or in any way reconvey to the States that power."[24/] But in 1945, in the teeth of the Cooley doctrine, Congress enacted the McCarran Act, conferring on the States the power to regulate insurance. The Court in Prudential Insurance Co. v. Benjamin 328

---

22/ Justice Brandeis provided a classic list of such corrections in Burnet v. Coronado Oil and Gas Co. 285 U.S. 393 (1932) at 407-409.
23/ 279 U.S. 438 (1929) at 459.
24/ 12 How. 299 (1851) at 317.

U.S. 408 (1946) unanimously sustained the delegation, the opinion for the Court recognizing in Congress a "plenary and supreme authority" over interstate commerce. What had once been the Court's interpretation of the Constitution had yielded to the congressional teaching.

The story is an old one, frequently retold. The Supreme Court is not immune to reason and to instruction. It reverses itself. It listens to Congress. Those who want an institution immoveable and beyond the reach of popular instruction must look elsewhere.

6. Further Reasons for Congress to Exercise Its Section 5 Power Here

"The Morgan case," Archibald Cox has written, "is soundly rooted in constitutional principles, yet it clears the way for a vast expansion of congressional legislation promoting human rights." 25/ This expansion, as Cox observes, can be achieved by any law which "may be viewed" as having a relation to an end specified by the Fourteenth Amendment.26/ In the present context, the Fourteenth Amendment guarantees life to persons. But no one can enjoy adult life unless he or she is born. To protect the life guaranteed by the Amendment, Congress has the power under section 5 to protect the path to that life. The proposed legislation is readily seen as a way of protecting the means necessary to have life after birth.

Further, it is sometimes forgotten that the Court in Roe v. Wade, acknowledging that "the Constitution does not explicitly mention any right of privacy," finally located that right with some uncertainty in the Fourteenth Amendment "or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people." 27/ To this point in this presentation, focus has been upon the Fourteenth Amendment. But if Justice Blackmun's other basis be accepted, Congress is better suited that the Court to make the determination as to the balance struck between the rights of the States and reserved Ninth Amendment rights. Such a determination requires political discretion. As Archibald Cox has written generally of why the Court should defer to Congress in its exercise of section 5 power, such judicial following of a con-

---

25/ Cox, "Foreword: Constitutional Adjudication and the Promotion of Human Rights," 80 Harv. L. Rev. 91 (1966) at 107.

26/ Ibid. at 104.

27/ Roe v. Wade 410 U.S. 113 at 153.

gressional lead "rests upon application of the fact that the fundamental basis for legislative action is the knowledge, experience, and judgment of the people's representatives, only a small part, or even none of which may come from the hearings and reports of committees or debates upon the floor." 28/ As Ninth Amendment rights are reserved to the people, the people through its elected representatives can determine, better than a nonelected elite, where the line / limiting governmental power should be drawn.

7. The "Dizzying Implications" of the Proposed Act. Two professors of law at Harvard Law School, Messrs. Tribe and Ely, have undertaken to instruct the general public, in the New York Times of March 17, 1981, on "the dizzying implications" of the proposed legislation. It must be assumed that they have said nothing in a newspaper of mass circulation that they could not say to this committee even if, given the popular medium being used, they have employed language that would seem careless in another context. They speak, for example, of the proposed Act "overruling" Roe v. Wade when all lawyers know that only a court overrules. Still, such carelessness does leave the unfortunate impression that the proposed Act is a direct challenge to Marbury v. Madison, a polemical and utterly unwarranted implication.

There is a second unfortunate implication in this article due again, no doubt, to its popular audience. The unmistakable impression is given that resort to congressional power under section 5 is the brand new invention of two conservative leaders. Who would suspect from reading Tribe-Ely that Gerald Gunther, one of the senior constitutional law professors in the country, in his leading casebook on Constitutional Law had twice raised the question of whether Katzenbach v. Morgan gave Congress power to affect the result in Roe v. Wade? 29/ Who would suppose that three other leading constitutional law professors, William Lockhart, Yale Kamisar and Jesse Choper, had asked, "Apart from 'specific' constitutional prohibitions, under Morgan, what are the limits of congressional power?" 30/ Who could imagine that,

---

28/ Cox, "Foreword" at 105.

29/ Gunther, Constitutional Law: Cases and Materials (1975 ed.) at 656, 1037.

30/ Lockhart, Kamisar, and Choper, Constitutional Law (4th ed. 1975) 1616.

as far back as 1966, Archibald Cox in the Harvard Law Review greeted Katzenbach as the discovery of "a vast untapped reservoir of federal legislative power to define and promote the constitutional rights of individuals in relation to state government." 31/ Who would believe that Professor Tribe himself had reconciled Katzenbach with Marbury v. Madison and written, "Judicial review does not require that the Constitution be equated with the Supreme Court's view of it." 32/ It would have had to have been a very intuitive reader of the Times to have guessed that Professor Tribe himself saw no incongruity in Congress providing criteria for constitutional decisions to the Court. Professor Tribe and Ely's fears were justified only if an assumption were made — an assumption which Professor Ely professed to repudiate — that the abortion liberty was part of the Bill of Rights.

The heart of the Tribe-Ely critique is that the proposed Act abandons "the old-fashioned" way of amending the Constitution. Surely these professors of constitutional law cannot be unaware that the correction of constitutional error has been going on for a long time. A method of correcting judicial error in interpretation of the Constitution that has changed the meaning of the Commerce Power, of Article III courts, of voting tests under the Fourteenth Amendment cannot be fairly described as the new invention of Senator Helms and Congressman Hyde. It is a method of "amending the Constitution," to use Tribe-Ely's misleading phrase, as traditional as the Court's "amending the Constitution" by interpretation.

Nonetheless, Professors Tribe and Ely see "dizzying implications" in the method proposed. They suggest it could be used to amend the law on libel, giving a right to libel to a defamed public official; that it could be used to authorize racially restrictive covenants; that it could authorize coerced confessions. In an impatient rhetorical burst they ask why Congress does not simply redefine "due process" to include "any law Congress or a state legislature approves." The method, they say, reduces "the Constitution to whatever those in power want it to mean."

This astounding statement proceeds as if the basis for the proposed statute had not been laid by the Court itself as far back as Katzenbach and

---

31/ Cox, "Foreword" at 99.
32/ Tribe, American Constitutional Law (1978) 271.

as recently as Fullilove. The Court has not invited Congress to rewrite the Constitution at will, nor has Congress responded by arbitrary assaults on civil liberty. The trick of the kind of rhetoric Tribe and Ely engage in is to suppose that all the bad things are done by the group one disapproves of, while all the good things are done by your side. It is rhetoric persuasive only to one's own side.

There are many experts on constitutional law who have said explicitly or in effect that the Supreme Court's creation of the abortion liberty was simply the work of "those in power" making the Constitution mean "what they want." 33/ An exercise of "raw judicial power" was how Justice White described the decision.34/ Oddly enough, Professor Ely was one of those who found that this was the kind of decision the Court had fashioned. Ely could find no principle or standard which had guided the Court.35/ Now when a very limited and precise means is taken, in a traditional way, to correct the exercise of raw power, the curious objection is offered that this modest measure will lead to excess of the very sort being corrected.

8. Context and Constitutional Interpretations. The parade of horribles in the Tribe-Ely piece is a truly dizzying instance of constitutional interpretation offered without context. Sound constitutional interpretation requires a look at the context in which Congress is acting and in which the Court will be responding. That context is formed by the following facts.

(1) Roe v. Wade was one of the most radical decisions ever made by the Supreme Court. At one stroke it set out criteria by which the abortion statutes enacted by Congress and by the fifty States became invalid. It gave the United States the most radical abortion law in the civilized world. In effect, it made abortion on demand a liberty under the Constitution.36/

(2) The reasoning of this decision, so far as "person" is concerned, is remarkable in that it concentrates on showing that other uses of "person"

---

33/ See Noonan, A Private Choice: Abortion in America in the Seventies (1979) 29-32.

34/ Doe v. Bolton 410 U.S. 179 (1973) at 272.

35/ Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," Yale L. J. 82 (1973) 920 at 946-947.

36/ Noonan, A Private Choice, 10-12.

in the Constitution — in the Fugitive Slave Clause, in the qualification for Representatives and Senators, in the disqualification of Electors, etc. — are such that they could not possibly apply to any being before birth.[37] But by the same token, a corporation could not qualify as a person under the Fourteenth Amendment. A corporation could not have been a fugitive slave, a corporation could not be a Representative or a Senator, a corporation could not be a presidential elector. If Justice Blackmun's reasoning on person is correct, then Santa Clara County v. Southern Pacific RR 118 U.S. 394 (1886) and all its progeny were wrongly decided, and corporations should be held unprotected by the due process clause.

Indeed it would be interesting, if the Court had in fact, adopted the reasoning of Justice Blackmun to exclude corporations from the protection of the Fourteenth Amendment, to see if the conservative critics of Katzenbach v. Morgan would have denied the Congress power to suggest to the Court by statute that corporations could be considered persons too. Here we deal not with a hypothesis requiring the artificial extension of the meaning of "person" but with real creatures of flesh and blood, whose brains are working, whose hearts are pumping, whose legs are kicking, but which the Court has found not to be persons because they could not vote, be a Senator or Congressman, or become a runaway slave.

(3) Roe v. Wade has been vigorously criticized by leading authorities on law, among them Alexander Bickel of Yale, Robert Byrn of Fordham, Archibald Cox of Harvard, Richard Epstein of Chicago, John Hart Ely of Harvard, Joseph O'Meara Jr. of Notre Dame, Harry Wellington of Yale, and Joseph Witherspoon of Texas. A professionally satisfying defense of it has not been found.[38]

(4) As a result of Roe v. Wade one million five hundred thousand lives per year are being taken by abortions. Even accepting the highest guesses as to the number of abortions prior to the decision, this figure represents an enormous increase — at least 50%, at least 500,000 — in the number of deaths occasioned by the decision.

It is in the context of this kind of radical attack on state power,

---

37/ Roe v. Wade 410 U.S. 113 at 157.
38/ Noonan, A Private Choice 20-32.

this kind of fallacious reasoning, this kind of criticism, this kind of slaughter that Congress is asked to take remedial action.

9. Further Steps. Enactment of the proposed Act will not be the end of abortion. Legislation is not assured of being permanent. Its effect across the United States will not be uniform. No one who has observed the play of ideology in the Supreme Court can guarantee that a law, constitutional according to the principles the Court has enunciated, will actually be sustained by the Court.

Accordingly, Congress should regard passage of this Act as the first of three steps. The second step will be to pass a constitutional amendment annulling Roe v. Wade. That annullment can be accomplished simply by words such as, "Nothing in this Constitution or the Constitution of any State shall be construed to confer on any person the right to an abortion"; or by words couched in terms of restoring the power the Court has taken away: "The Congress and the several States shall have power to protect life, including the unborn at every stage of biological development, irrespective of age, health, or condition of dependency." Either one of such Amendments would restore the status quo ante Roe v. Wade, and return to the States their traditional power to protect life.

A final step would be the enactment of an Amendment actually mandating the protection of human life from conception. Such an Amendment would complete the great educational process of which the Act before you is the first and necessary step.

Senator EAST. Professor Van Alstyne?

## STATEMENT OF WILLIAM VAN ALSTYNE, PROFESSOR, DUKE UNIVERSITY SCHOOL OF LAW, DURHAM, N.C.

Mr. VAN ALSTYNE. This committee has sat this afternoon, Mr. Chairman, to such an extent that I am going to deal only with one point to spare the journalists, you, and the public from being redundant.

I have no doubt that the legislation is at best a complete exercise in futility, and at worst, merely a gratuitous effort to contribute to the animation that may propel a proposed amendment, by means of which, of course, super majorities in the country may change the outcome of *Roe* v. *Wade*.

### THE REASON FOR PROFESSIONAL CONSENSUS

I quite agree with Professor Tribe that the letter you have received, signed by a highly diverse number of constitutional experts,

is significant for purposes of this committee. It is remarkable really that such ideologically very divided persons, including some of the most constitutionally conservative members of the academy, are overwhelmingly of one opinion.

I suggest to you that there is at least an issue which glues and cements them altogether. It goes to the non sequitur that if something can be rationally deemed "a human life" from some not irrational perspective, which it surely can—a zygote may, a blastula may, a very young embryo may, a developed fetus may, even a gamete may by some, then it may also be defined by Congress as a "person" as that word appears in the 14th amendment. All of this effort is mounted on the supposition that if there is some intelligent consensus that one or more of these forms of biological existence may also be subject to the descriptive term "human life," they at once, therefore, can also be described in a way which will bind the Supreme Court as within the word "person" as that word appears in the 14th amendment. I assure you that is a flat non sequitur.

This Congress may review exactly the kind of problem Professor Noonan used for colorful contrast, the treatment by the Supreme Court of corporate enterprises, fictitious entities, as "persons." It may hold elborate hearings and have very amusing debate that they cannot find a "person" in the fictitious entity of the corporation and, therefore, reach its solemn legislative conclusion that corporations are not persons.

That is all very well for all of your purposes. It cannot, however, affect the Supreme Court's decision to the contrary. Their decision to the contrary simply goes to an adjudicated construction of a word in the document, which construction Congress cannot alter by simple statute.

Nothing in *Roe* v. *Wade* says that rational people may not for their own private purposes regard zygotes, blastulas, embryos, or fetuses as human beings. Nothing. They are not presuming to do so, construing a word as it appears in a document.

The Supreme Court's interpretation, on the other hand, is simply that as of 1866 when the 14th amendment was drafted and that word was selected, it was not meant to, and did not, extend to zygotes, blastulas, embryos, and fetuses. They are not within its coverage.

Corporations, since the stockholders ultimately are adult human beings, can be treated fictively as a single entity, a surrogate representing those adult persons in the form of the entity.

The seeming bizarreness of having a word like "person," that to a lay person might describe an animate biological being, may have some coherence if you attend to the kind of problem that you are dealing with, with corporate litigation arising under the 14th amendment.

These arguments that you have heard from my adverse colleagues on my right have all been made before. Their definition as to what the Reconstruction Congress might have meant by way of defining the word "person" in 1866 has been briefed before. It has been adjudicated before. It is explicit in the decision of *Roe* v. *Wade* that it is not acceptable.

Identically, when the case of *Dred Scott* was argued before the Supreme Court, the issue was not, I assure you, whether Dred Scott, being black, was "a human being." It is preposterous to suppose that the outcome of the case rested on a Supreme Court view that Dred Scott, being a slave, is not a human being.

The Supreme Court judges are in the professional business of trying to assign a definitive meaning to a given word in a given clause in the Constitution. In that particular instance, the clause was not in the 14th amendment. It was in article 3. The word was "citizen." They do not demean Dred Scott. They may report, as a matter of fact, a sad chapter of specific American constitutional history, that certain human beings were not meant to be benefited as citizens for the purpose of article 3.

The decision in *Roe* v. *Wade* is equally emphatic with regard to the meaning of the word "person" as it appears in the 14th amendment. The Reconstruction Congress did not have in mind and did not intend to include among the beneficiaries of section 1, zygotes, blastulas, embryos, or fetuses.

You may regret that, Mr. Chairman. You may appropriately seek recourse, as has been done not less than five times, by taking a disagreeable definition imputed by the Court to language in the Constitution and appropriately have it overruled by amendment.

Indeed, virtually every amendment we have had is an amendment which stands exactly upon a super majoritarian disagreement with the Court's construction of a word that appears in some clause in the Constitution.

Senator Moynihan was exactly correct in offering you as an example the very divisive decision by the Supreme Court in the first effort by the country to put together a graduated income tax for the country as a form of raising revenue which Congress thought was more equitable than flat sales taxes, for instance.

Among the things that were taxed was rental income derived from real estate. The Constitution requires that a thing called a direct tax has to be apportioned among the States according to their population. It is an unusable formula such that if this tax were described by the Supreme Court as a direct tax, then it would fall. And it fell.

Congress thought that when a tax is not directly on land and is only indirectly on land and rather on income from land, then it ought not be defined as a direct tax. That was their view. They acted upon it. The enacted legislation appropriate to their view of the definition of the word. They were held to be in error. The Supreme Court had the last word on the meaning of the word direct.

This controversy was litigated with respect to the meaning of the word "person" in *Roe* v. *Wade.* There is no member of the Court who dissented with regard to that feature of the case.

This is as futile an exercise as in the poetry of Omar Khayyam: "The moving finger writes and having writ moves on. Nor all your piety, nor wit can call it back or cancel out half a line."

If then you wish to reconstruct the language of the Constitution to fit what in your view, respectfully, would be a better understanding of that language, you may have your way. You may have it according to the conventional process which has been used exact-

ly in this kind of encouter with the Supreme Court not less than five times, the first being as fresh in the country's history as 1793, to overrule the definition of the word by substituting an amendment which then gives the congressional view, and the country's view, quite a different tenor.

For that reason, all of these other matters aside, respectfully, I have a private sense of profound impatience because I do agree with one of the Senators who testified before you. That is, I do not think that this legislation, among those who have been attentive to the rudimentary difficulties of what is involved here, is seriously intended. I think rather it is frankly a stalking horse, more to dramatize the depth of private feeling that attended the decision in *Roe* v. *Wade*.

It is not inappropriate for Members of Congress to use the newsworthiness of proposed but futile, and in my opinion, frankly fatuous, legislation for such advertising purposes. We are not subject to the Federal Trade Commission and may not be enjoined here for deceptive trade practice.

However, this bill cannot possibly be secured on the foundation for which it is advanced. Indeed, if the theory were sound, then by a like process, it would obviously be within the capacity of this Congress to venture its preferred definition of any other term in the same document, and by having ventured that preference then, presume to bind the court to the outcome of its own definition.

It has never been that way. It never can. We are among a very few countries in the world, as our public does not know, in which the Supreme Court, indeed, for purposes of adjudication is given the last word on the adjudicated meaning of each term in the U.S. Constitution.

Most countries do not have supreme courts with that power. Indeed, most written constitutions are enforceable only by their parliaments and their supreme court cannot enforce them.

It is the legacy of our Constitution, it is its brilliance, and it is its correctness as *Marbury* v. *Madison* itself that you may not alter the meaning of that language short of an amendment itself. The rest, in my opinion, respectfully, is all just futility, and to a great extent, some posturing as well.

Thank you, Mr. Chairman.

Senator EAST. Thank you, Professor Van Alstyne.

[Three letters submitted by Prof. Van Alstyne follow:]

Duke University
DURHAM
NORTH CAROLINA

SCHOOL OF LAW

POSTAL CODE 27706

May 14, 1981

Senator Max Baucus
Ranking Minority Member,
Subcommittee on Separation of Powers
United States Senate
Washington, D.C. 20510

ATTN: MR. KAY

Dear Senator Baucus:

Pursuant to your request, I shall attend hearings on S. 158 next Thursday, May 21, at 1:30 p.m., conducted by the Subcommittee on Separation of Powers. These hearings follow on the same day as hearings in the morning being held by Senator Hatch, Chairman of the Subcommittee on the Constitution, respecting the power of Congress to regulate the appellate jurisdiction of the Supreme Court. The subject matter of these two hearings significantly overlap one another.

The time required of me in preparing a statement for submission in advance of the morning hearings has made it physically impossible also to prepare as complete a statement in advance of the afternoon hearings as I would wish. As a best effort to comply with the Subcommittee Rule respecting the submission of such a statement in advance of the hearings, however, I am enclosing twenty copies of two letters, both addressed to the pending bill (S. 158), originally composed in response to separate inquiries by Donald Edwards, Chairman, Subcommittee on Civil and Constitutional Rights, in the House of Representatives, and by Senator Hatch. Between these two letters, the Subcommittee will have the benefit in advance of most of what I shall present at the hearings. Insofar as S. 158 also raises a question respecting the power of Congress to affect federal court jurisdiction in respect to cases drawing into question the constitutionality of state or federal statutes, I am also enclosing one copy of my lengthy prepared statement that will serve as the basis for my appearance in the morning, before Senator Hatch's subcommittee. I have not thought it appropriate to provide more than a single copy of this statement because of its very great length.

I look forward to the Subcommittee hearings and to the occasion of discussing this subject with you.

Sincerely,

William Van Alstyne

William Van Alstyne

Duke University
DURHAM
NORTH CAROLINA

SCHOOL OF LAW

POSTAL CODE 27706

March 31, 1981

The Honorable Don Edwards
Chairman, Subcommittee on Civil and Constitutional Rights
The United States House of Representatives
Washington, D. C. 20515

Dear Mr. Edwards:

H. R. 900 is both unconstitutional and wholly unworthy of Congress. Its presuppositions respecting the power of Congress to impose its own definitions upon words in the Constitution are naive and incorrect. Its additional presumptuousness in attempting to revive criminal statutes already adjudicated by the Supreme Court as violative of fundamental personal rights is unprecedented and unsound. I shall elaborate briefly on both these points. I shall be pleased to provide any additional assistance to you in your further consideration of this foolish bill.

The abortion decisions of 1973 do not mark the first occasion when a constitutional adjudication by the Supreme Court has met with very great resistance. As early as 1793, an interpretation of Article III subjected states to law suits in federal courts contrary to what many widely believed could not be done without the consent of such states. The case was Chisholm v. Georgia, 2 U.S. 519, and it was subsequently overturned by the provisions of the Eleventh Amendment in 1794. A little more than a half-century later, the Supreme Court interpreted the word "citizen" in Article III to exclude a number of persons whom many (including a minority on the Supreme Court itself) believed to be capable of acquiring that status. The case was Dred Scott v. Sanford, 60 U.S. 393 (1857), and it was subsequetly overturned by the provisions of the Fourteenth Amendment in 1868. Thirty years later, the Supreme Court interpreted the phrase "direct taxes" in Article I to include a tax on income derived from the rental of real estate, contrary to the different interpretation of the same phrase by Congress (and by a minority of the Court itself). The case was Pollock v. Farmer's Loan & Trust Co., 157 U.S. 429 (1895). It was subsequently overturned by the Sixteenth Amendment in 1913, which permitted the unapportioned taxation of such income. And as recently as 1970, contrary to Congress's own interpretation of "equal protection," a majority of the Supreme Court held that the disfranchisement of citizens over eighteen years of age (but less than twenty-one years of age) in all state and local elections was not within any corrective power of Congress pursuant to Section 5 of the Fourteenth Amendment. That outcome, too, was also overturned -- by ratification of the Twenty-Sixth Amendment in 1971.

In each of these (and many other) instances, final adjudications by the Supreme Court have involved interpretations of words or phrases in the Constitution different than the interpretation imputed to the same words by state legislatures or by Congress. In the vast majority of instances, the adjudicated interpretation by the Supreme Court continued to be controlling, despite dissatisfaction by others who believed that interpretation to be unsound. That observation correctly characterizes even the single most famous (and important) decision in our entire constitutional history, the case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In part, that famous case involved the issue whether Congress could enlarge the original jurisdiction of the Supreme Court by adding into its original jurisdiction some cases that might otherwise reach the Court only on appeal. The language of Article III itself is wholly inconclusive, and an eminently reasonable argument could be made that while Congress might not have power to limit or to reduce the original jurisdiction of the Court, it could most certainly enlarge that jurisdiction by adding such cases as were otherwise within the judicial power: cases that Congress believed to be sufficiently important that they, too, should also commence in the Supreme Court itself. Chief Justice Marshall held otherwise, however, and--there being no amendment ever made to the Constitution to change that result--that remains the case even now.

Marbury v. Madison, and Martin v. Hunter's Lessee, concretely established two propositions which are themselves the essence of the

American constitutional system. The first is that in the adjudication of all cases and controversies arising under the Constitution, it is the judiciary's interpretation of the Constitution, rather than that of Congress, which is final. The second is that in the adjudication of all cases and controversies arising under the Constitution, it is the judiciary's interpretation of the Constitution, rather than that of state legislatures or state courts, which is final.

In keeping with these bedrock principles, it is perfectly well understood that the finality of those Supreme Court interpretations are reversible by two means only. The first is the capacity of the Court to overrule iself. The second, as illustrated by the Eleventh, the Fourteenth, the Sixteenth, and the Twenty-Sixth Amendments, is to "overrule" the Court by amending the Constitution.

The technique of H. R. 900 is not to propose an amendment. It betrays a complete lack of confidence that the constitutional demands for two-thirds majorities in both houses, and ratification by three-fourths of the states, could be obtained to that end. Thus, in repudiation of the provisions of Article V that nothing less than these extraordinary majorities may suffice authoritatively to displace a final adjudication by the Supreme Court respecting the adjudicatory significance of a part of the Constitution, it presumes instead to instruct the Court on the "right" meaning of a particular word. This attempt is as futile (and improper) as though Congress, following the decision in Marbury v. Madison, had presumed to adopt a law in which Congress "finds" that Article III "was intended to" permit some cases to be added to the Court's original jurisdiction which cases might otherwise come only within its appellate jurisdiction. It is as futile as though Congress, following the decision in Chisholm v. Georgia, had passed a law in which it "found" that Article III did not intend to permit states to be sued in federal courts without their consent. It is exactly the same as though Congress, after the decision in Pollock v. Farmer's Loan & Trust, had adopted a statute in which "Congress finds that the phrase 'direct taxes' in Article I was not intended to include a tax on income derived merely from the rental of real estate." Indeed, if this technique were available to Congress, in no instance would amendments to the Constitution be required authoritatively to alter the Supreme Court's interpretations of the Constitution. As you (and every member of Congress) are well aware, however, our system of constitutional government, unlike that of many other nations, is not one of parliamentary supremacy. It is not the case that we are under a Constitution, but the Constitution is what Congress says it is. A Constitution so construed cannot act as a positive law restraint upon Congress or upon the States. Rather, a Constitution so construed would permit Congress not merely to control the scope of the Fourteenth Amendment, but to define its own powers, to override all reserved state powers, and to demolish the separation of powers as well--all by the breathtaking expedient of having Congress bind the courts by presuming to "find" what every part of the Constitution was "intended" to do.

We come, then, to H. R. 900. In Roe v. Wade, the Supreme Court held that the word "person" as it appears in the Fourteenth Amendment is exclusive of gestating fetuses prior to the time of fetal viability. H. R. 900 presumes to "find" that the word "person" in the Fourteenth Amendment, to the contrary, includes not merely viable but unborn fetuses but, indeed, embryoes, blastulas, and zygotes as well. Presumably, it means to "find" that the instant there is sufficient contact between a sperm and an egg as to produce any preliminarry reaction whatever, and certainly at least telophase (the last step in mitosis in simple cell division), the chemical reaction at the least discernible preliminary step dates a "person" for all Fourteenth Amendment purposes.

Having discovered in the Fourteenth Amendment (?) a definition of "person" contradictory of the Supreme Court's interpretation, Congress then proposes to use that finding to validate state laws already held to be violative of another person's fundamental right as previously determined by the Supreme Court. It is, of course, the holding of Roe v. Wade that no state may criminalize a woman's decision to terminate an unwanted pregnancy within six months of conception, assuming only that she secures the assistance of a competent physician who, in assisting her, complies with reasonable medical procedures. That freedom is described by the Court as "fundamental." Nothing, in any of the subsequent decisions of the Court, reneges on that description. The ambition of H. R. 900 is not to support

that freedom, or even to assist such women carrying fatally malformed fetuses, or women for whom pregnancy may be threatening to their health. To the contrary, in prior versions of the "Hyde Amendment," Congress has already set a cruel determination against such women by restricting any such assistance and by rendering, for them, even first-term, medically-indicated abortions subject to private charity and to the commercial market alone. The Supreme Court has found no adequate constitutional basis to forbid this selective vindictiveness. But I see no evidence at all that it will be impressed by Congress's cellophane effort to do indirectly (by defining words in the Constitution) what it cannot do directly (to reverse substantive constitutional decisions by the Supreme Court).

If Members in Congress frankly desire to compel the birth of every fertilized ovum, or if Members in Congress think it wise that each state be allowed to criminalize whatever abortions, in whatever circumstances they wish to criminalize, they may do so. For even freedom of speech may be ended in this country by amending the Constitution itself (to permit the criminalizing of free speech), and so, too, may any other fundamental freedom we have. But the very purpose of Article V is to disallow such changes without the sobering check that the amendment process itself imposes. And it behooves Congress to respect that process in this instance, at least as much as it did in the establishment of an income tax.

I have not devoted any time in this brief letter to an "analysis" of Katzenbach v. Morgan, and the various (even conflicting) impressions which that case has generated. I will say briefly, however, that I know of no reasonable manner in which the sound foundation of that case can be adjusted to sustain what is being proposed in H. R. 900. The basic thesis of Katzenback v. Morgan is not complicated. That thesis is that Section One of the Fourteenth Amendment committed to the judiciary the obligation to hold invalid such state statutes as were clearly, in the Court's own view, forbidden by the Fouteenth Amendment. These, in brief, were all laws forbidden by Section One in its self-executing effect, laws so clearly (in the Court's view) in derogation of privileges and immunities, life, liberty, and property, or in derogation of equal protection, that they are invalid whether or not Congress has seen fit to say so. It is Section One, in its self-executing effect, which is the foundation of Roe v. Wade.

Section One was drafted to provide this minimum self-executing effect, moreover, partly because it was agreed in the 39th Congress (which proposed the Fourteenth Amendment) that it was unwise to leave the determination of invalid state laws merely to Congress. The original version of the Fourteenth Amendment did just that, providing only what Congress might do in respect to certain kinds of state laws, but not providing any security against state laws that Congress might not see fit to forbid. It was significantly to provide security against a remissness in Congress that the Fourteenth Amendment was redrafted (in its present form), so to make certain a self-executing effect, a minimum level of judicially-enforceable protection, irrespective of Congress's sentiment about such protection. Consistent with this understanding (which is consistent both with Roe v. Wade and with Katzenbach v. Morgan), it was also anticipated that Congress might (under Section five) reach some state laws that were not so clearly in violation of Section one as to require the courts to hold them invalid. And that, of course, is what happened in Katzenbach v. Morgan itself.

Ironically, a correct application of Katzenbach v. Morgan would be useful to sustain an Act of Congress very different from H. R. 900. For instance, although the Supreme Court has held that the due process clause does forbid any state from criminalizing medically safe abortions within the first two trimesters (a fundamental right that neither Congress nor the States may now attempt to override), it has not held that states are also constitutionally obliged to provide economically disadvantaged women any assistance for that purpose even if, without such assistance, their practical capacity to exercise their fundamental right is seriously prejudiced. Even the omission of medically-indicated abortions from a state medic-aid program otherwise assisting economically disadvantaged persons for medically-indicated services, has not been held by the Court as to be so utterly arbitrary as to be a per se violation of the Fourteenth Amendment. On the other hand, were Congress to regard such a differential treatment of women seeking medically-indicated abortions as plainly arbitary when the state otherwise has undertaken to extend assistance to economically disadvantaged persons, then I think Katzenbach v. Morgan would come into play.

The unequal treatment of economically-disadvantaged women otherwise unable to secure medically-indicated abortions might plausibly be regarded by Congress as so discriminatory and unfair under the circumstances that Congress might, on that basis, forbid the states so to discriminate against women. In this respect, exactly as in Katzenbach, Congress would be acting to enhance a fundamental right, rather than to restrict or to annihilate it. Katzenbach does not contemplate this latter power. Neither does Section One of the Fourteenth Amendment. Rather, Section One establishes a judicially-ascertained, minimum floor of self-executing constitutional protection which neither Congress nor the states may violate. It was that "floor" that was held to be violated in Roe v. Wade. H. R. 900 is wholly in conflict with this proper understanding of the Fourteenth Amendment and is, accordingly, both unauthorized and invalid.

I realize that nonetheless the tendency in Congress to vote for bills such as this is very great. It may appease particular constituancies and divert all blame to the courts. But you have not been a Member of Congress to have looked at matters in this cynical fashion, and I am confident you will not do so on this occasion, either.

Sincerely,

William Van Alstyne
William R. Perkins Professor of Law

---

Duke University
Durham
North Carolina

SCHOOL OF LAW POSTAL CODE 27706

May 5, 1981

Senator Orrin B. Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

I understand you have had some reluctance to support legislation to overcome the Supreme Court's decision in Roe v. Wade, despite your belief that that decision was unsound and that states should be free to prohibit abortions. I understand that while you are prepared to introduce and to support an amendment to the Constitution, re-establishing in state legislatures the discretion to regulate abortion according to each state's own determination, you are doubtful of the constitutional power of Congress to do so by simple statute -- and concerned that the theory of such a statute may seriously disserve conservative interests.

Judging the matter from the particular proposed statute I have had occasion to examine, I entirely agree with both of your concerns. The bill I have examined was originally sent to me from the House of Representatives (H.R. 900) and I do not have at hand the corresponding number of the Senate bill which, however, I understand to be identical. The Bill I have provides:

> Section 1. The Congress finds that present-day scientific evidence indicates a significant likelihood that actual human life exists from conception.
>
> The Congress further finds that the fourteenth amendment to the Constitution of the United States was intended to protect all human beings.
>
> Upon the basis of these findings, and in the exercise of the powers of the Congress, including its power under section 5 of the fourteenth amendment to the Constitution of the United States, the Congress hereby declares that for the purpose of enforcing the obligation of the States

under the fourteenth amendment not to deprive persons of life without due process of law, human life shall be deemed to exist from conception, without regard to race, sex, age, health, defect, or condition of dependency; and for this purpose "person" shall include all human life as defined herein.

Section 2. Notwithstanding any other provision of law, no inferior Federal court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in any case involving or arising from any State law or municipal ordinance that (1)protects the rights of human persons between conception and birth, or (2) prohibits, limits or regulates (a) the performance of abortions, or (b) the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions.

Section 3. If any provision of this Act or the application thereof to any person or circumstance is judicially determined to be invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected by such determination.

Section 3, the severability clause, is unexceptionable and I have no comment to make. Similarly, that portion of Section 2 addressed as a restriction on inferior federal court power to issue restraining orders I shall not comment on -- partly because I understand that it may now have been dropped from the bill and more substantially because I know the general subject of congressional power of federal court jurisdiction will be the subject of lengthy and separate hearings, later this month. While I have serious reservations about this portion of the bill, I think it inappropriate to deal with them here in light of these considerations.

With respect to the entire bill (including the restriction on federal court jurisdiction), I know you have received brief statements from more than a dozen very well established academic experts on constitutional law, uniformly concluding that the bill is plainly unconstitutional and clearly beyond the authorized constitutional authority of Congress. The uniform consensus of those signing these statements is professionally and politically remarkable. I do not personally know of any other proposed Act of Congress within the past two decades that has drawn such a response from ranking professors of constitutional law who are otherwise given to an immense range of disagreement both politically and professionally. Among them, many did not at the time (and do not now) think the Supreme Court's decision in Roe v. Wade to be correct. Among them also, several regard the powers of Congress to be extremely broad, especially in respect to the particular power relied upon in this bill, namely, Section five of the fourteenth amendment. Among them are individuals who are personally highly conservative on matters of economic policy, utterly unimpressed with "liberal" interpretations of women's rights, and severely critical of expansionist trends commonly associated with the Supreme Court. Ordinarily, House or Senate Committees holding hearings on this bill could readily expect to hear much more conflicting testimony than anything else. Erwin Griswold, Charles Alan Wright, and Phillip Kurland, for instance, are not "suspect" scholars; they are, rather, the eminent conservatives of constitutional law. The information you already have from them stating exactly the same conclusion shared with Gerald Gunther and John Ely, as well as Tribe, Brest, and myself, should in fact be prima facie convincing that the bill under consideration is regarded as extremely ill-advised -- and that it is not simply disliked or feared by constitutional liberals.

As a legislative "precedent," it is not difficult to see why very conservative constitutionalists would be opposed to this bill. Under the fourteenth amendment, states are forbidden to "deprive" persons of certain things. They are not, on the other hand, obliged to guarantee them, to provide them, or to protect them from interference by private parties. The Supreme Court has resisted efforts to persuade it, for instance, that states must guarantee a "right" to treatment, a "right" to a certain level of education, or a "right" to a certain level of economic subsistence. A portion of this bill, in contrast, speaks of "the obligation" of States not to deprive "persons" of life in the additional (and strained) sense of an affirmative duty to enact criminal statutes for the particular protection of such "persons." If the theory is sound, there is nothing to forestall Congress from similarly speaking of a constitutional obligation of each state "not to deprive" persons of meaningful lives by failing to appropriate tax funds for their health care, their educational "needs," adequate (public)employment opportunities, or any number of things which, in the view of Congress, are important to make life, liberty, and property valuable. Upon such presuppositious determinations by Congress, each state may be forced to allocate resources as Congress thinks best. Linked to the power of Congress granted by Section five of the 14th amendment (power to "enforce" this article by appropriate

legislation), it is exceedingly plain where this leads. If Congress can (a) determine authoritatively what affirmative obligations each state has in respect to the life, liberty, and property of each person, and if Congress can (b) legislate to "enforce" such affirmative obligations as determined by Congress, then indeed the rudiments of federalism are dead, the 10th amendment is meaningless, and each state becomes but the instrument of a uniform, congressional determined policy of social welfare. Some few dicta (and some larger number of writers) have urged this view in recent decades -- but I was unaware of any conservative Member of Congress who believed it to be desirable or sound. If, moreover, Congress now moves to embrace this view in its own legislation, surely the Supreme Court will feel itself to be encouraged likewise to "declare" what the "affirmative obligations" of states to be -- and correspondingly authorized to develop still additional judicial remedies to enforce them.

The bill is extraordinary in several additional respects. It employs a technique that would render unnecessary any amendment to the Constitution whenever Congress were dissatisfied with the integrity of a Supreme Court interpretation of that Constitution, by the simple (?) device of substituting a congressional definition for the Court's adjudicated definition of the same word. In this instance, the word is "person." In Roe, as I know you will recall, the Court held (rightly or wrongly) that the word "person" does not extend to pre-viable fetuses insofar as a state might presume such a definition to state a reason for criminalizing a women's decision to terminate an early pregnancy with competent medical assistance. Here, Congress presumes to instruct the Court differently on the meaning of constitutional text, for the explicit purpose of securing a different adjudicative outcome. If the theory of congressional supremacy respecting the adjudicatory meaning of words in the Constitution were sound, there would never be any need for amending the Constitution as a necessary means of setting aside a final constitutional adjudication by the Supreme Court. Five amendments to the Constitution have been put into place as specific reactions to Supreme Court decisions: the 11th, the 14th, the 16th, and 19th, and the 26th amendments. Each amendment was introduced, and carried through the burden of ratification, to nullify the Court's interpretation of constitutional text. It is remarkable to suppose that the amendment process itself is made quite difficult (with two-thirds majorities in both Houses, and three-fourths of the states), if it is not even necessary to amend the Constitution at all.

For example, in the original income tax case, the Supreme Court held that a tax on income derived from the rental of real estate was a "direct" tax which, because it was a "direct" tax, would have to be apportioned among the several states by population, as required by Article I. Many in Congress, and many academic commentators, believed the Court's interpretation of the word "direct" to be incorrect. By way of public reaction, the 16th amendment was proposed and, once ratified, freed Congress from having to apportion this kind of income tax. But if the approach taken in this bill is sound, all that was necessary was for Congress to have "found" that Article I was not intended to include a tax on income from real estate as though it were a tax "directly" on real estate -- and to have instructed the Court (?) accordingly. No one seriously believes such a power to reside in Congress. The amendment process, and the fact of multiple amendments that "corrected" Supreme Court decisions, stand against the very notion. More importantly, if the technique were sound, of course it is a two-edged sword that will cut against federal and conservative interests much more frequently than it will cut in the opposite way.

But a very few years ago, the Supreme Court held that state and local employees could not be placed under the federal minimum wage law because the attempt by Congress to do so (under the commerce clause) cut too deeply into state rights, i.e., to determine by state law the proper balance between the level of state and local employee wages and competing state and local needs to be met. The Court has also recently protected contractual rights of state bondholders from being ruined by state legislatures which sought to renege upon those commitments. But a very "liberal" Congress might not like either of these "conservative" decisions and might, if the theory of this bill were sound, simply presume to define the very text of the Constitution more "liberally" than the Supreme Court -- and presume to revive these invalid laws. Conservatives in Congress have resisted these kinds of efforts in the past. It is scarcely safe, consistent, or prudent all of a sudden to be seen to embrace them or to appear to give them legitimacy. Put more bluntly, the theory of this bill is inconsistent with Marbury v. Madison itself, but is even more presumtuous than that. It does not even content itself by withdrawing jurisdiction from the Court to decide certain kinds of cases; rather, it leaves them to be decided there, while "advising" the Court on the "proper" meaning of the words in the Constitution according to which the Court is to judge the case at hand.

Finally, this bill is not an application of the theory of the Court's own very

controversial decision in Katzenbach v. Morgan. In that case, the Court held by a majority (and as an "alternative" holding) that a state law not deemed so arbitrary by the Court itself as to be unconstitutional might nonetheless by held by Congress to be so arbitrary that it ought not be enforced. Here, however, a reversal of that technique is employed: a state law found by the Court to be invalid is sought to be revived under a congressional view that such a state law is, in fact, not violative of an individual's constitutional rights. Even the Katzenbach view of congressional power emphatically and explicitly took care to discredit this possibility and surely it is not be expected that the more conservative members of the Court, unpersuaded in Katzenbach itself, would find it acceptable. It is surprising to think that equally conservative Members of Congress would rush to embrace these possibilities.

In closing, I need only add my professional regard for your different approach. As a personal matter, I know we are not in agreement on the general issue of abortion. But insofar as such matters are always open, regard for the separation of powers, for consistency in public office, and for turning "square corners," clearly compliment your own respect for constitutional processes. I would not endorse an amendment to the Constitution to return every woman's pregnancy to the fate of whatever crminal statutes each state might prefer. If it is to be done, however, surely it should be done in the manner contemplated by the Constitution itself -- by amendment.

Sincerely,

William Van Alstyne

Senator EAST. Our hour grows late. I would like to proceed with my 10 minutes and then turn it over to Senator Baucus. I would like to assure the panelists and all the audience that we are fully aware of the pressures of time.

I am sure you, coming from the academic community, feel enormously frustrated that such momentous things are jammed into such a limited period of time. For what consolation there is, I can assure you your statements are a part of the record. I can also assure you that these matters will be explored in great depth.

What this does give us is an opportunity to form a public record and begin a public dialog.

I know all of you each have many, many things you would like to raise. I do, too, and I know Senator Baucus does. Again, we are back to this problem of I have 10 minutes and what does one say in 10 minutes before a panel of such distinguished gentlemen as the four of you, particularly when there are such deep differences of opinion.

If I might, let me direct my remarks to Professors Tribe and Van Alstyne. The others may listen if they want to.

Let me try to give you my perspective on this as a man trained in law and then in political science.

However, not because of your very fine testimony, but as I see lawyers get into this question of *Roe* v. *Wade* and its implications, I am somewhat reminded of the old statement that the law sharpens the mind by narrowing. There is a tendency, it seems to me, in discussing the narrow legal constitutional questions, which, mind you now, become very important, to lose sight of the broader political context in which this matter has to be dealt with.

Here is the frustration the legislative body has, which is the distinct politcal arm of the Government, concerning the power of judicial review, *Marbury* v. *Madison*, the *Federalist Number 78*.

*Marbury* v. *Madison*, is predicated on *Federalist 78* in which you may recall Hamilton set out a very narrow conception of the power of judicial review. He said it would only be used where actions had

been taken by legislative bodies contrary to the manifest tenor of the Constitution, the express provisions. For example, he noted bills of attainder and ex post facto laws. But he went on to caution that the court ought not to improve their will for a legislative judgment. He was very explicit on that. It was a very narrow conception of the power of judicial review.

*Marbury* v. *Madison* is in keeping with that. You four distinguished gentlemen do not need this Senator to lecture you on the meaning of *Marbury* v. *Madison*, but you may recall what it said was that in that case the Congress by the Judiciary Act of 1789 had tried to expand the power of judicial review beyond those expressly provided for in article three, namely by adding the writ of mandamus.

Therefore, it was an action of Congress contrary to the express provision of the Constitution, and, hence, an appropriate case for the power of judicial review.

I am saying it is a long, long road from *Marbury* v. *Madison* to *Roe* v. *Wade*. Many critics across the spectrum are saying this was an incredible assumption of judicial power. I remember in the dissent that Justice White and Rehnquist said that it is an improvident and extravagant use of the power of judicial review. Justice Rehnquist said it was judicial activism.

Here is the frustration Congress has: How do you respond to that? How do you deal with it?

What we are trying to do—I resist the argument, Professor Van Alstyne, that this is a trivial venture—is to find a practical, modest, appropriate approach.

If you are really saying to us, gentlemen, whenever the Supreme Court with its extravagant use of the power of judicial review intervenes into the political process, you are going to have to turn around and use the constitutional amendment process, do you know what that does to the legislative process of the Congress in terms of major substantive policy questions? We are simply debilitated. It means that we and the States together must constantly be amending the Constitution.

With such an overly active Court, we were hoping we could do something short of that kind of dramatic response where we keep adding amendments to the Constitution. Hence, this idea. Some may say it is rather novel. Maybe because of its novelty lawyers are shocked by it, they who are so embedded with tradition as they understand it in their profession.

However, what we are trying to do is see if there might not be practical alternatives other than constitutional amendments. In *Roe* v. *Wade*, as Mr. Galebach and Mr. Noonan have pointed out, there seems to be an invitation here of sorts, an implied one. The Court said the judiciary was not equipped to define when life began, the implication being certainly some other entity of Government might be able to, perhaps the legislative branch.

We are best equipped to deal with these profound and deep and sensitive policy questions. So we are entering into that water. All we are trying to do, as Mr. Galebach has said, is to try to find some sort of definition. The Court seemed to suggest that might solve the problem.

You may be right. The bill may be enacted into law. It may return the matter to the States. The question may go directly to the Supreme Court. All we want to do is to get it to the Supreme Court. If they hold the statute unconstitutional, then those who still have this concern can move to the constitutional amendment route. However, we look upon this bill as the practical, prudent, reasonable first step.

I wanted to clarify from the standpoint of someone serving in the legislative chamber, in the political arm, that I see this on the campaign trail. There are so many things the public wants to know. Why cannot Congress do something about this major policy question, or that major policy question?

The point is the Supreme Court has short circuited the legislative process. We cannot deal with busing. No, they handle that one. Prayer in the classroom, they handle that one, too. Abortion? No, that is theirs, too.

Increasingly, as you go down the litany, you will find so many major policy questions that the Congress is no longer able to deal with. Many Members of Congress in both chambers and both parties have now reached the point where we are going to begin to assert our policymaking role because certainly under a reasonable conception of the separation of powers, we have that prerogative. It is in that spirit which we undertake this effort.

We have a very hard choice to make here. I hate to keep imposting on our dear witnesses. We have a series of votes that we are going to go over and cast. We would expect to be back here within roughtly 45 minutes.

I know your schedules are busy, but if you could bear with us, we would appreciate it. Then we could come back and wind this up. Again, we regret the constant interruption. If you could do that since you are here, we would be deeply appreciative of it.

The good audience has an option. You may do what you want to do, obviously, but we do have to go over and vote. We shall return as quickly as we can.

I will call a recess until we return.

[The subcommittee was recessed.]

Senator EAST. We shall stand reconvened. Again, I thank you, gentlemen, for your indulgence on this confusing day. We will not be voting again until the 2d of June. There is some blessed relief there, if nothing else. Perhaps the country will be a little better off anyway to take a rest from all of this.

Senator Baucus will be returning in a minute. He would like to ask his questions then. He and I had agreed that I could finish up what I was doing.

I will not weary you, gentlemen, with a restatement of what I was saying, but as you will recall, I was expressing a little bit of the anxiety you find in the legislative chamber as to how to deal with what many perceive to be a usurpation by the judiciary of the policymaking function.

As I say, *Roe* v. *Wade* certainly could not be justified by *Marbury* v. *Madison* or the *Federalist 78* because the Georgia and the Texas statutes were not contrary to the manifest tenor of the Constitution. The Constitution said absolutely nothing about abortion.

In short, as I was saying, in so many matters the Court has not been prudent. It has tended to frustrate the political process in this country. That is exactly why this issue is here, in my judgment.

Perhaps if we had had deliberation on this issue, if the Congress, for example, had come to the same conclusion that the Court came to in *Roe* v. *Wade*, the same policy result, that would probably have ended it. There would not be much else you could do except to try to continue to urge through political movements that Congress change that policy but the Court circumvents and frustrates the deliberative process, the political process. Then we are forced to come back and try to find some way out of this constitutional crisis. We are groping here, as I was saying, for what we think is a relatively modest solution to it. We are not trying to overreact to the problem.

However, in so doing, then of course we are chastised for perhaps being trivial and not appreciating that the Court has ruled and the only way you overcome Court rulings is through constitutional amendments.

We are then invited to go to the very heavy constitutional artillery. I just question whether in the long run if the Court continues its current practices of being so heavily involved in political decisions they leave us with no alternative but to start the amending process. That greatly distorts the nature of the American system, the federal system, and the separation of powers, which are the broader themes of the subcommittee.

Having perhaps made my point ad nauseum there, I would be interested in you two gentlemen responding.

Mr. TRIBE. Mr. Chairman, anything but ad nauseum. I understand the feeling and I think there is a great deal in it, but let me just suggest a couple of points.

First of all, I think it is easy always to imagine a kind of golden age. *Marbury* v. *Madison* one thinks of as a modest and strictly interpretivist decision. In point of fact, as my colleague, Professor Van Alstyne has shown more ably, I think, than most, *Marbury* v. *Madison* was itself a remarkable decision not clearly dictated, and probably not dictated in any serious sense by the language of article III of the Constitution.

If one goes point by point through the landmark decisions of the U.S. Supreme Court, one does not at all get the feeling that there is a sudden period of activism in the Warren Court or the Burger Court. It has really been a fairly smooth landscape throughout.

Throughout that period, Congress has not been without important devices for making its will felt and known through amending the Constitution, and not merely so frequently as might be supposed if you thought of the Court doing some terribly apocalyptic thing every other day. The decisions that are of genuine deep concern, of the kind that you would describe as leading to crisis, do not happen all that frequently.

However, apart from constitutional amendment, there are other measures. I understand that the Senate just today passed a funding cutoff in the abortion field of the sort that the Supreme Court quite clearly would uphold and which, whatever I might think about it or others might think about its wisdom or humanity, certainly expresses a powerful political sense this body.

There are a great many things that can be done legislatively, not the least of which is effectuated through the power of advice and consent in the Senate when appointments are made to the U.S. Supreme Court.

It is not as though there is somehow a one-way dialog, with the Court handing down Olympian edicts and the Congress of the United States being helpless to respond by anything short of an excessive number of radical amendments.

On the contrary, I think it would be a fearsome development if, whenever the Supreme Court had spoken on a matter and there were significant disagreement, but not quite enough to amend the Constitution, a routine response became legislative redefinition of a constitutional term that has been defined by the Supreme Court. It would be an understatement to say that such responses would be unlikely to offer productive direction for political dialog.

I think the national dialog over the human life amendent in its many incarnations, is itself, an important, valuable enterprise. I think you are certainly right, Mr. Chairman, as far as I can tell, that if the Court had gone the other way in *Roe* v. *Wade,* as the supreme court in West Germany did in holding that life was entitled to protection from the moment of conception, that, too, would have generated a serious political move in the other direction.

I do not think that is to be described as a crisis. I think that is the direction through which our system is meant to evolve. The national debate which will either produce a human life amendment or will not produce one is a healthy thing for this country.

The question then becomes whether it is a valuable thing to try to speed that process along by passing something this is quite likely to be struck down, or whether that is a diversion that in the end will make everyone look worse and accomplish very little.

I appreciate the underlying impetus behind this. I think it is not a good idea to amend the Constitution too lightly, but when we are talking about a decision of this moment, I do not think it symptomatic of an unduly casual attitude toward the Constitution to say this is the sort of thing on which only an amendment would be the appropriate response if one did not agree.

Senator EAST. Thank you.

Professor Van Alstyne.

Mr. VAN ALSTYNE. I agree with most of that, Senator East.

At the last ditch, it is one of those "cannot helps," that is to say, it is not possible to have the Supreme Court of the kind we have and expect always to be unsurprised by a particular decision.

Professor Tribe is surely correct. The Marshall Court in a variety of areas, if not *Marbury,* which I think was an activist decision, many of its other decisions, astonished the country and drew a lot of anger from a lot of people. Many of those decisions were looked at as profoundly subversive of States' rights from the very beginning. *Fletcher* v. *Peck* and a great variety of other decisions were of that kind.

I do not at all mean to make sport of the gravity of your question merely by beginning with the observation that there is no uniqueness, no novelty by the sense of the public consternation here.

There is no way ultimately to dissolve the likelihood of recurrent consternation from time to time short of fundamentally changing

the nature of the accord. That, too, can be done, as I have said. I do not pass that off lightly with some smug expectation that it would never occur to anybody to do it.

Most counties of the world operate under different systems. It has only really been since World War II that the American model of a Supreme Court has picked up much enthusiam.

The country from which we trace our immediate origins, the English, never had such a court, had no written constitution, and there is no power of judicial review, which you know very well.

The other cousins we have from the English Commonwealth have nothing like it. The New Zealand Supreme Court has no such power. Australia's has none. There is a great commotion in Canada, as you know, on exactly this.

Ultimately, I mean only to say that one needs to put it in some perspective.

I agree that there are other marginal devices. There is no question in my mind that in a variety of areas of American constitutional law, the keenness of Congress to side with Mr. Nixon's restaffing of the Court in the early 1970's did, after suitable lag time, show up in a pattern of decisions, not in this area, but in some other areas on procedural due process, on the availability of habeas corpus. There has been a shift in the pattern of those decisions.

It is not illicit of Congress to make its displeasure felt incidental of the appointment process. Hearings were held this morning on an entirely different approach. I am not enthusiastic about it, but it is a device open to Congress in selected areas, probably including this one, a device not to try to seek by redefinition the reversal of Supreme Court decisions, but really to manifest such profound displeasure with the quality of decisions by the Court, to remove from its capacity to decide certain cases at all.

Now, most of us are terribly reluctant to urge that because once you make an exception of certain kinds of cases, it may generate a public expectation that whenever there is profound dissatisfaction with a certain series or kind of decision, then, indeed, Congress will be expected equally to make an exception there and so on.

Those are risky enterprises.

I agree with Professor Tribe, too, that it is not unproductive, and I do not want to be misunderstood as being disrespectful of the profound national debate that your own efforts and others have contributed to with regard to the meaningfulness and the beginning of life.

That may work itself out. If it works itself out in an amendment, which currently I would not support as a private citizen, so be it, but I think that is perfectly proper. We have done it before. Doubtless, it shall happen again.

In the meantime, while I have the floor, I want to observe that my own view is that some of the Justices of the Supreme Court have, themselves, been very conservative in their subsequent interpretation of their own original decision in *Roe* v. *Wade.*

Mr. Tribe refers to the most current version of the Hyde amendment. We have had a series of those. Surely, Senator, an awfully large number of persons, including those not pleased with *Roe* v. *Wade,* had forecast that those limiting acts of Congress on funding

and then acts of Congress freeing the States to desist from funding and devices of that kind, many of those had been predicted would necessarily also be held unconstitutional.

You know as well as I that they have all been upheld so far. There is to that extent, therefore, a certain chastening within the Court.

The constancy of this apparent incessant and frustrating dialog is not without its therapeutic ramifications. It may very well be that what ultimately best comes out is simply the shared recognition that the country is not without its resources, and the Court from time to time tends to veer in the pattern of decisions in some acknowledgement that that is so.

Mr. TRIBE. Senator East, might I add just one word?

Senator EAST. Yes, certainly.

Mr. TRIBE. I fear that the notion of an activist Court giving rise to legislative reaction of this kind might yield a kind of negative feedback of the sort that the Congress does not truly want. That is, the message, the signal that I believe the U.S. Supreme Court would get from a statute of this kind would not be the kind of chastening signal that my colleague describes in other contests.

Instead, I think it would come to the view that the Congress was willing to pass laws, engage in the solemn activity of lawmaking, almost as a kind of ersatz petition for rehearing, in effect daring the Court to say again what it had already said before.

If that were to happen, I think the Court would give less weight than it ought to give in general to decisions by Congress that a measure ought to be passed. We really ought to cultivate a climate where the Court defers more to Congress than it would if it sees Congress as simply petitioning for rehearing.

Senator EAST. It is a fascinating point, but it seems to me then, Professor Tribe, that you are suggesting we ought to be more confrontational. What I would rather do is be less so and hope, as Professor Van Alstyne is saying, that we would chasten them first of all through the very kinds of hearings that we are having.

They would be sensitive to the very profound political policy impact they have on the American system of government. It is causing enormous reverberations throughout the body politic. We are feeling it in here. Maybe they cannot quite sense it over there in the Supreme Court building, but those of us out in public life, running for public office, involved, hear this all the time.

I would hope that we could have a more modest approach. I do not think that the three branches ought to be flailing one another over the head with their heavy artillery all the time.

I would prefer to let them understand our concerns and perhaps ultimately the greatest cure would be if they would simply show restraint and get the message that they have gone further than they ought to in the policymaking area.

That would be the single greatest thing in the long run that would come out of that. However, since that message does not seem to have been fully communicated, rather than go to extreme measures, we would rather gently nudge them and say there is a problem here, if you will, in the broader sense of sound government, politics, political science. Are you hearing this?

We take a modest response. You make the argument well, but you are saying that in being too modest, they may not get the message. Therefore, you are suggesting that we go to the constitutional amendment.

However, I fear if that were done first, prior to the bill, then as Professor Noonan has already indicated, we will find those who have said you cannot do it by a statute saying, "Yes, you are going the right way, but that is a bad amendment, and that is a bad one, that is a bad one." Sooner or later, I suspect, we would be getting a lot of rhetoric from the same quarter saying really there is nothing you can do.

I come to the conclusion as a political scientist more so than a lawyer that the critical point may well be that they like the policy result of *Roe* v. *Wade*. By saying you cannot cure it by statute, you cannot cure it by constitutional amendment, what they are doing, and it is a very good political ploy—I do not mean that in a calculating Machiavellian way—a very astute way of defending your turf, the status quo, by saying there is not any way you can actually change this, although we certainly respect your right to want to change it and we understand your anxiety over the policy question involved. However, frankly, there is not any practical way to do it.

Congress works a little more unevenly than the judicial branch. We ebb and flow. These distinctions are increasingly looked upon by so many people, in fact increasingly by Congressmen and Senators, as not really sincere. I am not questioning the motives of the people, but they are really sincere constitutional objections. They are really ways and instruments of defending their political turf because they like the policy result of *Roe* v. *Wade*.

Mr. TRIBE. That is what makes it so important to recognize that among the group of scholars who signed that letter there are strong advocates of a human life amendment. There are strong opponents of *Roe* v. *Wade*. There are people who believe *Roe* v. *Wade*. was the worst decision in the history of the U.S. Supreme Court.

However, they are united in the view that what you describe as a modest nudge would be seen by the Court as an unmerited kick, and would yield a recoil phenomenon that would not be productive of useful dialog.

Mr. VAN ALSTYNE. Let me add a point, if I may, on that, Senator.

As a professional matter, it is strange for me to be indentified with Mr. Tribe because for about the last four or five inquiries before the Senate, I have been on the other side. My view is, for instance, that the States may convene a constitutional covention with far greater ease than many of my more liberal colleagues think.

Indeed, I was the before Senator Hatch's committee 3 weeks ago urging the proposition that it would be in the national interest if Congress were to enact a statue which forbade sex and race discrimination across the board. That meant across the board, including no use of race to favor a person, which would inevitably disfavor others.

I take a far more generous view, quite frankly, of the power of Congress to keep from the Federal courts the capacity to decide

cases than a good number of my colleagues in the fraternity. But I assure that my professional views do not merely follow the convenience of my preferences as a private citizen. As a private citizen, I would probably also speak resolutely against an amendment that you might propose, but I should certainly not misrepresent the authority of Congress to propose it however it might want to.

One other thing because of the question raised with me by Senator Hatch: In one sense, because the ambition of the bill is merely to restore discretion to each State to deal with this problem rather than to impose a congressional solution, from that perspective, I quite agree that the nature of the proposal that you put before us is a modest one.

In terms of the theory of the device, however, it is really very radical in terms of a role for Congress. I am very serious in speaking that way. If it is constitutional in this case for Congress to tell a State that it has an obligation of a certain kind which it must fulfill under these circumstances, by a mere parity of reason, and with no effort or desire to be sophistic about it, a more radically oriented Congress may easily as well say to each State that we believe you have an obligation to make the quality of life equally well protected for those who possess very little. Therefore, we are mandating by Federal statute that you do the following kinds of things for the un-well-to-do, that you must provide a certain minimum complement of health care at public expense, that you must provide at State taxpayer's expense regardless of your other needs not less than so much education for each person, irrespective of their condition, as it were.

The theory of this, that Congress may describe the obligation of States and, through its section 5 power, then impose upon the States Affirmative duties to vindicate these obligations as defined by Congress has in past years, of course, been used by the most activist Members of Congress, the least sensitive to the quality of States rights, to make their own fiscal decisions according to their discretion.

The theory of the bill, therefore, as distinct from the operative proposal on its face is one of radical congressional power in the overriding of State autonomy to allocate the scarcity of resources according to its own best discretion in the apportionment of those resources.

I think it is one reason on political grounds that some conservative colleagues of yours who otherwise associate themselves intimately with your concern on the abortion issue as such may be a little bit diffident about the approach taken in the bill itself.

Senator EAST. Gentlemen, I appreciate you comments. Since the hour moves on, I am going to turn over the questioning to my distinguished colleague, Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Galebach, I would like to clear up, if we could, your understanding of how this bill would affect State action. My understanding is that the bill, if it is enacted without any additional State or Federal legislation, would prohibit States from funding abortions. Is that your understanding, too?

Mr. GALEBACH. In general, except where States had a justification as compelling as, say, to prevent the death of a mother.

Senator BAUCUS. In those cases, too, would the bill also prohibit States from funding clinics that distribute IUD's and morning-after pills in your view?

Mr. GALEBACH. It could very well.

Senator BAUCUS. That is, without additional legislation, this bill, if it passes, would have the effect of prohibiting States from funding clinics that distribute IUD's and morning-after pills?

Mr. GALEBACH. There might be some tough legal questions that would come up as to whether the State could fund other operations of the clinic, but the State could not fund any device that would terminate a human life after conception.

Senator BAUCUS. Because that would be State action prohibited under the bill?

Mr. GALEBACH. Yes.

Senator BAUCUS. Would the bill permit a State to ban all abortions?

Mr. GALEBACH. Yes; it would.

Senator BAUCUS. Would it permit a State to ban the use of IUD's and morning-after pills?

Mr. GALEBACH. It would. As a practical matter, that would take a separate decision by a State. That is, if a State enacted an antiabortion statute of the type that were generally in effect before 1973, preventing the destruction of a human life and making that a crime, it would impossible to prosecute someone for the use of an IUD, because you would never know if a life existed and if that life had been terminated.

However, a State could make a separate decision to ban, say, manufacture or production.

Senator BAUCUS. What I am trying to determine is if this bill passes. Whether its effect is to send the status of this question to what it was prior to *Roe* v. *Wade*. My understanding is that the effect of this bill is to place more restrictions on the States than those placed on them prior to *Roe* v. *Wade*. The bill would prohibit States from funding abortions and prohibit States from funding any device which would interfere with development of the fertilized egg.

Mr. GALEBACH. In that sense, but it is important to keep in mind——

Senator BAUCUS. That is the effect, is it not?

Mr. GALEBACH. That is correct, except it is not an infringement of a constitutional right.

Senator BAUCUS. I am not arguing whether it is an infringement of a right or not.

Mr. GALEBACH. OK.

Senator BAUCUS. The point is that the effect of this bill does not reinstate the law prior to *Roe* v. *Wade*. It goes much further.

Mr. GALEBACH. Insofar as it would outlaw State action that terminates a life after conception, it would be different from before *Roe* v. *Wade*.

Senator BAUCUS. Would you agree with that general assessment. too, Mr. Noonan?

Mr. NOONAN. To the extent I have gone into IUD's as a method of preventing pregancy or birth, I have never completely satisfied myself that there is adequate evidence as to how they operate. The

problem basically is it is very hard to have clinical tests on human beings. Most of the evidence has come from animals. Animals are always somewhat different from human beings.

I think there is a basic argument as to how these operate.

Senator BAUCUS. If the medical community is unanimous in its belief that the effect of IUD's is to abort or terminate the living organism after conception, then would you agree that the effect of this bill would be to prevent States from funding any actions which would have that effect?

Mr. NOONAN. I am responding to what I think is a hypothetical contrary to what has been established. In the present state of medical knowledge, under present law, I would not answer that affirmatively.

Senator BAUCUS. You were stating earlier that most constitutional scholars say that the Congress has the power to limit inferior court jurisdiction.

Mr. NOONAN. I was saying the courts say that, not scholars.

Senator BAUCUS. Is it true that in some cases the courts have not so held where the effect of the limitation is to preclude someone from gaining a forum to determine a right or address a right?

Mr. NOONAN. I do not know of any Supreme Court precedent that limits the right of Congress.

Senator BAUCUS. In any way?

Mr. NOONAN. To limit an inferior Federal court as to its jurisdiction.

Senator BAUCUS. Would either you, Professor Van Alstyne, or Professor Tribe, have a different view on that point?

Mr. TRIBE. I certainly would. It depends, as is often the case on these matters, on definition, but to suggest that the Supreme Court has somehow granted Congress carte blanche is this area is very misleading, I think.

In one example that I described in my prepared statement, where the Court said that Congress has plenary power over bankruptcy in addition to its supposedly plenary power over lower Federal court jurisidiction, it was a closely divided Court that concluded, only because reproductive rights and family rights were not involved, that Congress did have the power in that case to make a Federal forum unavailable for bankruptcy discharges.

In an early case after the Civil War, the Supreme Court struck down an attempt to exclude certain former members of the Confederacy from practice in the Federal courts despite the fact that one could easily say that Congress plenary power over the lower Federal courts and those who may appear there certainly includes the power to control and govern who may practice there.

Senator BAUCUS. I would like the read two different professors' views on this. I think professors are like lawyers. Each probably has a different view, but let me read a portion of a letter on this point from former Solicitor General Erwin Griswold pertaining to section 2 of this bill.

He writes in his letter to us as follows:

> Section 2 of S. 158 undertakes to restrict the jurisdiction of inferior Federal courts established under Article III of the Constitution. Although it is not wholly clear, I am inclined to think that this would be held to be unconstitutional in light of all the circumstances under general principles of the separation of powers. On the whole, it could be concluded that this is not really an effort to regulate the

jurisdiction of the lower courts, but is rather a congressional effort to overturn a constitutional decision of the Supreme Court of the United States, making it virtually impossible for the issue to come before the Supreme Court by stifling access to the lower courts.

The other letter is from Prof. Charles Alan Wright, who states with respect to this section in this bill:

I think Congress has very sweeping powers over the jurisdiction of the inferior courts. At the same time, I feel certain that Congress must exercise its power over Federal jurisdiction, as it must its other powers, in a fashion consistent with constitutional limitations. Under such cases as *Hunter* v. *Erickson* and *U.S.* v. *Klein*, I do not think Congress has authority to close the Federal court door in suits arising under laws that prohibit, limit, or regulate abortions, while allowing access to Federal courts to challenges to statutes that permit, facilitate, or aid in the financing of abortions.

Everyone has their own view, but at least those are the views of two professors.

Mr. NOONAN. If I may comment, there certainly has been a lot of professorial speculation—very result oriented, as the chairman has pointed out—not only as to abortion but as to busing. People who do not like Congress entering a field very easily tease out precedents as you heard Professor Tribe tease one out to show that there might be some restriction.

However, the fact is there are not any cases, and the power does not come from a grant of the Supreme Court as Professor Tribe characteristically phrased it, but it comes from the Constitution. The Constitution says that you have the power to establish inferior Federal courts. You have the power to establish them and you have the power to diminish them.

The leading case is still the *Norris-LaGuardia Act* case which is precisely the same kinds of response to abuse of power.

Senator BAUCUS. I was struck earlier with a point that Mr. Van Alstyne made about the role of the Supreme Court in American constitutional law and American Government compared with some countries where there tends to be more instability because the supreme court is not the final arbiter over terms of the constitution.

I think it is a very good point. In fact, it is my understanding that in the last couple of decades, some parliamentary countries are beginning to establish supreme courts as final arbiters of constitutional terms so that there will be more stability in interpretation that had previously occurred in those countries.

Is that accurate? I see a couple of heads nodding.

Mr. TRIBE. Senator Baucus, might I say something in rehabilitation of Charles Alan Wright and Erwin Griswold, although they hardly need it.

Those comments from both of those gentlemem were anything but result oriented. Both of them thought *Roe* v. *Wade* was wrong. Both are quite encouraging of congressional action in this area I believe, but they both reluctantly conclude that this is not the kind of measure that could be sustained.

The fact that there are no precedents precisely in point itself neatly demonstrates what I should have thought our history would otherwise have made quite clear. That is, that on the whole, and I include the Norris-LaGuardia Act precedent, Congress has refrained from manipulating the jurisdiction of the Federal courts in order lopsidely to undo substantive rights of a constitutional kind.

The fact that Congress has not done it helps to explain why the Court has not had to strike it down.

Mr. GALEBACH. Senator Baucus, I wonder if I could read just one sentence from the most recent Supreme Court decision that I have been able to find on this point I think it is directly on point.

It is a 1973 decision in which Justice White, writing for seven other Justices as well, said that Congress has the sole power of creating inferior Federal courts and of "withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."

That is pretty strong language.

As to Dean Griswold's letter, I have the greatest respect also for his legal scholarship, but as a matter of fact, this withdrawal of jurisdiction will not prevent cases from coming to the Supreme Court. They will go up through the State court system. There will be many cases coming up from any State that enacts an antiabortion law.

The whole point of this bill is not to keep the Supreme Court from reviewing those sort of cases. The point is to get those cases up to the Court as soon as possible so that the Court can make a new decision informed by Congress on when human life begins.

Senator BAUCUS. I guess one other question that troubles me is when should Congress try to overule the Court by statute?

To take an extreme case, in following Senator Moynihan's analogy, what if the Court were to hold the electronic media were protected under the first amendment? Let us assume that we in the Senate do not like radio and TV commentators, but we do like what the New York Times has to say.

Why should Congress not enact a statute that restricts the electronic media if it feels that way?

Mr. GALEBACH. I would like very much to speak to that. I think that is one of the most important questions before us today.

I think as pertains to the human life statute——

Senator BAUCUS. We could arguably pass a statute which has that effect.

Mr. GALEBACH. Yes; the one time when it is most clear to me that Congress can act is when the Supreme Court has declared itself unable for some reason to decide a fundamental question that goes to the constitutional issue. That does not happen very often. It has happened here.

As for Senator Moynihan's examples, the Supreme Court did not leave open any question there. What might be analogous is if the Supreme Court looked at the medium of television and said they did not see any indication that the framers of the first amendment intended to protect television and cannot tell for sure whether television is a news medium and held it unprotected.

I think Congress could then come in and say they do believe television is a news medium, and that changes the first amendment constitutional issue.

That is a rough analogy and there are always problems with analogies, but that is a much closer analogy to the human life bill than the sort of example Senator Moynihan was raising.

Senator BAUCUS. You are saying the Court did not decide when human life begins, and, therefore, asked Congress to make that determination. Is that what you are saying?

Mr. GALEBACH. They did not expressly do so.

Senator BAUCUS. I know they did not.

Mr. GALEBACH. They did declare themselves unable to do it.

Senator BAUCUS. They did not invite Congress to either.

Mr. GALEBACH. The real question is whether a definition of human life is relevant to the question of personhood. The only way we are going to know that for sure is by the Supreme Court reviewing the human life bill.

In *Roe* v. *Wade*, they did not say that it was irrelevant whether unborn children were human beings. They did not say they did not care. They just said they could not decide.

Mr. TRIBE. May I speak to that, Senator Baucus?

Senator BAUCUS. Yes.

Mr. TRIBE. I must say I have heard Mr. Galebach make this argument over and over again. It strikes me as increasingly implausible every time I hear it.

The Supreme Court had the candor and the good grace not to be arrogant about the matter and to say that human life is something we cannot define and something that no government can try to impose.

They had no doubt whatever about the meaning of "person" under the Constitution. They left no opening there. To encourage the Court to conceal its profound doubts about moral and theological matters by saying we will jump into the breach only when they are candid enough to scratch their heads in public seems to me to be an incredibly perverse political and philosophical doctrine. It is a trick. It has nothing to do with what the Court was really holding in *Roe* v. *Wade*.

What the Court was holding was that the State cannot impose its answer. No one has ever suggested that Congress has more power to impose an answer just by virtue of section 5 of the 14th amendment than the States do because Congress is no less limited by the due-process clause just as the States are.

I think that what you are hearing now is just really beside the point.

Mr. GALEBACH. This is a very interesting personal debate because I have heard Professor Tribe say time after time that the Supreme Court held in *Roe* v. *Wade* that Government cannot decide when life begins. The Court did not hold that.

Mr. TRIBE. I did not say that. I said the States.

Mr. GALEBACH. OK, then we agree. They said the judiciary is not in a position to speculate and the States may not decide.

The limitations on the judiciary do not apply necessarily to Congress. There are many questions Congress can decide that the judiciary simply are not in a position to decide. Whether to declare war is the sort of question you will never get a judge to decide, but Congress can decide it.

Senator BAUCUS. Is it not true though that in most cases where the Court did not decide, the Court says or implies directly that this is a question for Congress to decide?

I can think of many cases where the Court stated that this is not a matter for the Court to decide and stated or implied that it is a matter for Congress to decide.

One can read this *Roe* v. *Wade* decision in various ways. I am not trying to argue that it should necessarily be read one way or the other. However, I am not sure whether the Court said that it did not decide this issue because it could not or because it would not.

The English language is not as precise as it could be. Perhaps if we had the Supreme Court sitting here, we could delve more deeply into the recesses of their minds and their reasoning and we could be better able to determine what they meant, if they knew what they meant.

However, I suspect that they said not that they could not but that they would not. I suspect, too, that in their judgment, as a matter of public policy, it would be improper for this decision to be made basically for the reasons that Professor Tribe and others have indicated, I think they felt that the issues involved were so personally anguishing and complex that it would not be right to force a uniform or near uniform solution on the country.

I do not know if that is correct but that is the feeling I get from reading that decision and listening to the debate over it.

Mr. GALEBACH. I agree the Supreme Court did not make it explicit. If they had, we would not have anything to debate here. Therefore, it is left up to us to draw the inferences, but those inferences can be drawn either way. There are good constitutional arguments in favor of saying that the Supreme Court was unable to. The Supreme Court did not say whether or not Congress was able to. It just did not address that issue.

The Supreme Court did not say whether all human life is of equal value, or whether, as Professor Van Alstyne said, blastulas, zygotes, and embryos do not have the same value. All of those questions are open and we are only going to find out the answer to them when the Supreme Court reviews the human life bill.

Senator BAUCUS. I suspect, too, that the law on this subject is going to change the more that medical science advances with respect to the fetus.

Mr. VAN ALSTYNE. I think not, Senator. I know that is a widely held view, but it is arguable. Medical science can already create and bring to term an adult mammal from a single cell. A single cell has all the potential for a replicated mammal.

I suggest to you it has no bearing on the constitutionality of a State criminal statute which might make it a misdemeanor to dispose of an unfertilized ovum. Nothing other than a mere embarrassment of temporary impedence to medical technology precludes us from taking an ovum under a process of cloning and bringing to term a full-grown adult. The phenomenon of asexual reproduction has already been done with amphibians. It has been done with manageable mammals. It does not make a bit of difference.

If a State wants to try to make a misdemeanor of disposing of an unfertilized ovum, it will not get anywhere insofar as the Constitution is concerned. The fact that medical technology may develop nutrient baths and make it possible to take a 5-week-old embryo and by nurturing it in the extraordinary amniotic chemical fluid of

that nurturing bath to bring up a full-grown adult should not make any difference to the outcome of *Roe* v. *Wade* in my opinion.

Senator BAUCUS. Why?

Mr. VAN ALSTYNE. Because despite presentations here to the contrary notwithstanding, I just utterly disagree as to the mischaracterization of the holding of the case. The fundamental characterization is that the State has no sufficient interest in this degree of life to compel a woman to go forward with it. Without saying it is not a form or stage of human life, it has no sufficient interest in that life to overbear the prerogative of the woman in respect to her decision not to carry it to term.

Insofar as by way of counterargument to that position, an argument was then made in the case that this degree of life is a "person" under the 14th amendment, then surely the State is able to protect it.

At that stage, the Court simply held that the word "person" in the 14th amendment is not inclusive of such immature forms as an historical and textual matter of 14th amendment interpretation.

Senator BAUCUS. My point is I am wondering if as medical science advances to the point that you are describing, that is if it can take a 5-week-old fetus and place it in an amniotic bath then maybe moralists, ethicists, philosophers, religious leaders might tend to reach some kind of consensus on this issue. At that point, perhaps the Supreme Court will address it. I do not know.

Mr. TRIBE. I think it is instructive that you have disagreement now between the two of us. I agree with you, Senator Baucus. It was, in a way, the genius of the Court's flexible definition of viability that left that very possibility open.

The Court was saying that a woman cannot be forced to remain pregnant. Viability is a variable line. As technology advances to the point where the developing blastula may be preserved and nourished to maturity without imposing an obligation on the woman that she remain pregnant against her will, then viability will have occurred at a much earlier point, and then the Court's decision, without a change of a single word, would mean that the State from that point forward could prevent the destruction of the fetus, not perhaps its removal but its destruction.

It seems to me that in a sense the Court's decision, whatever else might be said about it, anticipated the possible advance of technology that you are describing.

Senator BAUCUS. Mr. Noonan?

Mr. NOONAN. I just wanted to have a chance to reply to your question which I understood was addressed to Mr. Galebach and me as to when Congress should enter in.

I wanted to really address the what seemed to me was the assumption of the question, that you were doing something precedent-breaking and new.

There has been no response at all from my colleagues to my contention that this is a relatively familiar process. Whether it is something that involved Congress acting contrary to a century-old precedent on insurance or a 30-year-old precedent on Federal courts or a 7-year-old precedent on voting rights, Congress has done it.

In this particular area, you have express authorization from the Constitution to do it. Clearly you should not do it all the time. However, on the one hand you have Professor Van Alstyne saying it is a trivial ploy. On the other hand, Professor Tribe is telling you this is an enormously important issue.

It seems to me that, obviously, this is an issue of great importance to many Americans. It is not something where the people are willing to wait for medical science to protect these unborn lives.

The parade of horribles that you got from Senator Moynihan are singularly unpersuasive. He speculates about what might happen if Congress ran wild in a way that is very hard to imagine. You are dealing with a Supreme Court which did run wild, which did overrun the rights of a multitude of human beings.

We are trying to create a means of coping with a real situation.

Mr. TRIBE. I think Professor Noonan owes this body a little more candor when he says: "No one answered." We were talking during the break and I was trying to explain to him why every one of those supposed precedents was radically irrelevant to the matter before us.

I do not want to bore the two of you with it, but I am surprised that he does not share those observations with you.

As to the rest, we cannot conduct this discussion, can we, on the premise that *Roe* v. *Wade* was an abomination and clearly wrong? We have a constitutional process for resolving those things. If anyone thinks that we can bootstrap ourselves into the right answer to these deep questions by simply assuming that the Court went wild and that, of course, then it is OK for this body to do anything, I do not think we can really advance the inquiry that way.

Senator BAUCUS. Mr. Galebach, you do not think, do you, that Congress should simply pass statutes for the sake of issuing advisory opinions to the Supreme Court? I mean we should be serious about our business here and take our business very responsibly.

Mr. GALEBACH. Absolutely. I think there is one case that Professor Noonan mentioned that is a perfect instructive example. It is certainly not entirely off point. It is the case of literacy tests.

The Supreme Court said that literacy and illiteracy are neutral as to race, creed, and color. That is what the Supreme Court said in 1959. In 1970, Congress said literacy tests are discriminatory and were to be outlawed.

That is contrary to what the Supreme Court had said. Why did the Supreme Court go along with Congress? Why was their mind changed? The reason was that Congress provided findings that showed that given the educational patterns in this country, literacy tests were likely to be discriminatory against black persons.

There is something from the committee report which I would like to read just very briefly which shows the sort of finding that Congress provided to the Court which changed their mind on that constitutional question.

This was a report of the Senate Judiciary Committee on the Voting Rights Act:

> The educational differences between whites and negroes in the areas to be covered by the prohibitions, differences which are reflected in the record before the committee, would mean that equal application of the literacy tests would abridge 15th amendment rights.

That was the finding of Congress. That changed the Supreme Court's mind as to whether literacy tests were discriminatory.

In the human life bill, we have a very similar situation with Congress making findings as to whether unborn children are human beings in the expectation that that will change the Supreme Court's mind in much the same way.

We cannot be absolutely sure it will change the Supreme Court's mind, but there is certainly a good chance based on all the evidence and the legislative history of the 14th amendment.

Mr. VAN ALSTYNE. Senator Baucus, that is flatly wrong. Since I have been passive, I want to assert that. The case comparison is exactly upside down as a matter of fact.

The more appropriate comparison would be if in *Roe* v. *Wade* the woman's case having been heard and the Supreme Court having been more diffident than it was, it might then have concluded that this is a very close case, but we are not prepared to say that the woman's fundamental right has been violated. The grounds are close, but they are not clear enough.

Therefore, we hold against her claim of right, after which, in comparison with the exact case my colleague has presented to you, Congress were to say we have looked at this problem and we have concluded that State laws which so invade the woman's prerogative to decide are, indeed, arbitrary. The Court might then have sustained the act of Congress insofar as it would invalidate State statutes.

The comparison cannot run the other way. If in the first case the Court says this State law is so intrusive that even by the merely modest judicial standard we find the State has itself already violated the 14th amendment, then my colleague's suggestion is Congress can suddenly convert that.

The Congress may not rehabilitate State statutes which in the Court's view are, per se, so arbitrary that they are unconstitutional, although it is true that Congress may sometimes sweep aside State statutes which in the Court's view are not so very arbitrary that section 1 deals with them alone.

His is an inverted use of the *Katzenbach* v. *Morgan* case and there is absolutely no precedent for it. Indeed, in three different cases, the Supreme Court has said that Congress may not rehabilitate State statutes which violate judicial standards of 14th amendment tests. There is not a case to the contrary in the record.

Mr. GALEBACH. I am trying to figure out how Professor Van Alstyne can say that my example is flatly wrong. I assume it is because he is assuming Congress can expand the voting rights of persons, it can expand the privacy rights of women, but it cannot expand the right to life of human beings. I do not see why not.

Moreover, there is nothing in Supreme Court precedents to justify that assumption. The Supreme Court has said Congress can expand 14th amendment rights, but cannot contract them. The human life bill expands the rights of human beings to life.

Mr. VAN ALSTYNE. And contracts those of the woman.

Mr. GALEBACH. That is the question the Supreme Court did not address in *Katzenbach* v. *Morgan*. It did not say what happens when Congress expands one right which has the incidental effect of

restricting another right. Maybe it will go one way. Maybe it will go the other. However, to say it is flatly wrong is just going too far.

Mr. VAN ALSTYNE. It is not, but let me help my colleague by quoting from a fragment of the Congressional Globe when the 14th amendment was under consideration. The first draft of the 14th amendment would have left it to Congress to define in both directions the content of protected personal rights under the 14th amendment.

Indeed, in its original form, it did not say anything about "no State shall deprive any person of life, liberty, or property." It said rather that "Congress shall have power to make laws necessary and proper" to secure these rights. That is how it was originally presented in 1866.

There were two kinds of objections that were made to that proposal in 1866. One was that it went too far by giving Congress too much power. The other was that it went too far in leaving it to Congress to determine what personal rights were, after the 14th amendment should be ratified.

When this proposal was recommitted, it was recommitted after a Congressman, as Mr. Hotchkiss among others, said:

> This amendment proposes to leave it to the caprice of Congress, but I want them secured by constitutional amendment that legislation cannot override. Then, if gentlemen wish to go further and provide by laws of Congress for the enforcement of these rights, I will go with him.

Respectfully then, under section 1, the language is: "No state shall deprive any person of liberty without due process." The court has said that means a State may not criminalize a woman's prerogative to receive a medically secure abortion within the first two trimesters. That is the minimum floor provided by the language as judicially enforced by the Supreme Court. That is why it is phrased that way: No State shall do that to a woman.

If then Congress wants to protect a woman's rights with regard to abortion even more than that, as by supplying money to assist her or making sure that the needy women are as readily able to secure an abortion as a well-to-do woman, Congress may go further and vindicate that right to an abortion. That is the way the amendment works.

There is a judicially provided minimum floor protection for women according to *Roe* v. *Wade*. If Congress wants to befriend women more than the Court did, Congress may do so, but it may not go below the floor. That is the theory of it. That is the answer to my colleague's strange sense of dilemma here.

Senator EAST. Gentlemen, this was very interesting.

In concluding, I cannot resist bringing to Professor Tribe's attention that Mr. Galebach is, of course, an alumnus of his very distinguished institution and faculty. To some degree, we have to hold you accountable for this young man.

Mr. GALEBACH. Professor Tribe did not have the chance to instruct me.

Mr. TRIBE. I ascertained that he was not in my constitutional law class.

Senator EAST. To some extent we are holding you and your very distinguished institution responsible here. We thought you were doing very well.

Again, we wish to thank all of you for coming. We regret that time closes in on us. It has been very fruitful and productive. We know that you will be available to members of the committee or the staff for additional questions that we might want to submit to you in writing or otherwise. We would look upon your continued counsel as valuable to our ongoing process here.

Again, thank you for coming. If there is no further point to be made, we shall stand adjourned.

[The subcommittee was adjourned at 6:26 p.m.]

# THE HUMAN LIFE BILL

MONDAY, JUNE 1, 1981

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2228, Dirksen Senate Office Building, Hon. John P. East (chairman of the subcommittee) presiding.

Present: Senators Baucus and Heflin.

Staff present: Jim McClellan, chief counsel; Craig Stern and Jim Sullivan, counsels.

## OPENING STATEMENT OF CHAIRMAN JOHN P. EAST

Senator EAST. I would like to call the Subcommittee on Separation of Powers to order.

This morning, we are continuing our discussion of S. 158. We have had a series of discussions already. We had earlier sessions that dealt with the scientific and medical implications of this legislation. We had a session just prior to the recess dealing with the constitutional and statutory implications of it, and this morning we are continuing that dialog.

We have two distinguished panels this morning.

I would like to welcome my distinguished colleague, Senator Baucus, the ranking minority member of this subcommittee.

If you would like to make a statement, please go ahead.

## STATEMENT OF SENATOR MAX BAUCUS

Senator BAUCUS. Thank you, Mr. Chairman.

I have no formal statement to make, except that I look forward to the additional days of hearings we have scheduled on S. 158. I think the past several days have been most instructive. We have received a great deal of useful testimony on the bill.

I am also very pleased to see that we have two very distinguished panels of individuals who will testify this morning.

It is an interesting footnote to today's hearing, according to my understanding, that this will be the first time that former Solicitor General Archibald Cox and former Solicitor General Robert Bork have been together since that infamous date a few years ago.

With that, I think we should begin the hearing. I look forward very much to the testimony.

Senator EAST. Thank you, Senator.

We would like to proceed in this way, if we might: Would the first panel please take their place? That is the panel consisting of

Prof. Robert Bork, Prof. Robert Nagel, Prof. Archibald Cox, and Prof. Basile Uddo.

Before we commence, I would like briefly to identify these very distinguished gentlemen.

Mr. Bork is currently the Alexander M. Bickel Professor of Public Law at Yale University Law School. He served as Solicitor General of the United States for 1973 until 1977 and as Acting Attorney General of the United States in 1973 and 1974. He is also an adjunct scholar at the American Enterprise Institute.

Professor Nagel is currently a visiting professor of law at Cornell University. He received his B.A. from Swarthmore College and his law degree from Yale University. He served as deputy attorney general of the State of Pennsylvania from 1972 until 1975 and as associate professor of law at the University of Colorado since 1975 and is a member of Phi Beta Kappa.

Prof. Archibald Cox is the Carl M. Loeb University Professor of Harvard Law School. He is a former Solicitor General of the United States and a former director of the Watergate Special Prosecutor Force. Professor Cox is the author of "The Role of the Supreme Court in American Government."

Prof. Basile Uddo is associate professor of law at Loyola University in New Orleans. He holds a B.A. from Loyola and received his doctor of jurisprudence degree from Tulane Law School and the LL.M. from Harvard University.

Gentlemen, we welcome you all this morning.

The way we would like to proceed, please, is to have each of you summarize his comments extemporaneously the best you can. Your written statements will be a part of the record, so we would like to encourage you to summarize them the best you can, again, consistent with making your point.

We would like for each of you to take your turn at bat, and then we would like to be able to come back and begin the discussion.

I would remind all parties concerned that we are under a time limit—until 1 o'clock, at which time we expect to adjourn. We have two panels. We would appreciate it if, in terms of statements as well as questions and answers, people would be as concise as they can, in order that we might get in as much useful discussion as possible.

I would also like to remind the spectators that, under the rules of the Senate, applause is inappropriate. We are delighted to have you here, but we would simply appreciate your restraining your enthusiasm for the testimony, whichever way you happen to lean on the matter. We are all very aware that there are rather strong differences of opinion on this issue. You do not have to be around very long to learn that.

Professor Bork, it is a pleasure to have you. If you would, please summarize your statement for us.

## STATEMENT OF PROF. ROBERT BORK, YALE LAW SCHOOL, NEW HAVEN, CONN.

Mr. BORK. Thank you, Senator.

S. 158 would provide that human life would be deemed to exist from conception. The intended result is to bring 14th amendment protections of human life to bear upon unborn fetuses. The object,

as I understand it, is to return to the States the power to regulate abortions that was denied by the Supreme Court in Roe against Wade.

The bill further attempts to remove jurisdiction over abortion cases from the lower Federal courts, if not from the Supreme Court, thus insuring that litigation concerning abortion laws would reach the Supreme Court through the State courts.

It seems to me, in brief, that the bill is constitutional insofar as it deprives the lower Federal courts of jurisdiction but unconstitutional insofar as it attempts to prescribe a rule of decision for the courts under the 14th amendment.

Before coming to the question of constitutionality, I should say that if this bill were enacted and accepted as constitutional it is not at all clear what the results would ultimately be.

States might choose to allow many types of abortions simply by not banning them. Under the premises of S. 158, that would be equivalent to not having a law against some kinds of homicides.

There is at least one Supreme Court decision that suggests that that might be denial of equal protection of the law, but it is highly uncertain whether or not such an attack would succeed today if the State chose not to prohibit some kinds of abortions.

It has been said that the passage of S. 158 would not interfere with private abortions, which seems to me correct since, in such cases, there is no State action.

But it has also been said that the passage of the law would preclude Federal or State funding of abortions. That seems to me not entirely clear. The State courts and ultimately the Supreme Court would have before them under this statute a case involving the clash of two constitutional rights—that of the woman and that of the fetus.

Given the clash of two constitutional rights, it is impossible to say how the Supreme Court would adjust them, and it is entirely possible that the adjustment would produce a constitutional law of abortions very much like the law of *Roe* v. *Wade*.

I mention these matters merely to suggest that S. 158 may not be a cure-all. We do not know what it would become in the hands of the courts even if they accepted it, at least nominally, as constitutional.

I turn now to my doubts that S. 158 is constitutional. Here, I am forced to defend the Supreme Court's ultimate authority to say what the Constitution means against recent decisions of the Supreme Court.

The supporters of S. 158 argue for its constitutionality from a line of cases that seem to cede to Congress a major role in defining the substantive content of the Constitution. There is no doubt that these decisions exist—you have heard about them, and I will mention them only briefly.

In the *Lassiter* case, of course, the Court held that States were constitutionally empowered to use a nondiscriminatory literacy test for voting. Yet, in *Katzenback* v. *Morgan*, the Court held the Court could eliminate literacy in English as a condition for voting by exercising the power granted in section 5 of the 14th amendment.

In *Oregon* v. *Mitchell*, the Court upheld Congress elimination of all literacy tests.

There are other decisions that declare a congressional power to define substantive rights guaranteed by the 13th, the 14th, and 15th amendments, by employing the power to enforce that those amendments have given to Congress.

I would conclude, therefore, that S. 158, which is an attempt by Congress, I think, to define a substantive right given by the Constitution, would be constitutional but for my conviction that each of these decisions represents a very bad and, indeed, pernicious constitutional law.

The power lodged in Congress to enforce constitutional guarantees is the power to provide criminal penalties, redress in civil damage suit, and the like, for violations of those constitutional guarantees, as they are defined by the courts.

The power to enforce is not a power to define the substantive content of the guarantees, themselves. I know of no indication that Congress was given any such power in the legislative history of these amendments and no precedent of the Supreme Court that would uphold any such power until the era of the modern activist Supreme Court.

In these respects, I agree entirely with the dissent of Justice Harlan, joined by Justice Stewart, in *Katzenbach* v. *Morgan* which stated:

> When recognized State violations of Federal constitutional standards have occurred, Congress is of course empowered by section 5 of the 14th amendment to take appropriate remedial measures to redress and prevent the wrongs. But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the S5 power into play at all.

The majority position that Congress can define the substantive content of the 14th amendment works two constitutional revolutions at once. It replaces the Supreme Court with Congress as the ultimate authority concerning the meaning of crucial provisions of the Constitution, and it also replaces State legislatures with Congress for all matters now committed to State legislation.

A National Legislature empowered to define the meaning, for example, of involuntary servitude, privileges, and immunities, due process, equal protection, and the right to vote can void any State legislation on any subject and replace it with a Federal statute.

It is because, I think, S. 158 rests upon the principle of *Katzenbach* v. *Morgan* that I think it is unconstitutional. This places me in a somewhat uncomfortable position.

I am convinced, as I think most legal scholars are, that *Roe* v. *Wade* is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority. I also think that *Roe* v. *Wade* is by no means the only example of such unconstitutional behavior by the Supreme Court.

The fact is that S. 158 proposes a change in our constitutional arrangements no more drastic than that which the judiciary has accomplished over the past 25 years.

I think the question to be answered in assessing S. 158 is whether it is proper to adopt unconstitutional countermeasures to redress unconstitutional action by the Court. I think it is not proper.

The deformation of the Constitution is not properly cured by further deformation. Only if we are prepared to say that the Court has become intolerable in a fundamental, democratic society, and

that there is no prospect for getting it to behave properly, should we adopt a principle which contains within it the seeds of the destruction of the Court's entire constitutional role.

I do not think we are at that stage, but if others think we are, then we should be debating not the technicalities of S. 158 and cases such as *Katzenbach* v. *Morgan* but the question of whether we should retain, abandon, or modify the constitutional function of the courts as we have known it since *Marbury* v. *Madison*. That is a legitimate subject for inquiry, but we ought not to arrive at the answer in the narrow context of S. 158 without fully realizing what it is we are really discussing.

Thank you.

Senator EAST. Thank you, Professor Bork.

[The prepared statement of Professor Bork follows:]

PREPARED STATEMENT OF PROFESSOR ROBERT H. BORK

My name is Robert H. Bork. I am the Alexander M. Bickel Professor of Public Law at Yale University. I am pleased to testify on the constitutionality of S. 158 at the Subcommittee's invitation.

S. 158 would provide that human life shall be deemed to exist from conception. The intended result of the law is to bring fourteenth amendment protections of human life to bear upon unborn fetuses. The object, as I understand it, is to return to the states the power to regulate abortions that was denied by the Supreme Court in Roe v. Wade, 410 U.S. 113 (1973). The bill further attempts to remove jurisdiction over abortion cases from the lower federal courts but not the Supreme Court, thus ensuring that litigation concerning abortion laws would reach the Supreme Court through the state courts.

At the outset I want to say that discussions of constitutionality are often embarrassed by the failure to note the differences, which are sometimes significant, between a prediction of what the Supreme Court will do in fact, what it would do if it followed its own precedents, and what it would do if it followed the Constitution. I will evaluate the bill primarily from the third viewpoint, discussing its validity if the Constitution itself were followed.

From that perspective, it seems to me that the bill is constitutional insofar as it deprives the lower federal courts of jurisdiction but unconsitutional insofar as it attempts to prescribe a rule of decision for the courts under the fourteenth amendment.

Before coming to that, it should be said that if S. 158 were enacted and held constitutional it is not at all clear what the results would be. States might choose to allow many types of abortions simply by not banning them. Under the premises of S. 158 that would be the equivalent of not having a law against some kinds of homicides. There is at least one, perhaps aberrational, Supreme Court decision that suggests the possibility of

an equal protection attack on such an arrangement (Skinner v. Oklahoma, 316 U.S. 535 (1942), thus requiring the states to outlaw abortions or abandon laws punishing homicide. It is highly uncertain whether or not such an attack would succed today in this context.

It has been said that passage of S. 158 would not interfere with private abortions, which seems correct since there is in such cases no state action. But it has also been said that passage of the law would preclude federal or state funding of abortions. That seems less clear. The state courts, and ultimately the Supreme Court, would have before them a case involving the clash of two constitutional rights -- that of the woman and that of the fetus. The fact that the constitutional right of the woman to an abortion is the result of judicial legislation, is, in this context, irrelevant. Given the clash of two constitutional rights, it is impossible to say how the Supreme Court would adjust them. It is entirely possible that the adjustment would produce a constitutional law of abortions very much like the law of Roe v. Wade, 410 U.S. 113 (1973).

I mention these matters merely to suggest that S. 158 may not be a cure-all. We do not know what it would become in the hands of the courts, even if they accepted it, at least nominally, as constitutional.

I turn next to my own doubts that S. 158 is constitutional. Here I am forced to defend the Supreme Court's ultimate authority to say what the Constitution means against recent decisions of the Court. The supporters of S. 158 argue for its constitutionality from a line of Supreme Court decisions that cede to Congress a major role in defining the substantive content of the Constitution. There is no doubt those decisions exist. Since you have heard about them before, I will mention them only briefly.

In Lassiter v. Northampton Election Board, 360 U.S. 45 (1959), a unanimous Supreme Court held that states were constitutionally empowered to use a non-discriminatory literacy test for voting. Yet in Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court held that Congress could eliminate literacy in English

as a condition for voting by exercising the power granted in Section 5 of the Fourteenth Amendment. In Oregon v. Mitchell, 400 U.S. 112 (1970), a unanimous Court upheld Congress' elimination of all literacy tests. There are other decisions that declare a congressional power to define substantive rights guaranteed by the thirteenth, fourteenth and fifteenth amendments by employing the granted power to "enforce" the provisions of those amendments. These precedents all uphold the constitutionality of S. 158. I would conclude that S. 158 is constitutional but for my conviction that each of these decisions represents very bad, indeed pernicious, constitutional law.

The power lodged in Congress to "enforce" constitutional guarantees is the power to provide criminal penalties, redress in civil damage suits, and the like, for violations of those constitutional guarantees as they are defined by the courts. It is not a power to define the substantive content of the guarantees themselves. I know of no indication that Congress was given any such power in the legislative history of these amendments, and no precedent of the Supreme Court that would uphold any such power -- until the era of the modern, activist, liberal Supreme Court. In testimony here, you have heard cited the 1879 case of Ex parte Virginia, 100 U.S. 339 (1879), but that decision does not contemplate any such congressional power to define substance. It held that Congress could make it a federal crime to disqualify persons from jury service on account of race because the fourteenth amendment, as interpreted by the Supreme Court, prohibited such action.

In these respects, I agree entirely with the dissent of Justice Harlan, joined by Justice Stewart, in Katzenbach v. Morgan, which stated:

> When recognized state violations of federal constitutional standards have occurred, Congress is of course empowered by S5 to take appropriate remedial measures to redress and prevent the wrongs. (citation omitted) But it is a judicial question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution, something that is the necessary prerequisite to bringing the S5 power into play at all. (384 U.S. at 666)

The majority position in Katzenbach v. Morgan works

two constitutional revolutions at once. It replaces the Supreme Court with Congress as the ultimate authority concerning the meaning of crucial provisions of the Constitution. The majority position also replaces state legislatures with Congress for all matters now committed to state legislation. A national legislature empowered to define the meaning of involuntary servitude, privileges and immunities, due process, equal protection, and the right to vote, which includes all qualification of electors, can void any state legislation on any subject and replace it with a federal statute.

It is because I think S. 158 rests upon the principle of Katzenbach v. Morgan that I think it unconstitutional.

This places me in a somewhat uncomfortable position. I am convinced, as I think almost all constitutional scholars are, that Roe v. Wade is an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority. I also think that Roe v. Wade is by no means the only example of such unconstitutional behavior by the Supreme Court.

The fact is that S. 158 proposes a change in our constitutional arrangements no more drastic than that which the judiciary has accomplished over twenty-five years. Without any warrant in the Constitution, the courts have required so many basic and unsettling changes in American life and government that a political response was inevitable. Though I do not think it desirable that the political response should succeed in the form this bill takes, the fact of expressed political outrage at such judicial usurpation is in many ways a healthy development in our constitutional democracy.

The judiciary have a right, indeed a duty, to require basic and unsettling changes, and to do so, despite any political clamor, when the Constitution, fairly interpreted, demands it. The trouble is that nobody believes the Constitution allows, much less demands, the decision in Roe v. Wade or in dozens of other cases of recent years. Not even those most in sympathy with the results believe that, as demonstrated by a growing body

of literature attempting to justify the courts' performance on grounds of moral philosophy rather than of legal interpretation. Such justifications will not wash. The judiciary's legitimate power to set aside the decisions and actions of elected representatives and politically responsible officials comes from the Constitution alone and is limited to a fair interpretation of the Constitution.

The question to be answered in assessing S. 158 is whether it is proper to adopt unconstitutional countermeasures to redress unconstitutional action by the Court. I think it is not proper. The deformation of the Constitution is not properly cured by further deformations. Only if we are prepared to say that the Court has become intolerable in a fundamentally democratic society and that there is no prospect whatever for getting it to behave properly, should we adopt a principle which contains within it the seeds of the destruction of the Court's entire constitutional role. I do not think we are at that stage. But if others think we are, then we should be debating not the techinicalities of S. 158 and cases such as Katzenbach v. Morgan, but the question of whether we should retain, abandon, or modify the constitutional function of the courts as we have known it since Marbury v. Madison, 1 Cranch 137 (1803). That is a legitimate subject for inquiry, but we ought not arrive at the answer in the narrow context of S. 158 without fully realizing what we are really discussing.

Senator EAST. Professor Nagel?

## STATEMENT OF PROF. ROBERT NAGEL, CORNELL UNIVERSITY LAW SCHOOL, ITHACA, N.Y.

Mr. NAGEL. Mr. Chairman, I wish to address this question: Does section 1 of the human life bill exceed congressional authority on the grounds that it would reverse Supreme Court decisions that interpret the Constitution? Or, to use Professor Bork's phrase, is this bill an "unconstitutional countermeasure."

My conclusion is that, although there are sound reasons to vote against the bill, a fear that it is inconsistent with the role of the Supreme Court in our constitutional system is not one of them.

In deeming the fetus to be a person for certain purposes under the 14th amendment, the bill might appear to conflict with the Supreme Court's opinion in *Roe* v. *Wade* because that case held that a fetus is not a person within the meaning of the 14th amendment.

However, in *Roe* the Court did not hold that it is beyond the power of Congress to extend some of the protections of the due process clause to fetuses. The issue that the Court decided was whether the clause, as a self-executing provision, protects fetuses. These are two distinct legal issues.

The Court, quite properly, said nothing in *Roe* about congressional enforcement authority because that issue was not relevant to anything in the case. However, a number of Supreme Court decisions do make it clear that Congress is authorized by section 5 of the 14th amendment to extend protection beyond what the clauses, as self-executing provisions, would require. The proper exercise of this power amounts to the enforcement of the Constitution, not its amendment.

As you know, Supreme Court decisions defining the outer limits of what is proper under section 5 are complicated and there is much academic debate on the matter.

I read the cases to suggest that you would be acting responsibly and even cautiously if you respect two principles: Congress must act appropriately to expand rather than constrict established 14th amendment protections, and Congress may not expand protection in a way that conflicts with other constitutional rights and values. I will discuss each of these two principles.

### EXPANSION OF CONSTITUTIONAL PROTECTION

There can be no doubt that the 14th amendment protects persons against the deprivation of life by the State without due process of law. The human life bill appears to expand this protection because it protects persons, who would have been born but for State-aided abortions, from the deprivation of their lives before birth.

It also might be thought to expand the protection by guarding against a gradual erosion of the moral inhibition against destroying human life or by guarding against the possibility that at least some aborted fetuses might be human lives.

Whatever I might personally think of these rationales, it seems to me clear that the bill expands, it certainly does not constrict, the protection of life afforded by the due process clause.

It is certainly possible that the Supreme Court would hold that there is no reasonable or appropriate relationship between protecting the existence of something that might be a human life but which is not a person within the meaning of the 14th amendment and protecting the lives of such persons.

The Court might, for example, find fears about a possible connection between State-supported abortions and an increased willingness of officials to take the lives of persons to be too conjectural. But this is simply a possibility, and no prior decision of the Court requires this conclusion.

In fact, the Court in the past has afforded wide deference to congressional determinations about the appropriate degree of prophylactic protection that should be provided 14th amendment rights.

Moreover, in *Roe* v. *Wade* the Court limited the States' authority to prohibit abortions, not because of any finding that such prohibitions would not in fact protect potential lives, but because at some stages of pregnancy this interest was thought to be outweighed by the woman's right to privacy.

I do not deny that the mood and the tone and the emphasis of the Court's opinion in *Roe* might support a prediction that it would be inclined to reject possible empirical and judgmental bases of this bill. Nor do I deny that the decisions on Congress section 5 power would leave substantial room for such a rejection.

But if you are convinced that the protection of fetuses is appropriately related to the goal of protecting the lives of persons, then I believe it is within your constitutional authority to enact the legislation notwithstanding conjectures about the Court's possible response.

To vote against the bill merely because of the possibility that the Supreme court might disagree with your judgment would be to shift your own constitutional responsibilities onto the shoulders of the Justices. It would elevate, not the Court's constitutional interpretations, but its presumed inclinations to the status of dogma, binding the thinking and the judgment of members of a coequal branch of Government who have their own constitutional responsibilities to perfrom.

Moreover, it would be to deprive the Court of the benefit of your empirical findings and your moral judgments, both of which the court has repeatedly said are useful to it in the performance of its duties.

### CONSISTENCY WITH OTHER CONSITUTIONAL VALUES

Even if it appropriately expands a 14th amendment protection, Congress authority under section 5 may not, as I said, be used in a way that conflicts with some other constitutional value.

This bill might be thought to conflict with the right of a woman to decide to obtain an abortion as enunciated in *Roe* v. *Wade.* However, operationally this bill, on its own, would only prevent States from aiding or promoting abortions and thus would leave women free to obtain abortions privately.

I know of no Supreme Court decision that establishes a constitutional right to receive State aid or support in obtaining abortions.

Nevertheless, it might be thought that the bill is unconstitutional because its objective is to authorize States to restrict the private abortion decision and thus diminish a constitutional right.

I believe that it is very likely—almost certain—that such restrictive abortion laws enacted by States in response to this bill would be struck down by the Court as violative of the right to privacy. I think this because the Court has already demonstrated how it balances the interest in privacy and the State's interest that are served by prohibiting abortion, including the interests in protecting potential life.

The new interests that a State might assert after passage of this bill are sufficiently close to the interest in protecting potential life that I doubt that the Court's calculus would change. But the probable unconstitutionality of such State statutes would not make the human life bill itself unconstitutional

The bill would have the consequences of restricting the right to privacy only if the State should act to restrict that right, and then only if the Supreme Court were to decide to approve such restrictions. In that case, the legal right would not have been restricted but would have been redefined by the Supreme Court.

Such redefinition, while unlikely, is possible because of the nature of the Court's decision in *Roe.* That decision specifically held that the right to abortion is not absolute and may be restricted by the States, depending upon the balance between the severity of the restriction and the importance of the State's interest.

The Court, then, would not directly violate the rationale underlying *Roe* if it were to reassess its balance of those rights and interests when new information is received about their relative weights or when they are characterized or evaluated differently.

State reliance on congressional determinations about when human life begins or about the importance of protecting fetuses would not, then, be an affront to judicial review. It would enable the Court to engage in the kind of assessment process that, in *Roe,* it declared to be constitutionally relevant.

The new assessment of interests might be thought redundant and easy since the Court would already have made a closely related but not identical assessment. Or, on the contrary, it might be thought exasperating and difficult since the Court might feel impelled to explain more fully the bases of its assessments in *Roe.*

But unless the Court has to be protected from the frustrations of the task of judicial review, I cannot see how such factors could make the congressional objective improper.

### PROPRIETY OF DISAGREEMENT WITH THE COURT

It might be charged, however, that the congressional objective is not only to precipitate an opportunity for judicial reassessment but also specificially to induce a reversal of *Roe* v. *Wade.* But this is merely to say that the bill might have been prompted by disagreement with the Court. The constitutional system depends upon disagreement.

We know that Supreme Court reasoning is not too precious nor too perfect to be reconsidered because the Court does so frequently.

When this reconsideration might appropriately be affected by a differing congressional evaluation of related issues, the Court ought

not to be deprived of that information simply because the congressional evaluation is accompanied by a larger disagreement with the Court.

It is precisely when others think that it is wrong that the Supreme Court might be wrong, and it is then that it, like the other branches of Government, needs to know and to face up to that disagreement.

Unless the Court's direction and emphasis in its decisions amounts to a kind of civil religion, disagreement manifested in a statute that is otherwise within congressional power is not heretical. It is helpful in a system that assumes human fallibility and guards against it with institutional checks.

Senator EAST. Thank you, Professor Nagel.

[The prepared statement of Professor Nagel follows:]

## Prepared Statement of Professor Robert F. Nagel

I wish to address this question: Does section 1 of the Human Life Bill exceed congressional authority on the grounds that it would reverse Supreme Court decisions that interpret the Constitution? My conclusion is that, although there are sound reasons to vote against the Bill,[1] a fear that it is inconsistent with the role of the Supreme Court in our Constitutional system is not one of them.

In deeming the fetus to be a person for certain purposes under the 14th amendment, this Bill might appear to conflict with the Supreme Court's opinion in Roe v. Wade because that case held that a fetus is not a person within the meaning of the 14th amendment. However, in Roe the Court did not hold that it is beyond the power of Congress to extend some of the protections of the due process clause to fetuses. The issue that the Court decided was whether the clause, as a self-executing provision, protects fetuses. These are two distinct legal issues. For example, factors such as the intent of the framers of the 14th amendment or the place of social fact-finding might bear differently on congressional authority to enforce the clause than on judicial authority to interpret the words of the clause. The Court quite properly said nothing in Roe about congressional enforcement authority because that issue was not relevant to anything in the case.

---

[1] First, the Bill would nationalize the issue of state support of abortion, a matter that in our federal system is more appropriately left to the states. Second, the Bill is easily subject to misunderstanding at the local level and might be interpreted as an attack on the Supreme Court or as an invitation to adopt irresponsible restrictions on abortion. For example, health regulations or parental notification rules might be rescinded on the ground that states ought not impliedly endorse the destruction of "persons" by permissive regulation. Third, with the issues so volatile, the Bill might provoke the Supreme Court to unduly limit the section 5 authority of Congress in an effort to protect its own institutional authority and prestige.

However, a number of Supreme Court decisions do make it clear that Congress is authorized by section 5 of the 14th amendment to extend protection beyond what the clauses, as self-executing provisions, would require.[2] The proper exercise of this power amounts to the enforcement of the Constitution, not its amendment. As you know, Supreme Court decisions defining the outer limits of what is "proper" under section 5 are complicated, and there is much academic debate on the matter. I read the cases to suggest that you would be acting responsibly and cautiously if you respect two principles: (1) Congress must act appropriately to expand, not constrict, established 14th amendment protections; and (2) Congress may not expand protection in a way that conflicts with other constitutional rights and values. I will discuss each of these principles in turn:

(1) There can be no doubt that the 14th amendment protects persons against the deprivation of life by the state without due process of law. The Human Life Bill appears to expand this protection because it protects persons, who would have been born but for state-aided abortions, from the deprivation of their lives before birth. It also might be thought to expand the protection by guarding against a gradual erosion of the moral inhibition against destroying human life or by guarding against the possibility that at least some aborted fetuses might be "human lives". Whatever I might personally think of these rationales, it seems to me clear that the Bill expands, certainly does not constrict, the protection of life afforded by the due process clause.

Now it is certainly possible that the Supreme Court would hold that there is no reasonable or appropriate relationship between protecting the existence of something that might be a human life (but which is not a "person" within the meaning

---

[2]Katzenbach v. Morgan, 384 U.S. 641 (1966); Rome v. United States 100 S.Ct. 548 (1980); Fullilove v. Klutznick, 100 S.Ct. 275 (1980).

of the 14th amendment) and protecting the lives of "persons". The Court might for example, find fears about a possible connection between state-supported abortions and an increased willingness of officials to take the lives of "persons" to be too conjectural. But this is simply a possibility, and no prior decision of the Court requires this conclusion. In fact, the Court in the past has afforded wide deference to congressional determinations about the degree of prophylactic protection that should be provided 14th amendment rights. Moreover, in Roe v. Wade the Court limited the state's authority to prohibit abortions, not because of any finding that such prohibitions would not in fact protect potential lives, but because at some stages of pregnancy this interest is outweighed by the women's right to privacy.

I do not deny that the mood and tone and emphasis of the Court's opinion in Roe might support a prediction that it would be inclined to reject possible empirical and judgmental bases of this Bill, nor do I deny that decisions on Congress's section 5 power leave substantial room for such a rejection. But if you are convinced that the protection of fetuses is appropriately related to the goal of protecting the lives of persons, then I believe it is within your constitutional authority to enact the legislation notwithstanding conjecture about the Court's possible response. To vote against the Bill merely because of the possibility that the Supreme Court might disagree with your judgment would be to shift your own constitutional responsibilities onto the shoulders of the Justices. It would elevate, not the Court's constitutional interpretation, but its presumed inclinations to the status of dogma, binding the thinking and judgment of members of a co-equal branch of government who have their own constitutional responsibilities to perform. Moreover, it would be to deprive the Court of the benefit of your empirical findings and your moral judgments,

both of which the Court has repeatedly said are useful to it in the performance of its duties.

(2) Even if it appropriately expands a 14th amendment protection, Congress's authority under section 5 may not be employed in a way that conflicts with some other constitutional value. This Bill might be thought to conflict with the right of a woman to decide to obtain an abortion as enunciated in Roe v. Wade. However, operationally this Bill on its own would only prevent states from aiding or promoting abortions and thus would leave women free to obtain abortions privately. I know of no Supreme Court decision that establishes a constitutional right to receive state aid or support in obtaining abortions.

Of course, it is possible to think of arguments to support an extension of the right to privacy to include some types of state support. Such a development would make this Bill unconstitutional but I do not know of any case that requires this development and there are some that suggest it is unlikely.[3] So the most that can be said is that the Bill might conflict with the right to privacy if the decisional law changes in significant ways.

Nevertheless, it might be thought that the Bill is unconstitutional because its objective is to authorize states to restrict the private abortion decision and thus diminish a constitutional right. I believe that it is very likely, almost certain, that such restrictive abortion laws enacted by states in response to this Bill would be struck down by the Court as violative of the right to privacy. I think this because the Court has already demonstrated how it balances the interest in privacy and the states' interests that are served by prohibiting abortion, including the interest in protecting potential life.

---

[3]Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 100 S.Ct. 2671 (1980).

The new interests that a state might assert after passage of this Bill are sufficiently close to the interest in protecting potential life that I doubt that the Court's calculus would change.

But the probable unconstitutionality of such state statutes would not make the Human Life Bill itself unconstitutional. The Bill would have the consequence of "restricting" the right to privacy only if the states should act to restrict that right and then only if the Supreme Court were to decide to approve such restrictions. In that case, the legal right would not have been restricted but would have been re-defined by the Supreme Court. Such re-definition, while unlikely, is possible because of the nature of the Court's decision in Roe. That decision specifically held that the right to abortion is not absolute and may be restricted by the states depending upon the balance between the severity of the restriction and the importance of the state's interests. The Court, then, would not directly violate the rationale underlying Roe if it were to re-assess its balance of those rights and interests when new information is received about their relative weights or when they are characterized or evaluated differently. State reliance on congressional determinations about when human life begins or about the importance of protecting fetuses would not, then, be an affront to judicial review. It would enable the Court to engage in the kind of assessment process that in Roe it declared constitutionally relevant. The new assessment of interests might be thought redundant and easy, since the Court would already have made a closely related, but not identical, assessment. Or -- on the contrary -- it might be thought exasperating and difficult, since the Court might feel impelled to explain more fully the bases of its assessments in Roe. But unless the Court has to be protected from the frustrations of the task of judicial review, I cannot see how such factors could make the congressional objective improper.

It might be charged, however, that the congressional ob-

jective is not only to precipitate an opportunity for a judicial reassessment but also specifically to induce a reversal of Roe v. Wade. But this is merely to say that the Bill might have been prompted by disagreement with the Court. The constitutional system depends on disagreement. We know that Supreme Court reasoning is not too precious nor too perfect to be reconsidered, because the Court does so frequently. When this reconsideration might appropriately be affected by a differing congressional evaluation of related issues, the Court ought not be deprived of that information simply because the congressional evaluation is accompanied by a larger disagreement with the Court. It is precisely when others think it is wrong that the Supreme Court might be wrong. And it is then that it, like the other branches of government, needs to know and to face up to that disagreement. Unless the Court's direction and emphasis in its decisions amounts to a kind of civil religion, disagreement manifested in a statute that is otherwise within congressional power is not heretical. It is helpful in a system that assumes human fallibility and guards against it with institutional checks.

In summary, let me put my conclusion in context. I believe that you are considering this Bill against a backdrop of increasing and unhealthy over-emphasis throughout our system on the role of the Supreme Court. Many of the framers of our Constitution and some of our most distinguished leaders have believed that constitutional decision-making should be shared among the branches of the government.[4] Many scholars have warned that the crucial importance of the courts in our system should not be exaggerated so that the judiciary becomes the exclusive source of constitutional meaning.[5] Yet there is an increasingly

---

[4] See G. Gunther, Constitutional Law Cases and Materials, 25-34 (10th ed.); D. Morgan, Congress and the Constitution, 45-89 (1966).

[5] E.g., Gunther, "Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process," 22 U.C.L.A. L. Rev. 30 (Continued)

widespread tendency in the public and among some members of Congress and even on the Supreme Court to regard the Court as the only legitimate source of constitutional meaning.[6] I think that fears about this Bill's incompatibility with judicial review extend even this inflated view of the Court's role and would necessarily elevate its statements from law to orthodoxy.

As Professor Jaffe observed,

> There will be and there should be popular response to the Supreme Court . . .; not just the "informed" criticism of law professors but the deep-felt, emotion-laden. . . reaction of the laity. This is so because more than any court in the modern world the Supreme Court "makes policy" and is at the same time so little subject to formal democratic control . . .[7]

The Supreme Court is an important arbitor of Constitutional meaning and is due great respect. But this Bill would not be incompatible with its function.

---

(Continued)

(1974); Sandalow, "Comments on Powell v. McCormack," 17 U.C.L.A. L. Rev. 1 (1969); Wechsler, "The Courts and the Constitution," 65 Colum. L. Rev. 1001 (1965); Tribe, American Constitutional Law, 27-33, 271-272.

[6]See D. Morgan, Congress and the Constitution, 335-337 (1966). See also Cooper v. Aaron, 358 U.S. 1 (1958); Powell v. McCormack, 395 U.S. 486 (1969); United States v. Nixon, 418 U.S. 683 (1974).

[7]Jaffe, "Impromptu Remarks," 76 Harv. L. Rev. 1111 (1963).

Senator EAST. Professor Cox?

## STATEMENT OF PROF. ARCHIBALD COX, HARVARD UNIVERSITY LAW SCHOOL, CAMBRIDGE, MASS.

Mr. COX. Mr. Chairman and Senator Baucus, may I first thank the subcommittee and say that I appreciate this opportunity to appear and state my views?

I wish to submit three points to the subcommittee:

First, the enactment of section 1 of S. 158 which, if I understand it correctly, attempts to overrule the Supreme Court decision in *Roe* v. *Wade* by a simple legislative majority in both Houses would be an unconstitutional nullity.

Second, in my judgment, section 2, which would deprive the inferior Federal courts of power to interfere by injunction or declaratory judgment with the operation of State antiabortion laws, is of questionable constitutionality. I cannot say categorically that it is unconstitutional, but I do not think one can responsibly say categorically that it is constitutional.

Third, and most important, even if S. 158 is technically within the power of Congress to enact, both sections should be rejected as radical and dangerously unprincipled attacks upon what I see as the very foundations of our constitutionalism.

The first point is elaborated on at length in my statement, and I would like simply to make one point orally. That is that the decisions in *Katzenbach* v. *Morgan* and other cases under section 5 of the 14th amendment, in my judgment, give no support whatever to an attempt to change the meaning of the Constitution, to redefine the words used in the Constitution, by simple legislative majority.

Because some of my writings about those cases have been quoted a good deal by the supporters of S. 158, I would like to quote a passage written 10 years ago before *Roe* v. *Wade* was decided and long before this controversy came up.

> Nothing in *Morgan* suggested that the Court should defer to Congress in the process of deriving the applicable legal standard from the document and other sources of law; the opinion seemed to require Congress to apply the same standard as the Court, merely leaving it free to apply the standard differently when the application turned upon "questions of fact."

S. 158 does not apply the same legal standard as the Court established in *Roe* v. *Wade*. S. 158 would reject the Court's standard by enacting that "persons" shall include all human life, as defined therein, which meant from the moment of conception, thereby including the unborn.

Again, in *Roe* v. *Wade*, the Court held that the woman's freedom to choose during the first two trimesters of pregnancy whether she wished to carry an unborn child until birth is constitutionally superior to any interest in or of the fetus up to the time of viability, regardless of when life may begin.

S. 158 seems to me to reject that legal standard also. It adopts one view of when life begins and then declares, contrary to the existing law, that its view of when life begins shall be controlling under the 14th amendment.

I would also wish to emphasize a little bit my third point: to wit, that the bill, even if technically within the power of Congress,

should be rejected as an unprincipled—I think it can properly be called a radical—attack upon the foundations of our Constitution.

We ought to remember that the ultimate bulwarks of liberty in the United States are the Bill of Rights and the 14th amendment, as interpreted and applied by an independent judiciary, headed by the Supreme Court of the United States.

Over the years, a large number of decisions have provoked strong, shortrun political or popular opposition. Sometimes this has produced clamor for legislation.

Over the years, a few decisions have proved clearly wrongheaded, and perhaps *Roe* v. *Wade* is such a case. I, myself, wrote critically of *Roe* v. *Wade* a little while after the decision came down.

Wrongheaded decisions can be changed by time and debate or by constitutional amendment. But the very function of the Constitution and Court is to put individual liberties beyond the reach of both congressional majorities and popular clamor.

Any principle which permits Congress, with the approval of the President, to nullify one constitutional right protected by the Constitution, as interpreted by the Court—that principle would sanction the nullification of other. That is why I say that the principle of S. 158 is exceedingly dangerous, and I can only call it radical.

I say this because, as I explained a moment ago, S. 158 simply seeks to substitute definintions of constitutional terms adopted by legislative majorities, with the approval of the President, for the terms in the Constitution.

Even if the proabortion decisions are wrong, it would be worse to accept the principle that bare majorities in the House and Senate, with the approval of the President, can change the Constitution. Indeed, it is worth taking just a minute to recall how long a struggle it was to come by that principle.

Our forefathers, in the latter part of the 18th century, came to the view that there should be some individual liberties that were beyond the power of any government, not just beyond the power of kings, not just beyond the power of elected executives, but most particularly beyond the power of legislative majorities.

At first, they did not know how to secure this, and I have quoted in my written statement some of their rather plaintive recitals, but then they did come to the view that you could do three things: (1) write down those basic liberties, (2) treat what was written down as law administered by the judiciary like other law, and, (3) maintain the independence of the judiciary.

James Madison, when the Bill of Rights was recommended to the States by the Congress, wrote: "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights. They will be an impenetrable bulwark against every assumption of power"—improper power—"in the Legislature as well as the Executive."

It is also worth remembering that throughout our history there have been attacks on this principle. The first came from the Jeffersonian Virginians when they sought to impeach, first, Samuel Chase and then John Marshall.

In the 1820's, the proponents of State sovereignty sought to take away the power of the Supreme Court to review State court decisions.

84-581 O—81——22

After the Civil War, the radical Republicans toyed with the notion of depriving the Supreme Court of jurisdiction.

There was more talk of that kind later. In 1937, President Franklin Roosevelt proposed to pack the Supreme Court with new Justices. The McCarthyites of the 1950's unsuccessfully sought to presuade Congress to limit Supreme Court jurisdiction over various programs aimed at subversives. And in 1964 some Senators and Representatives sought to deprive the courts of jurisdication to enforce the one-man, one-vote rule.

But always in the past, despite their discontent with a particular decision, the American people and the Congress have rejected those attacks as dangerously unprincipled, in the sense that if the principle were supported by such a precedent, they would endanger a bulwark of liberty.

So I urge the subcommittee now, and then later the full committee, to reject S. 158.

Senator EAST. Thank you, Professor Cox.

[The prepared statement of Professor Cox follows:]

## Prepared Statement of Professor Archibald Cox

I appreciate the opportunity to present my views on S. 158, the bill to provide that human life shall be deemed to exist from conception. I wish to develop three points.

First, enactment of Section 1 of S. 158, which attempts to overrule the constitutional decision of the Supreme Court of the United States in Roe v. Wade, 410 U.S. 113 (1973) by a simple legislative majority would be an unconstitutional nullity.

Second, Section 2, which would deprive the inferior federal courts of power to interfere by injunction or declaratory judgement with the operation of State anti-abortion laws is of questionable constitutionality.

Third, even if S. 158 is technically within the power of Congress to enact, both sections should be rejected as radical and dangerously unprincipled attacks upon the foundations of our constitutionalism.

It may be appropriate to add that I hold no brief for the Supreme Court's decision in Roe v. Wade. My published comments have been critical. Cox, The Role of the Supreme Court in American Government, 51-55, 112-114.

### I

### SECTION 1. OF S. 158 IS UNCONSTITUTIONAL

S. 158, Section 1 is -- in both form and function -- an entirely novel effort to change the meaning of the

Constitution by an Act of Congress enacted by simple majorities. If S. 158, Section 1 became law, the resulting statute would not itself create any legal rights or impose any legal duties; it would not itself require anyone to do anything, nor would it forbid anyone to do anything. Apparently, the theory is that the Fourteenth Amendment as newly interpreted by Congress would be the operative legal mandate. Because no previous Congress ever enacted a similar measure, it is exceedingly difficult either to discern the purposes or to predict the consequences. They seem to fall under three heads.

First, S. 158, Section 1 -- if constitutional -- would apparently have the effect of modifying the Fourteenth Amendment so as to make the Fourteenth Amendment prohibit any form of State information, counselling or other assistance to any person to be used to interfere with the development of the human fetus and the birth of a child. The Fourteenth Amendment, Section 1, provides:

> nor shall any State deprive any person of life, liberty or property without due process of law.

S. 158 defines "person" to include any unborn person from the moment of conception; it says that "life" shall "be deemed" to commence at the moment of conception. Reading these definitions into the Fourteenth Amendment, the Amendment would then provide that no State shall deprive an unborn person of "life" without due process of law. Under familiar authority the State would be sufficiently involved in such a deprivation of life to violate the Amendment if it furnished any facilities or financial assistance for

tion, or if any State official or employee took part

in an abortion. Cf. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972).

Conceivably, some justifications for abortion might be regarded as "due process of law," but I would suppose that any honest application of S. 158, Section 1 -- if constitutional -- would allow a State to justify taking the life of the "unborn" only under the rare circumstances justifying taking the life of a person who has been born.

In response, one might argue that Congress could not possibly be so foolish as to think that it has power simply to redefine the words used in the Constitution and, therefore, must be supposed to have intended S. 158, Section 1, to have some independent operative effect imposing statutory restrictions upon State action. Even if a court were to reach that result in the absence of any words declaring operative rights or duties, the effect would be the same. S. 158, Section 1 would then put the States under a statutory obligation not to provide facilities or financial assistance or other aid to abortion.

Second, S. 158, Section 1 -- if enacted and constitutionally operative -- may have the effect of requiring every State to enact and enforce against private individuals and organizations the most rigidly absolute of anti-abortion laws. The argument might take two forms.

One branch would assert that a State's failure to provide for unborn persons the legal protection customarily available for all others is itself a form of "deprivation."

The second branch would rest upon the Equal Protection Clause:

> nor (shall any State) deny to any person within its jurisdiction the equal protection of the laws.

Under S. 158, Section 1 an unborn fetus is a "person." The argument would therefore be that to deny to those persons the same police and legal protection against destruction of life which is available to other persons is to deny the unborn the equal protection of the laws.

One possible answer to the second branch of the argument is that S. 158 seeks to declare that "life" exists from the moment of conception and that the unborn are persons only for the purposes of the Due Process Clause and not for the purposes of the Equal Protection Clause. This is a curious view of "life" -- for some purposes it exists from the moment of conception but for other purposes life begins only upon birth -- and an equally curious view of the meaning of person -- sometimes the unborn but other times only the already born. But perhaps those are the views of the draftsmen and should be given effect in predicting the legal consequences of S. 158.

Third, S. 158, Section 1 seeks to provide State and lower federal courts with grounds for refusing to follow Roe v. Wade, and if possible, to induce the Supreme Court of the United States to reach a contrary decision.

The only imaginable source of congressional authority to enact such legislation is Section 5 of the Fourteenth Amendment, which provides:

> The Congress shall have power to enforce this article by appropriate legislation.

The two decisions putting the broadest interpretation

upon the "power to enforce. . .by appropriate legislation" are South Carolina v. Katzenbach, 383 U. S.301 (1964) and Katzenbach v. Morgan, 384 U.S. 641 (1966). But those decisions, even when read as broadly as I have suggested*, do not sustain the constitutionality of S. 158.

In South Carolina v. Katzenbach the Court upheld the power of Congress to outlaw the use of a literacy test for voting in State elections. Literacy tests themselves had been held not to violate the Fourteenth Amendment where the test was fair on its face and there had been no judicial finding of racial discrimination. Lassiter v. Northampton, 360 U.S. 45 (1959). South Carolina's chief argument was that the "power to enforce" under Section 2 of the Fifteenth Amendment is confined to preventing or redressing illegal conduct and cannot be used as a source of authority to enact prophylactic measures. The United States replied that since Section 2 gives Congress the same broad discretion in enacting measures reasonably adapted to preventing abridgement of the right to vote by reason of race or color as the "necessary and proper" clause confers upon Congress in regulating local activities where appropriate for protecting interstate commerce, Congress was not confined to dealing with discrimination in voting but might regulate or prohibit any conduct which created a danger of discrimination:

> Congress may employ means which, "although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government." (Brief for Defendant at 75, South Carolina v. Katzenbach, 383 U.S. 301 (1966), quoting United States v. Darby, 312 U.S. 100, 121 (1941).

*See Cox, Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91 (1966). Cox, The Role of the Supreme Court in American Government.

The Court accepted this broad interpretation:

> As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. (383 U.S. at 324.)

"The basic test to be applied in a case involving S. 2 of the Fifteenth Amendment," the Chief Justice declared, "is the same as in all cases concerning the express powers of Congress in relation to the reserved powers of the States"; and he then quoted Chief Justice Marshall's classic expression:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit the constitution, are constitutional. (Id. at 326.)

In effect, therefore, South Carolina v. Katzenbach upheld the power of Congress to prohibit conduct which is not unconstitutional -- the use of a literacy test -- under circumstances in which the conduct is likely to lead to racial discrimination violating an established constitutional right -- there, the right of citizens to vote regardless of race or color.

The decision in South Carolina v. Katzenbach gives no support to S. 158 because S. 158 does not seek to protect any established constitutional right. On the contrary, S. 158 seeks by legislative definition of "life" and "person" to create new constitutional rights. Thus, although S. 158 apparently would prohibit conduct which is not otherwise unconstitutional -- State aid to any interference with the natural development of a fetus -- the analogy to South Carolina v. Katzenbach breaks down because S. 158 does not and cannot impose the prohibition in aid of an established Fourteenth

Amendment right. A fetus is not a "person" under the established constitutional meaning of the word. Roe v. Wade 410 U.S. 113, 158 and cases cited. Only persons within the meaning of the Constitution have Fourteenth Amendment rights.

Katzenbach v. Morgan, 384 U.S. 641 (1966) grew out of a constitutional challenge to Section 4(e)(2) of the Voting Rights Act of 1965 which provided that no person who had successfully completed the sixth grade in a Puerto Rican school where instruction was in Spanish should be denied the right to vote because of inability to read or write English. The provision enfranchised thousands of Spanish-speaking citizens who had moved to New York from Puerto Rico but had been barred from voting by a New York statute requiring literacy in English. Since Congress has no general power to prescribe voting qualifications, Section 4(e)(2) could be upheld only as a measure for enforcing the Fourteenth Amendment's mandate that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Court, by a vote of seven to two, upheld the statute. One branch of opinion sustains congressional removal of the State's requirement of English literacy on the ground that Congress might have viewed the removal as a measure adapted to securing the Puerto Ricans residing in New York against unconstitutional discrimination in the provision of government services, such as public schools, public housing and law enforcement. 384 U.S. at 652-53.

The first branch of Katzenbach v. Morgan gives no support to S. 158, Section 1 for the same reason that South Carolina v. Katzenbach is distinguishable. Section 4(e)(2) was upheld as a means of securing a separate and established constitutional right -- the right to equal treatment in public services without regard to race or color. Enactment of S. 158 would not protect any established constitutional right. S. 158 simply attempts to create a constitutional right for the unborn, even though it is established constitutional law that the unborn are not "persons" within the meaning of the Fourteenth Amendment.

South Carolina v. Katzenbach and the first branch of Katzenback v. Morgan are plainly inappropriate for a further reason. In creating a new constitutional right for the unborn, S. 158 -- if effective -- would cut back upon the established constitutional right of a woman to decide during the first two trimesters of pregnancy whether she wishes to bear a child. Neither of the cited precedents involved an act of Congress attempting to cut back or dilute existing constitutional rights. On the contrary, the opinion in Katzenbach v. Morgan specifically notes the difference between adding and taking away protection, and goes on to state that the rationale of the opinion does not extend to legislation curtailing individual rights. (384 U.S. at 651 n. 10):

> We emphasize that Congress' power under S.5 is limited to adopting measures to enforce the guarantees of the Amendment; S. 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.

The second branch of the opinion in Katzenbach v. Morgan is somewhat closer to the mark, but it too gives

no significant support to proponents of the constitutionality of S. 158, Section 1. The New York law that Congress was seeking to supersede denied citizens literate in Spanish the same voting rights as citizens literate in English. The discrimination was under attack as a violation of the equal protection clause in another judicial proceeding, but the Court assumed that it would not be judged unconstitutional without the aid of legislation. Nevertheless, the Court went on to say in the Morgan case, "We perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause." 384 U.S. at 670-671. For this reason, the Court held that the New York statute must yield even though Congress' decision might differ from that which the Court would have rendered.

The essential point to be observed is that the second branch of Katzenbach v. Morgan involved only deference to congressional determinations upon what are truly questions of fact. There was general agreement that the legislative classification resulting from the English-speaking literacy test was unconstitutional only if the classification bore no rational relationship to some permissible public purpose. That was the applicable legal standard. Section 4 of the Voting Rights Act made no effort to change that standard. Whether a State law violates that standard often depends to a large extent upon the finding and appraisal of the practical importance of relevant facts. In the case of the English

literacy requirement, it turned upon such considerations as the extent to which the requirement served as an incentive to learn English and ease the process of assimilation, the availability of Spanish-language newspapers and their sufficiency to enable non-English-speaking voters to exercise the franchise intelligently, the importance of the franchise, and the relative effectiveness of other inducements to learn English.

The conventional constitutional formula called for the Court to presume the existence of facts giving validity to State legislation and to defer any State legislative findings of fact unless the findings were irrational. There is also a presumption that facts exist which sustain federal legislation and a principle of deference to congressional judgement upon questions of fact. In Morgan the federal and State statutes appeared to rest upon inconsistent findings and legislative evaluations of the practical conditions determining whether the discrimination against citizens literate only in Spanish was permissible or invidious. The Court, forced to choose between conflicting presumptions, applied the rule of deference to the congressional findings of fact.

S. 158, Section 1 does not rest upon any "findings of fact" in the sense in which those words were used in Katzenbach v. Morgan and the ensuing professional commentary. The bill does not ask Congress to make or declare new knowledge of actual facts or to appraise the practical operation of facts. Even the proposed finding that there is "a significant likelihood that actual human life exists from conception" rests entirely upon giving a particular meaning to the word "life."

What is "life" is not simply a question of fact. Over the years many sincere people have believed that life begins at the moment of conception. Everything depends upon what one means by "life." The meaning may be established by agreement upon a dictionary definition. The meaning may represent a theological, philosophical, moral, legal or other normative declaration of when a particular collection of phenomena should be given the same theological, philosophical, moral, legal or other normative consequences as the "life" we recognize in human beings after birth and before anything that might be determined to be "death." Because the meaning of "life" must first be fixed, the existence of life is not simply a question of fact.

The rest of Section 1 of S. 158 does not even purport to deal with the facts: it says that "life" shall "be deemed" to commence at the moment of conception; it defines "person" to include any unborn person from the moment of conception.

For these reasons even the second branch of Katzenbach v. Morgan gives no support to S. 158.

For similar reasons S. 158, Section 1 presents very different constitutional questions from the 1971 amendment to the Voting Rights Act reducing the voting age in all state and federal elections from 21 years old to 18 years old. The constitutional question was whether classifying 18-21 year-old citizens as ineligible to vote while citizens over 21 years old are permitted to vote violated the Equal Protection Clause. The classification was not invidious in the sense that it rests upon hostility or prejudice; age is relevant to the permissible State objective of securing an informed, intelligent and responsible electorate.

Thus, using the twenty-first birthday to draw the line was permissible if, but only if, the knowledge, experience, maturity, and appreciation of one's stake in the community necessary for an intelligent and responsible vote of those over 21 is sufficiently greater than that of those between 18 and 21 to justify excluding the younger group from participation in self-government. These are questions of fact in the first instance, of characterization or degree after the raw data is assembled, and ultimately, of balance or relative importance.

Section 302 of the Voting Rights Act in nowise sought to change the constitutional principle. Among other supporters of the reduction I urged that Congress honestly could and should find purely as matters of fact that the spread and improvement of education, the age at which young people take jobs, pay taxes, marry and have children, the tremendous interest of young people in government and public affairs, and their increased knowledge and sophistication everywhere as a result of new forms of mass communications had made 18-21 year-old citizens as able to cast informed, intelligent and responsible votes as those over 21 years old.

S. 158 is altogether different because, as I have repeatedly pointed out, it does not find facts but simply and directly seeks to change the applicable constitutional standards.* The second branch of Katzenbach v. Morgan

*I should mention two other reasons for concluding that Katzenbach v. Morgan does not sustain the constitutionality of Section 1 of S. 158.

First, the inferences that I and some other commentators drew from the second ground of decision in the Morgan case were repudiated by five Justices in

(Continued)

even when read most broadly, gives no support whatever to an attempt to change the meaning of the Constitution, to redefine the words used in the Constitution, by simple legislative majorities. As I wrote ten years ago, "Nothing in Morgan suggested that the Court should defer to Congress in the process of deriving the applicable legal standard from the document and other sources of law; the opinion seemed to require Congress to apply the same standard as the Court, merely leaving it free to apply the standard differently where the application turned upon 'questions of fact.'" See Cox, op. cit.

---

(Continued)

Oregon v. Mitchell, 400 U.S. 112 (1970). Oregon v. Mitchell represents the present law.

Second, Katzenbach v. Morgan sustained the power of Congress under Section 5 to give greater statutory protection to individual rights than Section 1 of the Fourteenth Amendment provides unaided except by judicial decision. Section 1 of S. 158 does not simply extend the protection available to individual rights. On the contrary, it attempts to cut back on the rights of the individual woman by denying her an aspect of liberty secured by the Fourteenth Amendment. The opinion in Katzenbach v. Morgan specifically notes the difference between adding and taking away protection, and goes on to state that the rationale of the opinion does not extend to legislation curtailing individual rights. (384 U.S. at 651 n. 10):

> We emphasize that Congress' power under §5 is limited to adopting measures to enforce the guarantees of the Amendment; §5 grants Congress no power to restrict, abrogate, or dilute these guarantees.

I expressed doubt concerning the validity of this distinction in The Role of Congress in Constitutional Determinations, 40 U. of Cinnci. L. Rev. 199, 247-259 (1971), arguing that the Court should defer to congressional findings of fact whether the legislation enlarged or cut back on individual rights. Whatever the force of my argument in 1971, later decisions make plain that the Court's present practice is to make its own findings where the party challenging legislation is asserting a "preferred" or "fundamental" constitutional right requiring strict scrutiny of legislation. See, e.g. First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

Consequently, my criticism rested upon a defective premise.

at 234. S. 158 does not apply the same legal standard as the Court established in Roe v. Wade. S. 158 rejects the Court's standard. In Roe v. Wade the Court held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158. S. 158 would reject this standard by enacting that "'person' shall include all human life as defined herein (i.e. from the moment of conception)," thereby including the unborn. In Roe v. Wade the Court held that the woman's freedom to choose during the first two trimesters of pregnancy whether to carry an unborn child until birth is constitutionally superior to any interest in or of the fetus up to the time of viability, regardless of when "life" may begin. S. 158 rejects that legal standard also; it adopts one view of when life begins and then declares, contrary to the existing rule of law, that its view of when life begins shall be controlling under the Fourteenth Amendment.

Thus, my present view that S. 158, Section 1 is patently unconstitutional is completely consistent with what I wrote of the power of Congress under Section 5 of the Fourteenth Amendment in 1971 (Cox, op. cit. at 254):

> [The argument] affects only the latitude available to Congress in applying general rules of law to what it finds to be actual social conditions, always within the legal framework supplied by the Constitution and the principles developed by the Court. No one suggests that the Congress can read into the Constitution new general rules of law that have been rejected by the Court, regardless of whether they expand or dilute constitutional rights.

II

JURISDICTION

Section 2 of S. 158 would deprive lower federal courts of jurisdiction to hear cases challenging the constitu-

tionality of state anti-abortion laws. While I strongly disagree with this limitation on federal court jurisdiction as a matter of public policy, a position that is developed in detail later in my testimony, I also have serious reservations as to the constitutionality of this kind of jurisdictional restriction.

It is well known that the Constitution gives to the Congress the power to establish such inferior federal courts as it deems appropriate. This broad power to establish lower federal courts has been interpreted to include the power for Congress to limit the kinds of cases that can be brought in those courts. Thus, there are numerous precedents that allow Congress to limit the jurisdiction of the inferior federal courts so long as the right of an aggrieved party to ultimately bring his constitutional claim to the Supreme Court is preserved.

The power of Congress to limit lower federal court jurisdiction is not, however, without bounds. This congressional power, like all others, is constrained by the other provisions of the Constitution, and must be exercised in conformance with other constitutional protections. Thus, Congress may limit federal court jurisdiction only if it does so consistent with, for instance, Fifth Amendment Due Process guarantees.

The jurisdictional limitation in S. 158 raises grave questions on this basis. The bill proposes that Congress deny to the lower federal courts the power to hear cases asserting particular federal constitutional rights. In singling out one set of constitutional rights for disfavored treatment, the bill burdens the exercise of those

84-581 O—81——23

rights. The Supreme Court has often held that Congress may not discriminate against particular constitutional rights by burdening their exercise. See Shapiro v. Thompson, 394 U.S. 618 (1969); Sherbert v. Verner, 374 U.S. 398 (1963). To do so violates both the equal protection and due process guarantees of the Fifth Amendment. I thus believe that the jurisdictional limitation in S. 158 is of dubious constitutionality, even though I cannot categorically say it would be held unconstitutional.

III

EVEN IF S. 158 IS TECHNICALLY WITHIN THE POWER OF CONGRESS TO ENACT, IT SHOULD BE REJECTED AS A RADICAL AND DANGEROUSLY UNPRINCIPLED ATTACK UPON THE FOUNDATIONS OF OUR CONSTITUTIONALISM.

Effects of S. 158

The ultimate bulwarks of individual liberty in the United States are the Bill of Rights and the Fourteenth Amendment interpreted and applied by an independent judiciary, headed by the Supreme Court of the United States. Over the years a few decisions have proved wrong-headed. The short-run unpopularity of other decisions has occasionally provoked clamor for legislation. A larger number of decisions have provoked strong, short-run political or popular opposition. From time to time political figures trading on the clamor have sought unsuccessfully to negate particular constitutional rulings by the action of congressional majorities impeaching Justices, packing the Court or curtailing jurisdiction.

S. 158 is such an attack upon our final guardian of

constitutionalism. I have written critically of the abortion decision, Cox, The Role of the Supreme Court in American Government 51-55, 112-114, but S. 158 should be opposed by all believers in our constitutionalism, regardless of whether they agree or disagree with particular rulings. Wrong-headed decisions can be changed by time and debate, or by constitutional amendment. The very function of Constitution and Court is to put individual liberties beyond the reach of both congressional majorities and popular clamor. Any principle that permits Congress, with the approval of the President, to nullify one constitutional right protected by the Constitution, as interpreted by the Court, sanctions the nullification of others. Enactment of S. 158--if effective--would undermine the basic balance of our institutions.

The underlying vice of Section 2 of S. 158 is simply stated. A right is only as good as the remedy. A constitutional right is at the mercy of legislative majorities unless supported by a judicial remedy. To deprive federal courts of jurisdiction granted by the federal constitution would result in a hodge-podge of inconsistent State interpretations, not all of which could be expected to rise above local selfishness or passion. This would be the practical result even if jurisdiction was left with the Supreme Court.

Section 1 of S. 158, as I have explained above, seeks to substitute legislative for judicial definitions of the words used in the Constitution in order to overturn Supreme Court decisions holding that a State may not punish abortion in the early stages of pregnancy because the

prohibition deprives the woman of liberty without due process of law. S. 158 declares that "life" shall be deemed to exist from the moment of conception; it seems to define the fetus as a "person" for the purposes of the Fourteeth Amendment, and thus to give the fetus superior constitutional rights.

The vice of Section 1 of the Helms bill is the underlying premise. Even if the pro-abortion decisions are wrong, it would be worse to accept the principle that bare majorities in the Senate and House of Representatives, with the approval of the President, can change the Constitution by simple legislative definitions. If Congress can supply a binding definition of "life" or "person," it can equally declare that the provision of "separate but equal" facilities to persons of different color is "equal protection of the law"; or that State aid to parochial schools is not an "establishment of religion"; or that the "probable cause" necessary to validate a search or seizure means simply the good faith belief of any police officer that the arrest or search will be helpful to law enforcement.

Historical Perspective

The balance among legislative, executive and judicial branches that these measures would disturb is the very bedrock of our constitutionalism.

In the latter part of the 18th century men came to believe that there are fundamental human rights that should be beyond the reach of any government -- not just a king, not just an elected executive, but any government, including even a majority of the representative Congress

or Legislature. They were confident of the rights, but they were at a loss to devise a method of protection. The Virginia Act of 1786 for establishing religious freedom rather plaintively declared:

> We all know that this Assembly. . . have no power to restrain the Acts of succeeding Assemblies. . . and . . . therefore to declare the Act to be irrevocable would be of no effect in law. . . [But] we are free to declare, and do declare, that the rights asserted are of the natural rights of mankind, and that if any Act hereafter be passed to repeal the present. . . such Act will be an infringement of our natural rights.

Gradually, they discovered an answer.

First, let the fundamental human rights to be put beyond the reach of government be written down in a constitution.

Second, treat the Constitution as law to be interpreted and applied by courts in the same fashion as any other law, but also make it supreme so that in case of conflict between the Constitution and any other law, the Constitution will prevail.

Third, make the Judiciary impartial and independent.

James Madison put it in a nutshell when he said in proposing the Bill of Rights -

> . . . independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive.

Throughout our history there have been legislative attacks upon the power of the Judicial Branch to protect constitutional rights. The Jeffersonian Democrats proposed to use impeachment as a vehicle for removing

justices whose constitutional views were distasteful to the dominant party in Congress. In the 1920's, the proponents of State sovereignty sought to take away the power of the Supreme Court to review decisions by State courts on constitutional questions. After the Civil War, the radical Republicans, fearful that the Supreme Court would find the Reconstruction Acts unconstitutional, revoked the Court's authority to hear a Mississippi newspaper editor's appeal of the denial of his habeas corpus petition, and considered other methods of barring judicial review.

In 1937, President Franklin D. Roosevelt proposed legislation to pack the Supreme Court with new justices who agreed with his constitutional philosophy. The Court packing plan was defeated. The McCarthyites of the 1950's unsuccessfully sought to persuade Congress to limit Supreme Court jurisdiction over unconstitutional federal and State programs aimed at alleged subversives. In 1964, some Senators and Representatives attempted to eliminate federal court jurisdiction over reapportionment.

In the past, despite their discontent with particular decisions, the American people and the Congress have rejected these attacks upon the Court as dangerously unprincipled.

I urge this Subcommittee and later the full Committee to reach that wise result today.

Senator EAST. Professor Uddo?

## STATEMENT OF PROF. BASILE UDDO, LOYOLA UNIVERSITY LAW SCHOOL, NEW ORLEANS, LA.

Mr. UDDO. Thank you, Mr. Chairman and Senator Baucus.

It is my pleasure to have been invited before the subcommittee today to testify. I am only going to spend a very few moments on the jurisdictional limitation provision, but I am afraid I am going to start by acting irresponsibly, as Professor Cox characterized it, because I am going to say that the jurisdictional limitation provision of the bill is, in my mind, beyond debate, constitutional.

I have addressed that question in an extensive article entitled: "A Wink From the Bench: The Federal Courts and Abortion," which appears in the Tulane Law Review and which I have submitted for the permanent record.

That article examines what I think is the clear authority and precedent for congressional control of Federal court jurisdiction, particularly when, as in this case, the jurisdiction of the Supreme Court and the State courts is left untouched.

Most of Professor Cox's references were to instances where Supreme Court jurisdiction was being attacked, and he did not mention the Norris-LaGuardia Act which, I think, is the exact paradigm for what S. 158 tries to do. You are all familiar with the Norris-LaGuardia Act and that it deprived the lower Federal courts of jurisdiction in labor injunction cases, which some people have characterized as perhaps saving the entire union movement in this country.

### OBJECTIONS TO S. 158

Because this subcommittee is familiar with the very sound arguments supporting Congress power to enact the human life bill and because my written testimony thoroughly analyzes Congress power in this area, I will not spend much time discussing those issues. Instead, I would like to focus upon some of the objections that have been raised to S. 158 and why I think most of those are ill conceived.

One objection is that, even though Congress may have superior factfinding ability, Justice Brennan in *Roe* v. *Wade* said that Texas could not adopt one theory of life, and, the argument goes, consequently, neither may Congress. I think this objection is without merit.

Initially, it is clear that no State has ever attempted the extensive factfinding on the question of human life that this subcommittee is now undertaking. While the Texas data may have been impressive, I think these hearings are certainly more thorough and more up to date, and unprecedented.

Moreover, it is clear to me that Congress, unlike Texas or any other State, is a coordinate, coequal branch of the American Government. Consequently, congressional determinations are owed particular respect by the Court.

Professor Cox himself has commented on this very point in explaining why a congressional determination of voter qualifications should, as the Supreme Court held, be superior to that of the State. And I quote Professor Cox:

Congressional supremacy over the Judiciary in the areas of legislative fact-finding and evaluation and over the State legislatures under the supremacy clause in any area within Federal power would seem to be a wiser touchstone.

And he elaborates in the context of his article. Consequently, I think, we should say that Congress deserves deference where a State may not.

Another objection that has been raised against S. 158 is that it goes beyond factfinding in determining when life begins by also concluding that, for purposes of the due process clause, the unborn, from conception, are persons protected by the 14th amendment.

Further, the argument runs, this conflicts with the determination in *Roe* v. *Wade* that the unborn were not persons under amendment. Therefore, they conclude, on the point of personhood, the Supreme Court is not in doubt and Congress may not act.

Admittedly, S. 158—the congressional determination in S. 158 on this point—would conflict with the Court, but I do not think this would render the bill unconstitutional. The Court has, in the past, allowed Congress to differ with it on determinations relevant to the 14th amendment by deferring to the congressional view.

That, I think, is the area that this subcommittee has become very familiar with, because I am sure that you gentlemen are familiar with the voting rights cases—with *Lassiter* and *Morgan,* which have been mentioned here already today.

You are also familiar with the more recent discussions of those section 5 powers in *Fullilove* and *City of Rome.* And, too, I think you are familiar with the Court's view that it will defer to congressional judgments that conflict with its view of the Constitution. And you also know that the Justices have always admitted that they can learn from the dialog with the Court.

### S. 158 AS DIALOG AND TEACHING

So, the human life bill offers nothing so dramatic as a threat to *Marbury* v. *Madison.* It offers teaching and dialog, and the process of dialog and teaching between the Court and Congress, I would suggest, is as old and as venerable as our Constitution itself.

The bill is merely a continuation of this process on two very important points of a very important issue: When does life begin, and who is a person for purposes of protecting life.

The question might be raised: Is this congressional teaching necessary? Is it wise? Is it something Congress should do? I think that, quite clearly, it is.

The 14th amendment protection of life is meaningless if no decision can be made about life or not life. For the unborn in 1981, it is clearly meaningless. If some others get their way, the very young and very old may lose their protection under the amendment, so too the defective.

Who could doubt that the day will come when we might hear arguments that science cannot decide if infants are human life or the invalid, old, or the severely handicapped? These, it will be said, are questions of philosophy or religion, of value or opinion.

If that is the case, then no one's life is really protected because we will have decided that we cannot decide, and protection will be a matter of power, not right. Only the powerful will be able to demand protection.

Consequently, Congress considered judgment on the question of when life begins is indispensable to understanding what the 14th amendment means when it says we protect life.

Without Congress judgment, and in light of the Court's self-professed incompetence on the question, a great void exists, a void which could easily be filled by a most compromising view of whose life should be protected.

Congressional teaching on the meaning of "personhood," I think, is similarly indispensable in trying to persuade the Court that they were incorrect in writing the unborn out of the Constitution.

There is probably no more weakly reasoned part of *Roe* v. *Wade* than Justice Blackmun's approach to defining "personhood" under the 14th amendent. Rather than look to commonsense, common law, medical data, or tradition, he chose to see how else the word "person" was used in the Constitution. He found that it was always used postnatally, in the fugitive slave clause, in the qualifications for Representatives and Senators, in disqualifications of electors, et cetera.

But, if course, virtually the entire Constitution was written about adult activities and would have had scant occasion to use the word "person" in any other sense.

Carried to its conclusion, Justice Blackmun's technique for defining "person" would include only adult white males, since that is who was contemplated by most of the other references to "person" in the body of the Constitution.

So, too, Justice Blackmun's approach would suggest that *Santa Clara* v. *Southern Pacific Railroad*, decided in 1886, was wrongly decided in that it held corporations to be persons under the 14th amendment. But, of course, I would suggest that the framers would have envisioned good sense as the guide to such decisions and not word games.

The Congress, I think, is on extremely solid footing in pointing out the Court's error on the question of personhood. It seems quite clear that those most familiar with the 14th amendment—its drafters—saw it as protecting all human beings.

Congressman Jonathan Bingham of Ohio, author of the 14th amendment, said it applied to every human being. Senator Jacob M. Howard of Michigan, who sponsored the amendment on the Senate floor, said it protected the rights of common humanity.

Faced with the biological, scientific, and medical data that this subcommittee has before it, is it conceivable that these men—the authors of the 14th amendment—would have said no, these humans are not to be protected? I think not.

Their concern for common humanity, for the sanctity, not the quality, of life—for the inalienable right to life—would certainly have caused them to resoundingly reject any notion that only certain lives are protected in the Constitution. The human life bill is an attempt to recapture, I think, that original intent.

### S. 158 AND RATCHET THEORIES

It is abundantly clear then, to me at least, that the human life bill is a perfectly acceptable, most likely constitutional, not very unusual bit of legislation. It employs techniques hailed by Professor Cox as, I quote, "a vast, untapped reservoir of Federal legisla-

tive power to define and promote the constitutional rights of individuals in relation to State government."

Further, Professor Cox has said: "It is a happy innovation, relieving pressures upon the Court that follows logically from familiar principles of constitutional adjudication."

Yet, some would suggest that an apparent afterthought footnote in *Katzenbach* v. *Morgan* holds the seed of this bill's unconstitutionality. In that footnote, Justice Brennan declared that section 5 "grants Congress no power to restrict, abrogate, or dilute the guarantees of the 14th amendment."

This theory of a one-way use of section 5 has come to be known as a ratchet theory. To date, it has never been used by the Supreme Court.

There are several reasons why this theory poses no problem for the human life bill. Professor Nagel elaborated on some of those.

Justice Brennan's footnote, taken at face value, would preclude congressional abrogation of rights, which presumes that such an abrogation would be the purpose of the exercise of power in the first place. Brennan's own example illustrates this: "Thus, an enactment authorizing the States to establish racially segregated systems of education would not be a measure to enforce 14th amendment rights."

Clearly, such an act would have no purpose other than the abrogation of rights. There would be no arguable expansion of 14th amendment rights explainable in nonracial terms.

On the other hand, it is quite easy to imagine an act clearly attempting to enforce or expand rights that incidentally affected other rights. *Katzenbach* v. *Morgan* is an example of this.

So it is with the human life bill. The bill, on its face, does not demonstrate an animus against a woman's right to privacy, nor is its purpose the dilution of such right. It is, instead, a dramatic reexpansion and enforcement of the rights of the unborn.

The admitted effect upon the right to an abortion is incidental and inescapable in pursuit of higher 14th amendment values.

Most important, however, I think the validity of the ratchet theory itself must be questioned. Its only explicit Court support is the two footnote references of Justice Brennan, one of which was in dissent. Beyond that, he has never elaborated on his theory or its constitutional basis.

Justice Black seems to be the only Justice to personally agree with it. In fact, the Chief Justice seems to reject it in that he has proposed Federal legislation to modify Court-created rights concerning exclusion of evidence in criminal prosecutions. Such legislation would be based upon section 5 and would certainly dilute the rights of criminal defendants, and yet it is suggested by the Chief Justice himself.

Futhermore, no case, as I said, has ever used the ratchet theory to invalidate a section 5 statute. Perhaps this paucity of use and support for the theory emanates from the weakness of the theory itself. The most careful criticism of it came, again, from Professor Cox.

His initial reponse was:

> It is hard to see how the Court can consistently give weight to the congressional judgment in expanding the definitions of equal protection in the area of human

rights but refuse to give it weight in narrowing the definition where the definition depends upon appraisal of the facts.

A poignant criticism, I would say.

ON THE RHETORIC OF THE "OTHER SIDE"

In concluding, let me comment upon one unfortunate specter that I think has arisen during the debates upon S. 158, and that is the nature of the opposition.

Until today, most of the opposition was not presented in substantive fashion. Today, fortunately, this subcommittee has substantive comments upon which it can make some decisions.

Prior to this, a few law professors have taken to a technique, I think, unbefitting the importance or the dignity of these proceedings. Their opposition has depended largely upon misstatement, innuendo, implication, and even sarcasm. They have taken to instructing this subcommittee and the public through means that I would characterize as less than scholarly.

The most forceful argument upon which they have depended is that *x* number of scholars have ordained that this bill is unconstitutional. Principled reasons for this view have been notably absent.

Professor Tribe, for example, has tried to impress this subcommittee with a so-called unison of voices among virtually all careful students of the Constitution.

I would submit that the only way one can accept that such a unison of careful scholars exists is if one believes that the entire universe of careful constitutional scholars is coterminous with those who teach at certain institutions and hold certain political and legal views. As self-serving as it might be, I am not prepared to accept that definition.

Even if one were to believe that there was such a unison, one would still require more than personal assurances that the instant legislation is unconstitutional. One would expect relevant and scholarly dialog.

It is interesting to note that, had the scholars who support the constitutionality of the human life bill acted similarly, they would have been denounced as reckless incompetents.

But those who support the human life bill, I think, have offered a thorough assessment of why they believe the Constitution would allow S. 158. They believe that their scholarship is careful. They believe that they have asked this subcommittee, rather than to trust their conclusions, to evaluate the data.

Consequently, I am confident that when you men reflect upon what has been presented to you and undertake your serious responsibility of passing on this bill you will find that the weight of authority rests with its constitutionality and argues for its passage, and I think that is all that can be asked of you.

Thank you.

Senator EAST. Thank you, Professor Uddo.

[An article submitted by Professor Uddo follows:]

[From the Tulane Law Review, Vol. 53]

# A WINK FROM THE BENCH: THE FEDERAL COURTS AND ABORTION

BASILE J. UDDO*

*The hearing on the case before the panel of three federal district judges was my first contested case. I was petrified. I remember that Sarah Hughes . . . was one of the judges. At one point during the hearing, when my nervousness was obviously showing, Sarah winked at me as if to say, "It's going to be all right." Sure enough, it was.***

## INTRODUCTION

*Roe v. Wade*[1] and *Doe v. Bolton*,[2] decided by the Supreme Court in 1973, effectively nullified as unconstitutional the anti-abortion laws of all fifty states.[3] The public[4] and scholarly[5] reactions to those opinions were tumultuous and, for the most part, highly critical of the Court.[6] But, for all that those opinions did

* Associate Professor of Law, Loyola University School of Law, New Orleans, Louisiana. B.B.A. 1970, Loyola University; J.D. 1973, Tulane University; L.L.M. 1974, Harvard University. The author wishes to express his deep appreciation to Professor John T. Noonan, Jr. for his encouragement in the preparation of this article.

** This description of the first stage of *Roe v. Wade* was given by Ms. Sarah Weddington, attorney for the plaintiff in *Roe*, at a conference on abortion. Ms. Weddington's remarks appear in Abortion In The Seventies 277-79 (W. Hern & B. Andrikopoulos eds. 1977).

1. 410 U.S. 113 (1973).

2. 410 U.S. 179 (1973).

3. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 2 (1973).

4. *See* Lear, *Abortion: Court Rules Yes—People Say No*, Boston Herald American, Apr. 21, 1973. *See also* Wall St. J., Aug. 2, 1973, at 1, col. 1. *See generally* Blake, *The Supreme Court's Abortion Decisions and Public Opinion in the United States*, 3 Population & Dev. Rev. 45 (1977), *reprinted in* Human Life Rev., Winter, 1978, at 64.

5. *See, e.g.*, A. Cox, The Role of the Supreme Court in American Government 51-55 (1976); L. Lusky, By What Right? A Commentary on the Supreme Court's Power to Revise the Constitution 15-21, 99-100 (1975); Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807 (1973); Ely, *The Wages of Crying Wolf: A Comment On* Roe v. Wade, 82 Yale L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159; Rice, *The Dred Scott Case of the Twentieth Century*, 10 Hous. L. Rev. 1059 (1973). *See generally* G. Gunther, Cases and Materials on Constitutional Law 650-56 (9th ed. 1975).

6. Of course, there were defenders of both the reasons and results of the abortion cases. *See, e.g.*, Tribe, *supra* note 3, where Professor Tribe suggests that "some types of choices ought to be remanded, on principle, to private decisionmakers unchecked by substantive governmental control." *Id.* at 32. Furthermore, he argues that *Roe* does not represent a choice between abortion and continued pregnancy; rather it involves *"choosing among alternative allocations of decisionmaking authority."* *Id.* at 11. Finally, he suggests that the first amendment religion clause would bar legislative determinations about po-

to frustrate the historical protection of the unborn child,[7] their constitutional and methodological infirmities necessarily left unanswered a broad spectrum of abortion related questions.[8] Predictably, there have been many subsequent attempts to legislate and regulate consistent with the hazy holdings of the abortion cases. These demonstrably legitimate attempts[9] to reconcile the states' remaining police power in the area with the *Roe* and *Doe* decisions have been met with an unfortunate hostility in the lower federal courts.[10]

This current phenomenon of consistently pro-abortion results in the lower federal courts is uncomfortably similar to the anti-union bias expressed by these same courts during this country's struggle toward unionization in the early part of the twentieth century.[11] Then, the problem loomed so large that Congress finally stemmed the tide by enacting the Norris-LaGuardia Act,[12] a bill seriously restricting federal court jurisdiction in labor dis-

---

tential life because "views of organized religious groups have come to play a pervasive role" in making such determinations. *Id.* at 23. However, in his recently published treatise on constitutional law, Professor Tribe has at least partially retreated from this last argument in support of *Roe:*

> But, on reflection, that view appears to give too little weight to the value of allowing religious groups freely to express their convictions in the political process, underestimates the power of moral convictions unattached to religious beliefs on this issue, and makes the unrealistic assumption that a constitutional ruling could somehow disentangle religion from future public debate on the question.

L. Tribe, American Constitutional Law 928 (1978) (footnotes omitted).

For another support of the abortion decisions also based upon reasons not mentioned by the Court, see Heymann & Barzelay, *The Forest and the Trees:* Roe v. Wade *and Its Critics*, 53 B.U. L. Rev. 765 (1973).

7. *See* Noonan, *An Almost Absolute Value in History*, in The Morality of Abortion 1 (J. Noonan ed. 1970).

8. Some of these questions were expressly avoided by the Court. For example, the Court expressed no view on parental or spousal consent requirements, 410 U.S. at 165 n.67. Other questions, although not mentioned, were created by the far-reaching implications of the decisions. *See* Note, *Implications of the Abortion Decisions: Post* Roe *and* Doe *Litigation and Legislation*, 74 Colum. L. Rev. 237 (1974) (medicaid payments for abortions, abortion reporting systems, regulations of clinics and hospitals, abortion advertising limitations, hospital refusals to provide abortion services, retroactivity).

9. *See* notes 95-187 *infra* and accompanying text.

10. The term "lower federal courts" is used to describe courts of original jurisdiction and intermediate appellate courts created by Congress under article I, section 8, and article III, section 1 of the Constitution. The ensuing discussion will focus upon the district and circuit courts, but the basic arguments would apply to all courts so created by Congress. As to state courts and the United States Supreme Court, *see* note 58 *infra*.

11. For a more comprehensive discussion of the labor union/federal court problem, see notes 59-94 *infra* and accompanying text.

12. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-115 (1976)).

putes, with special emphasis on the dreaded labor injunction.[13] The time has come for Congress to recognize a similar problem in the area of abortion litigation and to take steps to remove abortion cases from the jurisdiction of the lower federal courts.

The ensuing discussion will focus on three major points: first, the power *vel non* of Congress to legislate in this area; second, the propriety of treating the labor context as a valid paradigm for the suggested action; and third, the problem of the federal courts' treatment of abortion legislation and the need for congressional intervention.

## I. The Power of Congress to Control Federal Court Jurisdiction

Any discussion of congressional power over the federal judiciary necessarily begins with article III of the Constitution. Section 1 of that article vests the judicial power of the United States in the Supreme Court, "and in such inferior Courts as the Congress may from time to time ordain and establish."[14] It is this statement, coupled with its history, that has consistently supported the conclusion that Congress not only has power over lower federal court jurisdiction, but that this power is in essence plenary.[15] This conclusion was not, however, without its critics. Despite the words expressing an apparent option on the part of Congress, some early legislators suggested that article III *required* Congress to create lower federal courts as a mechanism for assuring that all jurisdiction, especially that which the Supreme Court could not exercise as original, would be vested at all times in some federal court.[16] Nonetheless, the contrary position was recognized

---

13. The special devastation wrought by the federal labor injunction, usually used to stop strikes, is well described in F. Frankfurter & N. Greene, The Labor Injunction (1930) [hereinafter cited as The Labor Injunction].

14. U.S. Const. art. III, § 1.

15. *See generally* P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and The Federal System 309-438 (2d ed. 1973) [hereinafter cited as Hart & Wechsler]; C. Wright, Handbook of the Law of Federal Courts 22-26 (2d ed. 1970).

16. Charles Warren, commenting on the debates surrounding the Judiciary Act of 1789, noted that "[t]he broad pro-Constitution men took the position that Congress had no power to withhold from the Federal Courts which it *should* establish any of the judicial power granted by the Constitution." Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 67 (1923) (emphasis added). In fact, Warren himself sees strength in the argument:

> In one view of the case, the strong pro-Constitution men probably held the better position . . . . It could well be argued that [the Constitution] did not intend to leave it within the power of Congress to withhold from the Federal

in the first Judiciary Act, wherein Congress did not grant the full judicial power of the United States to federal courts.[17]

Of course, the supporters of broader congressional power over federal jurisdiction were bolstered by the rather clear history of article III. During the debates of the Constitutional Convention, several proposals were offered to make mandatory the establishment of lower federal courts.[18] In opposition, at least one proposal sought to prohibit inferior federal courts altogether.[19] The conflicting proposals were referred to the Committee of the Whole.[20] Initially, the Randolph proposal — requiring inferior courts — was accepted.[21] Subsequent opposition, however, argued the efficacy and propriety of relying exclusively upon state courts for original litigation, combined with "the right of appeal to the supreme national tribunal . . . to secure the national rights & uniformity of Judgmts [sic] . . . ."[22] James Madison became concerned that if such a view were to become part of the Constitution, appellate review would be an inadequate remedy for state court bias; hence "[a]n effective Judiciary establishment commensurate to the legislative authority, was essential. A Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move."[23] Madison (along with James Wilson) ultimately proposed a compromise that would forever bear his name; the Madisonian Compromise, which made the creation of inferior federal courts optional with Congress, carried the day.[24] This history, with its resulting compromise, has been properly interpreted not only as evidence of Congress' discretion in creating inferior federal courts, but also as the basis for the conclusion that Congress controls the scope of such jurisdiction once the courts are created.[25] Certainly, if Con-

---

Courts which Congress should establish any part of the judicial power granted by the Constitution.

*Id.* at 68.

17. Wright, *supra* note 15, at 24.

18. See the proposals of Edmund Randolph of Virginia and Charles Pinckney of South Carolina in 1 M. Farrand, The Records of the Federal Convention of 1787, at 104-05, 600 (3d ed. 1966).

19. *Id.* at 244. This proposal was by William Patterson of New Jersey.

20. *Id.* at 104-05.

21. *Id.*

22. *Id.* at 124 (remarks of John Rutledge of S.C.).

23. *Id.* at 124 (remarks of James Madison).

24. *Id.* at 125.

25. "And it seems to be a necessary inference from the express decision that the creation of inferior federal courts was to rest in the discretion of Congress that the scope of their jurisdiction, once created, was also to be discretionary." Hart & Wechsler, *supra* note 15, at 12.

gress is not constitutionally required to create the inferior federal courts, it can abolish them once created, and *a fortiori,* can exercise the lesser power of restricting or removing certain parts of their jurisdiction.[26] The Supreme Court, testing a portion of the Judiciary Act of 1789, said as much in 1850 in *Sheldon v. Sill.*[27]

In *Sheldon* the petitioners claimed that a provision of the act that excepted suits based upon assigned promissory notes from federal jurisdiction was a restriction violative of article III of the Constitution. The Court, through Justice Grier, said:

> It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result — either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.
>
> The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.
>
> Such has been the doctrine held by this court since its first establishment. To enumerate all the cases in which it has been

---

26. This deduction also finds support in various Federalist Papers. *See, e.g.,* No. 80 which says:

> From this review of the particular powers of the federal judiciary, as marked out in the constitution, it appears, that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniencies should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such *exceptions* and to prescribe such regulations as will be calculated to obviate or remove these inconveniencies.

The Federalist No. 80 (A. Hamilton) at 541 (J. Cooke ed. 1961).

27. 49 U.S. (8 How.) 441 (1850).

> either directly advanced or tacitly assumed would be tedious and unnecessary.[28]

Clearly, the Madisonian Compromise had produced plenary congressional power over lower federal court jurisdiction.[29]

To be sure, however, the contrary view of the broad pro-Constitution men, mentioned above,[30] did from time to time find its supporters. Perhaps the most famous was Justice Story. In the landmark opinion of *Martin v. Hunter's Lessee*,[31] Justice Story supported the nondiscretionary view of congressional power over inferior federal courts. For him the article III phrase "shall be vested" meant that the entire federal jurisdictional power *had* to be vested in one federal court or another. Consequently, he concluded that since the Supreme Court lacked most original jurisdiction, "Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance."[32] In pursuit of this conclusion, Story ignored entirely the history of the Convention and the particular significance of the Madisonian Compromise. Similarly, he mistakenly assumed that to meet what he saw as the constitutional imperative that federal jurisdiction "shall be vested," inferior federal courts had to be formed, and that relying upon state courts coupled with Supreme Court appellate review was not sufficient.[33] The latter, however, would have certainly achieved his desire for total vesting at some level. Nonetheless,

---

28. *Id.* at 448-49.

29. This position has consistently been espoused by the modern Court. *See, e.g.*, Palmore v. United States, 411 U.S. 389, 400-01 (1973) (Congress may withhold lower court jurisdiction "in the exact degrees and character which to Congress may seem proper for the public good.") (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845)); Glidden Co. v. Zdanok, 370 U.S. 530, 551 (1962) (inferior courts remain "constantly subject to jurisdictional curtailment").

30. *See* note 16 *supra* and accompanying text.

31. 14 U.S. (1 Wheat.) 304 (1816).

32. *Id.* at 331.

33. The prospect that, under certain circumstances, a state court *might not* have or would not take jurisdiction over a particular matter does not lend support to Story's position that inferior federal courts with *full* federal jurisdiction are mandated by the Constitution. What it does mean is uncertain, but clearly it can entail no more than the mere *possibility* of narrow areas of mandatory federal jurisdiction.

In fact, it has been suggested that federal jurisdiction would only be mandated where there is no state jurisdiction (*e.g.*, mandamus over federal officers, habeas power, and injunctions directed to federal officers). *See* Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa. L. Rev. 45, 76-108 (1975).

Story subsequently reaffirmed his position in his *Commentaries on the Constitution,*[34] notwithstanding that the Supreme Court had consistently rejected his reasoning and conclusion.[35]

Recently, however, several commentators have questioned Congress' heretofore unfettered control over lower federal court jurisdiction and have suggested alternate analyses and different conclusions.[36] Each of these theories harbors fatal weaknesses,[37] but more importantly, none would prevent Congress from limiting lower federal court jurisdiction in abortion cases. In fact, one writer suggests that his thesis is, in part, dependent upon a recognition of Congress' power to restrict jurisdiction in abortion cases.[38] Theodore Eisenberg's theory has been called the "changing circumstances" theory,[39] because his basic premise is

---

34. J. Story, Commentaries on the Constitution of the United States §§ 1584-1590 (2d ed. Boston 1851) (1st ed. Boston 1833).

35. *See also* note 29 *supra.*

36. *See generally* 1 J. Goebel, History of the Supreme Court of the United States: Antecedents and Beginnings to 1801 (1971); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction,* 83 Yale L.J. 498 (1974); Redish & Woods, *supra* note 33, at 45. See also the following lower federal court cases questioning the *absoluteness* of Congress' control over federal jurisdiction: Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), *cert. denied,* 335 U.S. 887 (1948); Cortright v. Resor, 325 F. Supp. 797, 809-10 (E.D.N.Y.), *rev'd on other grounds,* 447 F.2d 245 (2d Cir. 1971), *cert. denied sub nom.* Cortright v. Froehlke, 405 U.S. 965 (1972); West End Neighborhood Corp. v. Stans, 312 F. Supp. 1066, 1068 (D.D.C. 1970); Murray v. Vaughn, 300 F. Supp. 688, 698-702 (D.R.I. 1969).

37. For example, Professor Goebel bases his thesis upon minor word changes in article III made by the Constitutional Convention's Committee on Style; the original draft of article III concluded with the phrase: "and in such Inferior Courts as shall, when necessary, from time to time, *be constituted* by the Legislature of the United States." After revision, and as finally approved, that phrase read: "and in such inferior courts as Congress may from time to time *ordain and establish.*" Professor Goebel suggests that this minor change in phraseology was intended to mandate the creation of lower federal courts. Goebel, *supra* note 36, at 246-47 (emphasis added). In light of the article's history, such a theory is clearly unfounded.

The Goebel thesis is discussed and rebutted in Redish & Woods, *supra* note 33, at 59-61, where the authors conclude:

> Professor Goebel's position is susceptible to much the same criticism as that levied on Justice Story's theory. Although he does refer to the history of the drafting of the article, Professor Goebel, like Justice Story, maintains that Congress had no choice but to create lower federal courts. But also like Justice Story, he asserts this despite the fact that the Convention debates clearly indicate the framers compromised by awarding Congress discretionary power as to their creation. Nor are his arguments concerning the wording of article III especially convincing. Though etymologists might argue the point, it remains to be seen that the words "ordain and establish" are significantly more imperative than the phrasing of the original draft.

*Id.* at 61 (footnote omitted).

38. *See* Eisenberg, *supra* note 36.

39. Redish & Woods, *supra* note 33, at 67.

not that article III originally limited congressional discretion, but that changes in times and circumstances now require a different conclusion to give "contemporary validity" to the theory of the article III compromise.[40] In Eisenberg's words:

> If, because of changing circumstances, the framers' aspirations for the national judiciary cannot be fulfilled today without lower federal courts, then there is a conflict between the Hart and Wechsler view of the decision to leave creation of lower courts to Congress' whim and the constitutional definition of the judiciary's role.[41]

Eisenberg then examines the intended role of the judiciary[42] and concludes that, though multifaceted, its ultimate role is "to be able to hear and do justice in all cases within its jurisdiction."[43] Consequently, he suggests that while Supreme Court review might have realistically performed that function for the young Republic — as the framers felt it would — modern realities belie that conclusion:[44]

> Since the early days of the republic, however, the number of federal cases has increased dramatically . . . . This increase in case load has had significant consequences for both the Supreme Court and lower federal courts. The Supreme Court is clearly no longer capable of providing a federal forum to hear the merits of every case involving a federal question. If Congress were to abolish the lower federal courts, this aspect of the national judiciary's role would fall upon the Supreme Court in the form of review of state court decisions. The inevitable result would be that few litigants with federal claims could be heard in a federal court even on appeal. The burden of Article III, as understood by the framers, would fall upon one Court — the Supreme Court.[45]

Eisenberg suggests, however, that not all congressional control of federal jurisdiction is invalid; "neutral" statutes, *intended* to avoid case overload and to promote efficiency, are acceptable.[46] Conversely, assuming that there is a distinction between neutral and substantive jurisdictional statutes, substantive statutes,

---

40. Eisenberg, *supra* note 36, at 504.
41. *Id.* (footnotes omitted).
42. *Id.* at 505-06.
43. *Id.* at 506.
44. *Id.* at 508-10.
45. *Id.* at 510 (footnotes omitted). For responses to Eisenberg's basic thesis, see Hart & Wechsler, *supra* note 15, at 77-78 (Supp. 1977), and Redish & Woods, *supra* note 33, at 67-75.
46. Eisenberg, *supra* note 36, at 520-21.

those that attempt to do through jurisdictional control what Congress could not do through substantive regulation, are invalid.[47] "[T]hat is, [Congress] may enact any jurisdictional statute that does not prevent vindication of a constitutional right."[48]

Eisenberg recognizes, however, that his analysis runs headlong into the constitutionally valid Norris-LaGuardia Act.[49] That Act severely restricts federal court jurisdiction over the issuance of injunctions and temporary restraining orders in labor disputes. Eisenberg suggests that such a jurisdictional limitation is valid because Congress could have achieved the same result by substantive rule;[50] but as Eisenberg recognizes, the substantive validity of the Norris-LaGuardia Act was not at all clear when it came before the Supreme Court.[51] In fact, prior to the enactment of this legislation, the Supreme Court, in *Truax v. Corrigan*,[52] had ruled that a state statute strikingly similar to the Norris Act was an unconstitutional denial of due process. Eisenberg maintains, however, that the Act was nonetheless substantively valid because *Truax* was based upon discredited notions of substantive due process.[53] This, he suggests, was in the Court's mind when it upheld the Norris-LaGuardia Act in *Lauf v. E. G. Shinner & Co.*:[54]

> *Lauf's* holding . . . would present no problem if, at the time it was decided, *Truax* was already *discredited*, for then the Norris-LaGuardia Act would merely have the effect of accomplishing through jurisdiction what Congress could do through substantive rulemaking. By the time *Lauf* was decided, *Truax* was already *in peril;* substantive due process, the approach employed in *Truax*, saw its demise the year before.[55]

---

47. *Id.* at 521-28.

48. *Id.* at 527.

49. 29 U.S.C. §§ 101-115 (1976). For a full discussion of the Act, see notes 59-94 *infra* and accompanying text.

50. Eisenberg, *supra* note 36, at 528.

51. *Id.* at 529.

52. 257 U.S. 312 (1921).

53. Eisenberg, *supra* note 36, at 529.

54. 303 U.S. 323 (1938). A crucial weakness in this part of Mr. Eisenberg's argument is that the court never mentioned, much less overruled, *Truax*; moreover, the opinion clearly addresses the broad power of Congress over lower federal court *jurisdiction*. In the Court's words: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." *Id.* at 330.

55. Eisenberg, *supra* note 36, at 529 (emphasis added) (footnotes omitted). At this point Mr. Eisenberg *speculated* that had the Court gone beyond the jurisdictional question, it "would have upheld as well a substantive rule having the same effect as withdrawal of jurisdiction." *Id.*

At this point Eisenberg offers a footnote that is tremendously important if his theory is to be consistent. It also explains how his theory would apply in the abortion context. He states that

> [t]he Court's inability to tie the privacy-related decisions such as Griswold v. Connecticut . . . and Eisenstadt v. Baird . . . to the constitutional text again raises the spectre of substantive due process as epitomized by Lochner v. New York . . . . One commentator makes a plausible case for viewing the Court's most recent foray into privacy, the abortion case, Roe v. Wade, . . . as less justifiable than the thoroughly discredited *Lochner* decision.[56]

There is little doubt that by this statement Eisenberg, in accommodating the Norris-LaGuardia Act, is recognizing that certain Supreme Court decisions are so uniquely unprincipled and distant from the text, structure, and history of the Constitution that Congress can limit jurisdiction in these areas because such limitations would not, *in any real sense,* conflict with the protections of the Constitution. Just as *Truax* was bad constitutional law, so are *Roe* and *Doe.* Just as Congress recaptured labor law from the clutches of substantive due process, it might do the same for the traditional state interest in abortion. Just as illusory substantive economic due process rights were not allowed to hamper congressional jurisdictional power, neither should illusory privacy rights be allowed to do so.

In sum, the case is clear and strong for plenary congressional control of lower federal court jurisdiction, especially in abortion cases. In the abortion area, even the more formidable detractors from the overwhelmingly majority view recognize as legitimate congressional control of lower federal court jurisdiction. All that is necessary is a clear statement from Congress[57] that lower fed-

---

56. *Id.* at 529 n.178 (citations omitted).

57. While the courts have generally respected attempts to limit jurisdiction, even when Congress' language or intent was not comfortably clear, *see, e.g.,* Taylor v. St. Vincent's Hosp., 369 F. Supp. 948, 950-51 (D. Mont. 1973) (interpreting ambiguous language in § 401(b) of Health Programs Extension Act of 1973 as jurisdictional restriction), *aff'd,* 523 F.2d 75 (9th Cir. 1975), *cert. denied,* 424 U.S. 948 (1976), care should be taken to remove all doubt.

It has been suggested that to be effective a jurisdictional limitation must *amend* all relevant jurisdictional statutes; moreover, the amendments must assure some sort of judicial review. Hence, a statement that *no* court shall have jurisdiction in abortion cases might be invalid under the due process clause. Note, *Congressional Power Over State and Federal Court Jurisdiction: The Hill-Burton and Trans-Alaska Pipeline Examples,* 49 N.Y.U. L. Rev. 131, 137-43 (1974). While these suggestions are not supported by the jurisprudence, any statute restricting jurisdiction in abortion cases should be drafted with great care since any loophole carelessly included would probably be found and used.

eral courts[58] will no longer be allowed to exercise jurisdiction over abortion cases.

## II. The Experience Leading to the Norris-LaGuardia Act

The use of the Norris-LaGuardia Act as a paradigm for legislation limiting federal court jurisdiction in abortion cases is not meant to suggest that it is model legislation. There have been many attempts to limit jurisdiction that demonstrate the mechanics of the suggested legislation as well as, if not better than, the Norris-LaGuardia Act.[59] The significance of this particular Act is that the circumstances and events leading up to its enactment and those currently developing in the field of abortion regulations are similar. To be sure, there is no exact parallel, but discomforting similarities exist.[60]

As with abortion, the problems leading up to the Norris-LaGuardia Act began with several Supreme Court and lower federal court opinions that set the stage for continual federal court involvement in labor-management relations.[61] The starting point of this judicial involvement has not been precisely placed. It has been suggested, however, that the early uses and interpretations of the Interstate Commerce Act[62] to gain federal jurisdiction over labor disputes was the thin edge of the wedge,[63] but more devastating encroachments came with judicial interpretations of several other statutes. Prominent among these was the Sherman Act,[64] which declared illegal "[e]very contract, combination . . .

---

58. The writer has limited his discussion to lower federal courts as defined in note 10 *supra*. This is not to suggest that there are not similar arguments with regard to state courts and the United States Supreme Court; however, these arguments, which are based on the "exceptions clause" of article III and the "supremacy clause" of article VI, have been omitted because they involve different and usually more complex problems that would take the writer beyond the scope of this article.

59. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976); Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23. *See generally* Hart & Wechsler, *supra* note 15, at 360 ("In the fifteen years between 1953 and 1968, over sixty bills were introduced in Congress to eliminate the jurisdiction of the federal courts over a variety of specific subjects . . . ."); *id.* at 360-65; *id.* at 79-80 (Supp. 1977).

60. The labor law saga is well told in several accounts, but the benchmark is The Labor Injunction, *supra* note 13. For a recent and highly critical article on the Norris-LaGuardia Act, particularly the role of Frankfurter and Greene in its enactment, see Petro, *Injunctions and Labor Disputes: 1880-1932*, 14 Wake Forest L. Rev. 341 (1978).

61. The Labor Injunction, *supra* note 13, at 5-17. *See generally* A. Cox, D. Bok, & R. Gorman, Cases and Materials on Labor Law 18-59 (8th ed. 1977) [hereinafter cited as Labor Law].

62. Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (amended and codified in scattered sections of 49 U.S.C.).

63. The Labor Injunction, *supra* note 13, at 6.

64. 15 U.S.C. §§ 1-7 (1976).

or conspiracy in restraint of trade."[65] The Act was primarily directed toward the social and economic ramifications of the concentration of capital,[66] yet "[t]he courts in fact proceeded to hold unions liable for antitrust violations in more instances than manufacturers or distributors . . . ."[67] This trend found Supreme Court approval in the famous *Danbury Hatters*[68] case and again in *Gompers v. Bucks Stove & Range Co.*[69]

Labor responded vehemently to this debilitating use of the Sherman Act[70] and focused its efforts on remedial federal legislation;[71] efforts *apparently* rewarded by the Clayton Anti-Trust Act.[72] By the enactment of this Act labor seemed to have won two important victories: (1) an express union exemption from the anti-trust laws,[73] and (2) a limitation upon the federal courts'

---

65. *Id.* § 1.

66. *See* 21 Cong. Rec. 2461, 2569 (1890). *See also* The Labor Injunction, *supra* note 13, at 8; R. Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining 621-38 (1976).

67. Gorman, *supra* note 66, at 621. As Professor Gorman points out, the legislative history relative to the Act's application to labor is unclear. Labor activities were specifically excluded in the original bill, but the exclusion was "eliminated in the course of a major streamlining of the bill in committee." *Id.* Nonetheless, there is no clear indication that labor unions were intended to be covered by the Act despite the Act's silence. *See also* The Labor Injunction, *supra* note 13, at 139 n.17.

68. Loewe v. Lawlor, 208 U.S. 274 (1908). In *Loewe*, the Court expansively read the Act to include a secondary boycott by a labor union within its proscription of "any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business." *Id.* at 293. Consequently, the Court charged treble damages against the *individual members* of the union, obviously a strong deterrent to union membership.

69. 221 U.S. 418 (1911). The Court not only clearly included labor unions under the Sherman Act, but also precluded almost all union activity:

> [The Sherman Act] covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or . . . of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words or printed matter.

*Id.* at 438.

70. Gorman, *supra* note 66, at 622; Statutory History of the United States: Labor Organization 5 (R. Koretz ed. 1970) [hereinafter cited as Koretz].

71. Gorman, *supra* note 66, at 622; Koretz, *supra* note 70, at 5.

72. Act of Oct. 15, 1914, ch. 323, 38 Stat. 730 (codified in scattered sections of 15, 29 U.S.C.).

73. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (1976).

injunction jurisdiction in labor disputes.[74] But labor's celebration of what Samuel Gompers called an "industrial Magna Carta" was short lived. Again the judiciary dashed the hopes of workingmen and frustrated the will of Congress when, in *Duplex Printing Press Co. v. Deering*,[75] the Supreme Court upheld a private injunction against a secondary boycott by a group of machinists supporting the attempts of others to unionize a printing-press manufacturer. The hope that the Clayton Act had "swept out of the federal courts the precedents at common law and under the Sherman Act which had proved so detrimental to the labor movement"[76] was in vain. Justice Pitney held that the *Duplex* boycott constituted an illegal restraint of interstate commerce[77] under *Loewe v. Lawlor*[78] and was not protected by the Clayton Act. Furthermore, speaking for a six-man majority, Justice Pitney concluded that the Act's anti-injunction provision applied only "to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective"[79] — a prerequisite not met by secondary boycotts.

Dissenting, Justice Brandeis scorned the majority for ignoring the clear intent of Congress to put such labor activities beyond the reach of the antitrust laws and federal injunctions.[80]

---

74. No restraining order or injunction shall be granted by any court of the United States . . . in any case between an employer and employee . . . involving, or growing out of, a dispute concerning terms or conditions of employment. . . .

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place . . . for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do . . . .

29 U.S.C. § 52 (1976).

75. 254 U.S. 443 (1921).

76. Labor Law, *supra* note 61, at 44.

77. 254 U.S. at 467-69. The Court concluded that section 6 of the Act said only that the antitrust laws would not prohibit unions from *"lawfully* carrying out their *legitimate* objects," and since such a boycott would be illegal under the Sherman Act, as interpreted, it was not protected by section 6. *Id.* at 469.

78. 208 U.S. 274 (1908).

79. 254 U.S. at 472.

80. In other words the Clayton Act substituted the opinion of Congress as to the propriety of the purpose for that of differing judges; and thereby it declared that the relations between employers of labor and workingmen were competitive relations, that organized competition was not harmful and that it

Nonetheless, with *Duplex* and its progeny,[81] the wedge had been driven. Through the fissure rushed an era of harsh[82] judicial inter-

---

justified injuries necessarily inflicted in its course. Both the majority and the minority report of the House Committee indicate that such was its purpose. If, therefore, the act applies to the case at bar, the acts here complained of cannot "be considered or held to be violations of any law of the United States," and, hence, do not violate the Sherman Act.

. . . But Congress did not restrict the provision to employers and workingmen *in their employ*. By including "employers and employees" and "persons employed and persons seeking employment" it showed that it was not aiming merely at a legal relationship between a specific employer and his employees. Furthermore, the plaintiff's contention proves too much. If the words are to receive a strict technical construction, the statute will have no application to disputes between employers of labor and workingmen, since the very acts to which it applies sever the continuity of the legal relationship.

*Id.* at 486-88 (Brandeis, J., dissenting) (citations and footnotes omitted).

81. Subsequent cases further emasculated the Clayton Act protections. *See, e.g.*, Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927); United States v. Brims, 272 U.S. 549 (1926); Coronado Coal Co. v. UMW, 268 U.S. 295 (1925); UMW v. Coronado Coal Co., 259 U.S. 344 (1922); Alco-Zander Co. v. Amalgamated Clothing Workers, 35 F.2d 203 (E.D. Pa. 1929).

82. Clearly, the leaders of the union movement, many legislators, and legal scholars viewed the federal court involvement, especially via the labor injunction, as hostile to unions. *See, e.g.*, the comments by Matthew Woll, Vice-President, American Federation of Labor:

> Leaving aside the legal technicalities involved, the economic and human factors . . . are of the greatest importance. It is just as well that this question be fought out now and definitely, so that we may know whether we have a democracy in this country or whether we are to live under corporate domination, whether our industrial relations are to be determined by free and voluntary cooperation or by judicially enforced corporate tyranny.

N.Y. Times, Nov. 8, 1927, at 39, col. 1. *See also* Frankfurter & Greene, *Congressional Power Over the Labor Injunction*, 31 Colum. L. Rev. 385 (1931):

> The federal judiciary has for decades set the pace not only in the abundance of labor injunctions or in the breadth of their application and in the ever widening ambit of their interdiction, but also in fashioning legal restraints upon the organized activities of workers which "reminds of involuntary servitude." Federal courts have frankly refused to follow state policy and have intervened in such local affairs on the basis of their conception of some transcending national policy. But Congress is powerless to bring such decisions in conformity with its determination of the national policy! Federal courts can invade state policy by judge-made law. But Congress is impotent to define law for the general guidance of its own creations!

*Id.* at 390 (footnotes omitted).

"There can be no question but that in the issue of labor injunctions many courts have abused their powers." Sayre, *Labor and the Courts*, 39 Yale L.J. 682, 682 (1930). "In the absence of legislative safeguards, reactionary courts through the doctrine of criminal or civil conspiracy will always be provided with a means for curbing the otherwise lawful activities of labor unions." *Id.* at 687 (footnote omitted).

That there had been abuses of judicial power in granting injunctions in labor disputes is hardly open to discussion. The use of the injunction in such disputes had been growing in leaps and bounds. S. Rep. No. 163, 72d Cong., 1st Sess. 8 (1932). Of course criticism of the federal courts was not unanimous. *See* Newlin, *Proposed Limitations Upon Our Federal Courts*, 15 A.B.A.J. 401, 401-03 (1929); Parke, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A.B.A.J. 433 (1933); Editorial, 18 A.B.A.J. 248, 248-49 (1932).

vention that came to be known as "government by injunction."[83] There were varying estimates of the degree of federal court intervention into labor activities during this period.[84] Similarly, there was some dispute as to the degree to which such intervention was the reflection of bias rather than of good faith overzealousness.[85] However, there was little disagreement that federal court intervention, fueled by *Duplex*, was inimical to the rise of unionism.[86]

---

83. " 'Government by injunction' was the slogan by which the Democratic platform of 1896 inveighed against the practice of issuing labor injunctions." The Labor Injunction, *supra* note 13, at 1. *See also* Proceedings of the Democratic National Convention 194-95 (1896).

84. Frankfurter and Greene summarized the 118 *reported* federal cases decided between 1901 and 1928 as follows:

| | | |
|---|---|---|
| (1) | Cases in which restraining orders [were] applied for | 71 |
| | Granted | 70 |
| | Denied | 1 |
| . . . . | | |
| (3) | Cases in which temporary injunctions [were] applied for | 103 |
| | Granted | 88 |
| | Denied | 15 |
| . . . . | | |
| (5) | Cases in which final injunctions were applied for | 33 |
| | Granted | 30 |
| | Denied | 3 |

The Labor Injunction, *supra* note 13, app. II, at 247. For the view that Frankfurter and Greene may have understated the statistics, see Brissenden, "*The Labor Injunction*," 48 Pol. Sci. Q. 413 (1933). More recently, one writer suggests that Frankfurter and Greene greatly overstated the case. *See* Petro, *Injunctions and Labor-Disputes: 1880-1932*, 14 Wake Forest L. Rev. 341, 345-46 (1978).

85. Senator Norris, debating the Norris-LaGuardia Act, said:

> This case and the others which I have enumerated illustrate the necessity of passing a law which can not be nullified even by judges who have no sympathy with those who toil when their interests conflict with great aggregations of wealth. It brings to our minds the almost superhuman importance of an untarnished judiciary. A perfect law can be nullified by an unfair and biased judge.

75 Cong. Rec. 4510 (1932).

> Federal courts have, in too many instances, proved to be champions of capital against labor; they should show a greater regard for the realities of the situation.
>
> The courts, swayed by their conceptions of desirable social ends, have limited strike activities by decisions based on the doctrines of unlawful purpose and improper means. Too often they have been blind to the obvious fact that the definition of the scope of these two doctrines involves declarations of policy, ordinarily a task for the legislature rather than themselves.

Fraenkel, *Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts*, 30 Ill. L. Rev. 854, 880-81 (1936).

One supporter of the Norris-LaGuardia Act would not call the problem one of bias: "While there have been instances of unfairness, judges, by and large, have honestly tried to administer evenhanded justice in labor, as in all other, cases." Witte, *The Federal Anti-Injunction Act*, 16 Minn. L. Rev. 638, 651 (1932).

86. Hearings have been held by congressional committees over a period of years and the facts adduced have brought about an almost unanimity of opinion that such powers of the Federal courts [equity jurisdiction in labor disputes]

Predictably, pressure once again mounted for legislative relief. The original purpose of the Clayton Act had clearly been frustrated, and labor was without adequate protection in its legitimate attempts to organize. Some degree of protection came in 1932 in the form of a limitation on federal court equity jurisdiction: the Norris-LaGuardia Act.[87] The primary purpose of the Act was urgently stated by the House Judiciary Committee: "The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act . . . , which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent."[88] This purpose would be achieved by various means, but with emphasis upon the creation of specific jurisdictional limitations and restrictions. For example, federal courts were *prohibited* from issuing injunctions or restraining orders against a raft of essential union activities,[89] which had previously fallen prey to such "equitable" relief. In addition, the Act specified exacting procedures[90] as prerequisites to issuing permissible injunctions — those against picket-line violence or destruction of property. The balance of the Act attempted to provide a broad remedy for the problem of federal court obstacles to union activity.[91]

The effects of the Act were immediate and positive. The Supreme Court upheld the constitutionality of the Act in *Lauf v.*

---

have been exercised to the detriment of the public welfare and should be curbed. H.R. Rep. No. 669, 72d Cong., 1st Sess. 2 (1932).

"But, in fact, the [Norris-LaGuardia] act, as Professor Archibold Cox rightly points out, 'introduced the only period of unqualified *laissez-faire* in labor relations.' Up until then, the courts usually sided with employers to deny the unions basic rights . . . ." Koretz, *supra* note 70, at 162.

87. 29 U.S.C. §§ 101-115 (1976).

88. H.R. Rep. No. 669, 72d Cong., 1st Sess. 3 (1932).

89. 29 U.S.C. § 104 (1976) applies its prohibition of injunctions to, *inter alia*:

(a) Ceasing or refusing to perform any work . . .;

. . . .

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.

90. Principally, 29 U.S.C. § 107 (1976) attempts to further circumscribe the availability of injunctions and to prohibit *ex parte* orders typically obtained by employer affidavits not subject to employee rebuttal. In pertinent part the section requires notice, a fair hearing, and proof.

91. Among other things the Act declared an essentially pro-labor policy and required courts to consider this policy when interpreting the entire Act. *Id.* § 102. Also the Act defined "labor dispute" as going beyond direct employment relationships between the complaining company and the defendant workers. *Id.* § 113.

*E.G. Shinner & Co.*[92] and soon thereafter began reinterpreting the use of the antitrust laws in the labor relations field.[93] Additionally, the lower court abuses of the injunction procedure declined significantly.[94] Congress' purpose had been achieved; labor was no longer subject to judicial caprice.

The judicial animus toward labor, which threatened to substitute judicial will for legislative will, was evident in the sum and substance of the federal court opinions of the time. Recognizing it for what it was, Congress acted to balance anew the scales of justice. Congress acted wisely and well. Now, a similar animus is evolving against state attempts to regulate, however minimally, the abortion procedure. Part III of this article will show that the point has been reached when similar remedial legislation is needed to restore the balance that existed prior to the appearance of this judicial bias.

## III. The Abortion Cases and the Federal Courts

Since 1973 the number of federal court incursions into state abortion regulation cases has understandably increased. These cases address a plethora of abortion issues but can be generally grouped into three categories: General facility and procedure regulations, spousal and parental consent provisions, and refusal to use public funds.[95] The ensuing discussion will focus upon those cases in each category that best illustrate lower federal court attitudes toward abortion cases.[96]

---

92. 303 U.S. 323 (1938).

93. For examples of how the Norris-LaGuardia Act influenced this reinterpretation, see United States v. Hutcheson, 312 U.S. 219 (1941); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

94. Before the [Norris-LaGuardia] Act became law, the courts, particularly the district courts, had frequently issued injunctions so broad in their effect that they operated to restrain not only illegal, but legal activities as well, and they were based not only upon testimony in open court subject to cross-examination, but upon *ex parte* affidavits. *These same courts, however, under the guidance of the specific provisions of the new Act, have rendered decisions that reveal (except in rare instances) a complete change of practice and attitude.*

Monkemeyer, *Five Years of the Norris-LaGuardia Act*, 2 Mo. L. Rev. 1, 1-2 (1937) (emphasis added).

95. This division is somewhat artificial, and there is significant overlap. Nonetheless, these categories will facilitate discussion.

96. For each case discussed there are others that would, in varying degrees, illustrate the main point of this discussion. For citations to other cases that support the author's conclusions, see note 340 *infra*. No effort is made herein to discuss U.S. Supreme Court cases. To the extent they are mentioned they further illustrate the author's basic argument.

A. *General facility and procedure regulations*

In *Roe v. Wade*[97] the Supreme Court, through Justice Blackmun, made the following statement:

> It follows that, from and after this point [the first trimester], a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.
>
> This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.[98]

Soon after those words appeared, they were being read by lower federal courts as an admonition to sacrifice constitutional analysis to perfunctory, literal application. Virtually every reasonable attempt to assure that abortions would be performed with some regard for individual safety and the commonweal was rejected as unconstitutional under *Roe*.

Indicative of this response is *Doe v. Rampton*,[99] where a district court swept away with a broad brush an entire state statute[100] that attempted to regulate, as much as constitutionally permissible, the performance of abortions. Because the statute was enacted soon after *Roe* and because of the uncertainty of *Roe*'s proscriptions, the Utah State Legislature included a severability clause reflecting a concern for that uncertainty.[101] Despite

---

97. 410 U.S. 113 (1973). The criticisms of *Roe* are legion, *see* note 5 *supra*, and will not be reconsidered here. It is important to realize, however, that *Roe*'s unique constitutional weaknesses, as identified by virtually every *Roe* commentator, give greater cause for concern over subsequent federal court involvement. Bad constitutional law gives rise to even worse subsequent decisions.

98. 410 U.S. at 163.

99. 366 F. Supp. 189 (D. Utah 1973).

100. Utah Code Ann. §§ 76-7-301 to -320 (1973), *reprinted in* 366 F. Supp. at 194-98.

101. The clause read:

> If any one or more provisions, section, subsection, sentence, clause, phrase

this clear legislative intent to exercise its regulatory power to the extent permitted by *Roe*, two of the three judges on the panel invalidated the entire legislative effort as having an "overriding purpose and dominant effect . . . of making the obtaining or performing of an abortion in Utah extremely burdensome or impossible."[102] The court ignored the presumptive validity[103] of the state's action, and instead attributed to the legislature an impermissible *motive* in enacting the legislation,[104] though admittedly much of the statute dealt with questions wholly unanswered in *Roe* and therefore proper subjects of legislation.[105] In dissent, Judge Anderson persuasively noted "that established principles governing severability and judicial scrutiny of legislative intent require a contrary ruling."[106]

A similar simplicity of treatment was reflected by a panel of the Seventh Circuit in *Friendship Medical Center, Ltd. v. Chicago Board of Health*.[107] A private abortion clinic had sought

---

or word of this part or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this part shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed this part, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase or word be declared unconstitutional.

*Id.* § 76-7-320.

102. 366 F. Supp. at 193.

103. Without explaining the reason for such an action, the court summarily invalidated several selected provisions of the Act, finally rejecting the Act as a whole. *Id.* at 193-94.

104. *Id.* Judge Anderson, dissenting, pointed out that invalidation based upon motive has always been disfavored in constitutional adjudication. 366 F. Supp. at 200. *See, e.g.*, Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 224 (1948) ("But a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality."). *See also* Palmer v. Thompson, 403 U.S. 217, 224-26 (1971); United States v. O'Brien, 391 U.S. 367, 382-86 (1968) (Chief Justice Warren's classic condemnation of motive analysis in constitutional decisionmaking).

105. For example, Utah Code Ann. § 76-7-304 (1973) dealt with spousal and parental consent, questions expressly left unanswered in *Roe*. In addition, *id.* § 76-7-314 prohibited the use of public monies for payment of abortions, a question not discussed in *Roe*.

106. 366 F. Supp. at 199. On the propriety of severability, Judge Anderson cited Dorchy v. Kansas, 264 U.S. 286 (1924), where the Court said:

> A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad . . . . But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall.

*Id.* at 289-90 (citations omitted). Judge Anderson found several sections of the Utah law that met this standard. 366 F. Supp. at 199-200.

107. 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

injunctive relief and a declaratory judgment against abortion regulations[108] promulgated by the board of health. The regulations, though extensive, required in part

> [t]hat an abortion be performed by a licensed physician . . . in a facility that complies with [regulations]. Each facility is required to keep records [concerning patients] . . . [and] prepare monthly reports which are to include . . . the name and address of patients who developed complications following the abortion and a description of such complications . . . .
>
> All equipment and supplies must be maintained in proper working order, and necessary solutions, drugs and medications must be available. There must be . . . an elevator that can accommodate a stretcher if any abortion service is located above ground level, anesthesia and such other equipment as is necessary to treat for hemorrhage . . . and other emergencies . . . .
>
> In addition every non-hospital abortion service must have a written affiliation agreement with a licensed Chicago hospital allowing the use of its laboratory facilities and providing for the treatment of its patients requiring emergency care. The abortion service must have immediately available organized transportation facilities [for emergency transportation to a hospital].[109]

In addition, the regulations required that the facility be supervised by a qualified physician and have a registered professional nurse with post-graduate experience in obstetric or gynecological nursing on duty whenever the abortion facility was in use. The regulations also required a twenty-four hour waiting period between the initial examination and the abortion to permit review of required laboratory tests and to allow thorough consideration of the abortion decision.[110]

The court's response was that these regulations, to the extent that they applied to the first trimester of pregnancy, interfered with a fundamental right,[111] and that only a compelling state interest could sustain such interference.[112] *Roe*, it was maintained, "was declaring broad health and safety regulations for the first trimester impermissible."[113] The court based its decision

---

108. The lengthy regulations are reproduced in Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 367 F. Supp. 594, 608-21 (N.D. Ill. 1973).

109. 505 F.2d at 1144 (citations omitted).

110. *Id.* at 1145.

111. *Id.* at 1150-51. This conclusion has ominous implications. If, in fact, it means that health regulations that apply to *all* surgical procedures would have to sustain a more rigid scrutiny as applied to abortions, it so sets apart the abortion procedure that the state's power to regulate it is nearly emasculated.

112. *Id.*

113. *Id.*

upon a most literal and unreasonable reading of *Roe* and *Doe*. Unreasonable because the very underlying premise of the Supreme Court's conclusion was that first trimester abortions are so safe that the state has no interest in maternal health. But if the state cannot regulate the abortion facility *at all*—even to assure compliance with the most minimal safety standards—what assurance is there that first trimester abortions would remain safe? How much need the standards degenerate before the state can act? Indeed, under this literalist approach could the state ever act?

Clearly, the literalist approach is wrong. Not only does it fall of its own weight, but it requires the court to ignore other language in the Supreme Court opinions. In *Doe v. Bolton*,[114] the Court said:

> We feel compelled to agree with appellants that the State must show more than it has in order to prove that only the full resources of a licensed hospital, *rather than those of some other appropriately licensed institution*, satisfy these health interests. We hold that the hospital requirement of the Georgia law, because it fails to exclude the first trimester of pregnancy . . . is also invalid.[115]

The emphasized language is as clear as other language cited in *Friendship Medical Center, Ltd.*; it suggests, contrary to the court's conclusion, that a state may establish appropriate licensing standards. The *Friendship* court suggested, however, that the *Doe* language "flies in the face of the more direct and controlling language" that it preferred.[116] But why is this statement any less direct or controlling than other language quoted therefrom? Nevertheless, the court preferred a construction that invalidated as *unconstitutional* regulations which, *inter alia*, required an elevator large enough to accommodate a stretcher so that a hemorrhaging woman could be more safely and effectively transported to emergency care.[117]

---

114. 410 U.S. 179 (1973).

115. *Id.* at 195 (emphasis added).

116. 505 F.2d at 1151 n.14.

117. The court, in a footnote, refused to adopt a narrowing construction that would have saved the regulations as to post-first trimester abortions. Rather, it preferred to declare the regulations invalid *in toto*. *Id.* at 1154 n.19. Recent abortion clinic scandals in Chicago, where *Friendship Medical Center* originated, illustrate the Seventh Circuit's error in denying the need for abortion regulation. Several Chicago clinics have attempted abortions on women who were not pregnant, performed abortions before pain-killing anesthetics had taken effect, and hired moonlighting residents to perform abortions. These and other "grisly" acts—occasionally resulting in serious infection, loss of repro-

Another example of the broad judicial opposition to any state role in the abortion procedure is the district court opinion in *Wolfe v. Schroering*.[118] After *Roe* and *Doe*, Kentucky enacted a nineteen section law regulating abortions.[119] Plaintiff-physicians, representing a class, sought declaratory and injunctive relief against the enforcement of the statute. Although Judge Bratcher accepted the statute's flexible definition of viability[120] as consistent with the flexibility that inheres in the *Roe* definition,[121] most of the statute was less favorably treated. Amazingly, the court declared unconstitutional a provision requiring the physician, before performing a *post-first trimester* abortion, to inform the patient of the physical and mental consequences of *having or not having* the abortion. More astonishing is the judge's reason for so holding: "For the period subsequent to the first trimester, and prior to viability, the state must confine its regulation to the protection of maternal health and apply it only to the abortion procedure."[122] The Kentucky requirement was nothing more than a codification of the widely recognized common law requirement of informed consent for any significant surgical or medical procedure.[123] Furthermore, it fit the precise standard that the district judge applied: it was both protective of maternal health and applicable only to the abortion procedure, unless of course the judge saw the procedure as only the actual touching of the patient. If so, his vision was regrettably narrow. The medical literature makes it quite clear that the abortion procedure is more than a mere physical act upon a patient to be considered separately from its possible effects upon the patient's full person.[124]

---

ductive organs, and even death—would have been prevented by the instant regulations. Chi. Sunday Sun-Times, Nov. 12, 1978, § 1, at 1, cols. 1-2.

118. 388 F. Supp. 631 (W.D. Ky. 1974), *rev'd in part*, 541 F.2d 523 (6th Cir. 1976).

119. Ky. Rev. Stat. Ann. §§ 311.710-.810, 436.023 (Baldwin 1975).

120. *Id.* § 311.718. This section provides that once it can reasonably be expected for the fetus to have reached viability, no abortion may be performed except to preserve the life or health of the mother.

121. *Roe* said: "Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." 410 U.S. at 160. Judge Bratcher refused to read this definition as setting viability at no earlier than 24 weeks and opted instead for *Roe*'s intended flexibility in deciding the question. 388 F. Supp. at 636.

122. 388 F. Supp. at 636.

123. *See* Marcin & Marcin, *The Physician's Decision-Making Role in Abortion Cases*, 35 The Jurist 66 (1975); Plante, *An Analysis of "Informed Consent,"* 36 Fordham L. Rev. 639 (1968).

124. *See, e.g.*, West & Walsh, *The Need for Pre-Abortion Counseling—Now More Than Ever*, 59 Neb. Med. J. 34 (1974):

> Counseling by competent, trained, unbiased professionals should remain an integral part of the preabortion requirements. Before the Supreme Court decision, a psychiatric opinion was required on a candidate for abortion in most

Similarly, the court invalidated a requirement that twenty-four hours elapse between examination and abortion.[125] The court saw this requirement as an impermissible intrusion into the abortion decision-making process, both before and after the first trimester. Yet the opinion is uniquely unclear as to how this result was reached. Presumably, with respect to first trimester abortions, the judge's concern was a product of literalism.[126] As to post-first trimester abortions, the conclusion seemed to be that the waiting period requirement was impermissible as an attempt to regulate the abortion decision-making process.[127] However, such a requirement has nothing to do with obstructing or burdening the choice to abort; rather it is reasonably related to maternal health concerns similar to those Kentucky tried to protect by assuring a woman necessary information prior to deciding. To further undermine Kentucky's decision to foster informed consent to abortions, the court invalidated a requirement of written consent because it failed "to meet constitutional scrutiny in that it [was] overbroad; it [intruded] into the decision-making process and [included] the first trimester."[128] Again, the court's conclusions were unsupported. How can a written consent requirement be overbroad? What does it mean to *intrude* into the decision-making process? Moreover, after the first trimester, a great deal of intrusion is allowed, especially when, as in this case, it is directed toward maternal health.[129]

When the Supreme Court selected viability of the fetus as a point of special significance in the abortion decision, it not only made a biological mistake[130] but a practical one. Trying to ordain

---

states. This was to establish the risk to the woman's mental health the continuation of pregnancy posed. *Paradoxically, many of these screenings brought out the unresolved conflicts within the woman in regard to terminating the pregnancy and that, in reality, her mental health would be endangered by the abortion.*

*Id.* at 34 (emphasis added).

125. 388 F. Supp. at 638.

126. *See* notes 115-20 *supra* and accompanying text.

127. 388 F. Supp. at 638.

128. *Id.* at 636.

129. The balance of the opinion invalidates parental and spousal consent provisions, prohibitions of saline abortions, and a provision that hospitals need not perform abortions. These regulations will be discussed in the context of other cases.

Conversely, the court upheld a provision making it a criminal offense to sell or otherwise transfer or permit experimentation on a viable fetus and a reporting procedure for post-first trimester abortions, these being preserved through application of the Act's severability clause. *Id.* at 636-38.

130. "The notion of 'viability' defined in any such simple fashion is without biological and medical foundation. The word does not even appear in standard medical indexes." G. Grisez, Abortion: The Myths, the Realities, and the Arguments 32 (1972). "*Life* begins

by judicial fiat an essentially meaningless[131] point in the life continuum, the Court was confronted with the hopeless task of suggesting some degree of precision where there is none.[132] Understandably, however, many states have attempted to give some real meaning to viability as a point at which they may assert some protection on behalf of the fetus.

Minnesota, for example, defined viability as the point when a fetus is "able to live outside the womb even though artificial aid may be required."[133] Furthermore, "[d]uring the second half of its gestation period a fetus shall be considered potentially 'viable'."[134] This definition was challenged in *Hodgson v. Anderson*[135] as ignoring the definition announced in *Roe*: "Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."[136] Plaintiffs suggested that the Minnesota law would establish viability at twenty weeks. Other provisions of the Minnesota law prohibited an abortion of a "potentially viable" fetus without certification by a physician that in his best medical judgment the abortion was necessary to

---

when a single sperm cell penetrates and fertilizes a single egg cell: this action produces the single living cell with which every one of us starts life. *Growth* begins when this cell divides into two." A. Montagu, Life Before Birth 12 (1964) (emphasis added). "That moment, when the two new nuclei form and the now fertilized egg divides in two, is the beginning of the life of a new individual. This is zero hour of Day One." G. Flanagan, The First Nine Months of Life 26 (1962).

131. It is meaningless if it is to be used as a good point for fixing a protected right to live.

> Perhaps even more misleading than the factual oversimplification involved in the idea of "viability" is the assumption that ability to live independently is a suitable criterion of individual identity. Biologically this is certainly not true, for the fetus is genetically and functionally an individual from its beginning, but it is not capable of living independently until long after its birth. The mother's breasts are a biological sign of the infant's continuing dependence for survival, although in human beings dependence is prolonged far beyond weaning.

Grisez, *supra* note 130, at 33.

> 132. A full term pregnancy lasts 40 weeks or 9 months. Viability thirty years ago was at 30 weeks. Today it is as low as 20 weeks . . . . By the turn of the century it will be down to 10 or 12 weeks and with artificial placentae, earlier than that.
>
> It should be obvious that the babies haven't changed. What has changed has been the sophistication of the external life support systems around the baby. To measure humanity or the baby's right to life by viability is completely irrational. Viability does not measure the baby but rather the scientific sophistication and equipment of those around the baby.

B. Willke & J. Willke, Handbook on Abortion 22-23 (1975).

133. Minn. Stat. Ann. § 145.411, subd. 2 (West Supp. 1978).

134. *Id.*

135. 378 F. Supp. 1008 (D. Minn. 1974), *rev'd in part sub nom.* Hodgson v. Lawson, 542 F.2d 1350 (8th Cir. 1976).

136. 410 U.S. at 160.

preserve the life or health of the mother.[137] In addition, when such an abortion was performed, "to the extent consistent with sound medical practice the abortion [was to be] performed under circumstances which [would] reasonably assure the live birth and survival of the fetus."[138] Finally, the Minnesota law ascribed a duty to preserve the life of a live born fetus who survived an abortion performed after the period of potential viability.[139]

The three-judge panel invalidated these provisions,[140] reasoning that they were based upon an improper definition of viability. The court felt that there was something sacrosanct about the *Roe* references to trimesters and concluded that "the state must consider the separate trimester test."[141] The flaw, according to the court, was that Minnesota's stringent test of viability would allow it to apply the more rigid post-viability standard to an abortion being performed during the second trimester. Thus, the court chose to give inflexible significance to *Roe*'s ambivalent reference to twenty-four weeks as a possible point of viability.

> Using 24 weeks as the earliest point of viability places a decision to terminate pregnancy between 20 and 24 weeks in the second part of the *Roe* test. Thus at any point prior to 24 weeks and subsequent to approximately the end of the first trimester, the state may regulate only insofar as such regulations are related to maternal health.[142]

So words and numbers become more important than reality. The Supreme Court's mere *mention* of twenty-four weeks as a possible point of viability converts that number into a talisman capable of overriding the deliberations and fact-finding of the Minnesota legislature. Of course, if Minnesota were acting arbitrarily and their selection of twenty weeks had no basis in fact, the court's result would not be as discomforting, but testimony from a trial in a similar case is a sobering backdrop to what this three-judge panel has done.

> Mr. Morris: Doctor, as one who performs abortions I want to read you a sentence and ask you what it means to you. The sentence is, "Viability means capability of a fetus to live outside

137. Minn. Stat. Ann. § 145.412, subd. 3(2) (West Supp. 1978).

138. *Id.* subd. 3(3).

139. *Id.* § 145.415, subd. 2.

140. 378 F. Supp. at 1015-17. The court also invalidated an informed consent provision, a "conscience clause" allowing persons, hospitals, and institutions to refuse to perform abortions, and a set of abortion procedure regulations.

141. *Id.* at 1016.

142. *Id.*

> the woman's womb albeit with artificial aid" . . . .
> Dr. Mecklenberg: I would agree with that definition of viability. I think that it has been current. I think it is a definition that takes into account medical progress, *the fact that it is constantly changing.* My perusal of the medical literature would lead me to believe that *potential or continued life exists as early as 20 weeks* — not in the current edition of Eastman's Obstetrics Book, but in the previous edition, the earliest report a survivor was reported as a delivery at 20 weeks gestation. In my own experience I have — the earliest survival that I have had is a patient who was 21 weeks from the time of conception or 23 weeks from the first day of her last menstrual period. The child is a year and a half old and normal.[143]

Minnesota, therefore, seems to have acted reasonably in exercising its police power to protect viable fetuses, yet the *Hodgson* court tells us that the Constitution says no! In fact, the *Hodgson* court tells us that Dr. Mecklenberg must be wrong: "In any event, under present technology, it [viability] *does not* arise prior to 24 weeks."[144] This deception of language gives strength to a conclusion not reflective of reality and remains etched in the "case law" to steer others astray.

Pennsylvania is another state that attempted to give meaning to the Supreme Court's viability test. In 1974 the legislature enacted the Abortion Control Act,[145] which, *inter alia,* defined viability as "the capability of a fetus to live outside the mother's womb albeit with artificial aid."[146] Based upon this definition, the Act further provided that one who performs an abortion shall determine according to his "experience, judgment or professional competence that the fetus is not viable,"[147] and if the fetus may be viable, the person performing the abortion "shall exercise that degree of professional skill, care and diligence" necessary to preserve the life and health of the fetus as though it were intended to be born and not aborted.[148] Also, to the extent it is consistent with the life or health of the mother, "the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive."[149] Those who failed to adhere

---

143. Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554, 570 n.9 (E.D. Pa. 1975), *aff'd sub nom.* Collauti v. Franklin, 47 U.S.L.W. 4094 (Jan. 9, 1979) (quoting Record, Jan. 14, 1975, at 82-83) (emphasis added).

144. 378 F. Supp. at 1016 (emphasis added).

145. Pa. Stat. Ann. tit. 35, §§ 6601-6608 (Purdon 1974).

146. *Id.* § 6602.

147. *Id.* § 6605(a).

148. *Id.*

149. *Id.*

to these provisions were subject to "such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted."[150]

In *Planned Parenthood Association v. Fitzpatrick*,[151] plaintiffs objected to all of the foregoing as impermissibly vague and overbroad since there was a "difference of opinion among physicians as to the period of gestation indicated"[152] by the state's definition of viability. Defendants argued that Pennsylvania's definition was consistent with the flexible *Roe* definition, especially since *Roe* specifically stated that viability was tied to that stage at which the fetus was "potentially able to live outside the mother's womb, albeit with artificial aid."[153] With a broad brush, the three-judge panel declared the entire viability provision unconstitutional. Their chief concern was the imposition of criminal sanctions for failure to attempt to save a viable fetus, since there was disagreement among physicians as to the point of fetal development at which the statute would require the operating physician to exercise care for the life of the fetus.

The *Fitzpatrick* court did several things that seemed inappropriate under the circumstances. First, it rejected Pennsylvania's flexible definition of viability, which was a virtual quotation from *Roe*, deciding initially that:

> *Roe* makes it abundantly clear that the compelling point at which a state in the interest of fetal life may regulate, or even prohibit, abortion is not before the 24th week of gestation of the fetus, at which point the Supreme Court recognized the fetus then presumably has the capability of meaningful life outside of the mother's womb.[154]

Of course, no such conclusion is abundantly clear; it is a great deal clearer that, read as a whole, *Roe* eschewed any such rigidity as certainly it had to.[155] Even more dismaying, however, is the *Fitzpatrick* court's next statement:

> Consequently, *Roe* recognizes only two periods concerning fetuses. *The period prior to viability*, when the state may not regulate in the interest of fetal life, and *the period after*

---

150. *Id.* § 6605(d).

151. 401 F. Supp. 554 (E.D. Pa. 1975), *aff'd sub nom.* Collauti v. Franklin, 47 U.S.L.W. 4094 (Jan. 9, 1979).

152. *Id.* at 568-69.

153. 410 U.S. at 160 (footnote omitted).

154. 401 F. Supp. at 572.

155. The Supreme Court has said as much in Planned Parenthood v. Danforth, 428 U.S. 52, 63-65 (1976).

> *viability*, when it may prohibit altogether or regulate as it sees fit.[156]

Amazingly, the court did not seem to realize that it was begging the question. If the state's interest is dependent upon viability, it should be free to exercise that interest whenever the *facts* establish viability. Unless twenty-four weeks can be firmly established as the *only* possible point of viability, a state's regulations cannot be so circumscribed in asserting its "compelling interest" in fetal life. As demonstrated above,[157] and as the *Fitzpatrick* court was shown,[158] twenty-four weeks is simply not dispositive of the viability question. In fact, what this court held was that there are admittedly viable fetuses who will be at the mercy of the aborting physician[159] in derogation of rights guaranteed to such fetuses by *Roe*. The state's compelling interest was arbitrarily sundered for those fetuses.

Similarly, the court rejected the state's attempt to require the exercise of due care for the life and health of a potentially viable fetus who survives an abortion. The legislature, in effect, was trying to achieve some "equality of protection" for two groups of persons — the viable fetus who survives the abortion, and the premature child, born spontaneously at the same stage of fetal development. The court ignored the hiatus it created by disallowing protection for one group, while allowing the other to be given the full protection of the civil and criminal law.

---

156. 401 F. Supp. at 572 (emphasis added).

157. *See* notes 130-32 *supra* and accompanying text.

158. *See* note 143 *supra* and accompanying text.

159. As evidence that this is a real problem, see Commonwealth v. Edelin, 76 Mass. Adv. Sh. 2795, 359 N.E.2d 4 (1976). A statement issued by the American College of Obstetricians and Gynecologists further corroborates the existence of this problem, especially as it relates to the *Fitzpatrick* court's invalidation of a statutory standard of care:

> The College further recognizes that the United States Supreme Court and the several states have never clarified the issues raised by the delivery of live infants, whether previable or viable, resulting from legal abortion procedures. This lack of clarification places physicians in legal jeopardy. The College recognizes that issues of life and death are properly the province of courts and legislatures, but the College asserts also that if the state's compelling interest in the quality of medical care of its citizens is to be served, the laws must be clear on the issues at stake.

American College of Obstetricians and Gynecologists, *Some Ethical Considerations on Abortion* (statement issued Oct. 27, 1975, as amended Dec. 12, 1975), *reprinted in* P. Ramsey, Ethics at the Edges of Life 7 (1978). Statutes such as Pennsylvania's help to make these issues clearer for physicians without sacrificing the rights of mother or fetus. They counsel caution at the intersection of those rights, and any greater precision would be artificial and mischievous.

Undoubtedly the court's fear of statutory vagueness cannot be easily dismissed, but such concerns can typically be settled by abstaining and allowing adequate state court construction to narrow the statute to acceptable limits. In *Planned Parenthood v. Danforth*,[160] which involved a Missouri statute very similar to the one passed by Pennsylvania, Justice White said in dissent:

> The statute would appear then to operate only in the gray area after the fetus *might* be viable but while the physician is still able to certify "with reasonable medical certainty that the fetus is not viable." . . . Since the State has a compelling interest, sufficient to outweigh the mother's desire to kill the fetus, when the "fetus . . . has the capability of meaningful life outside the mother's womb," . . . the statute is constitutional.
>
> . . . .
>
> At worst, [the statute] is ambiguous . . . and the District Court should be directed to abstain until a construction may be had from the state courts. Under no circumstances should [it] be declared unconstitutional at this point.[161]

This approach seems the better part of wisdom since any other one would create the very real prospect that the state's compelling interest in viable fetuses would be, for the most part, an unprotectable one. Conversely, the only burden that abstention would place upon the abortionist is the exercise of greater caution in the "gray" area.[162]

*Doe v. Poelker*[163] serves as a final example of the problem of lower federal court aversion to *any* abortion regulations. In that case, the plaintiff, a pregnant woman seeking an abortion, objected to "an official St. Louis city policy promulgated by the mayor prohibiting the performance of abortions in the city-owned public hospitals for reasons other than to save the mother from grave physiological injury or death."[164] In addition to this policy, the court noted evidence that the method of staffing the hospital's obstetrics-gynecology clinic was part of a "procedure and

---

160. 428 U.S. 52 (1976).

161. *Id.* at 100-01 (White, J., dissenting).

162. The plaintiffs placed some emphasis upon a possible "chilling effect" on those women who might seek an abortion around the time of viability since many doctors might refuse to perform them. This, however, is the nature of the problem created by *Roe* and *Doe*. The woman's fundamental right to choose abortion and the compelling state interest in a viable fetus necessarily intersect in the "gray" area. It follows, then, that a woman and her physician *should* be more circumspect at this stage of fetal development.

163. 515 F.2d 541 (8th Cir. 1975), *rev'd*, 432 U.S. 519 (1977).

164. *Id.* at 543.

practice" that barred the performance of abortions.[165] The appellate court felt that the combined effect of the city policy and the clinic staffing procedures was "that indigent pregnant women who desire[d] abortions [were] unable to find a physician at the city OB-GYN clinic who [would] perform one."[166]

With a disturbing lack of clarity and in an unacceptably conclusory fashion, the court decided that the St. Louis policy and staffing procedures violated the equal protection clause of the Constitution; exactly how was not discussed. Rather, with the mention of abortion, the court seemed to assume that ordinary rules of constitutional analysis were suspended. First the court said: "[Plaintiff] asks that the city not deny her equal protection of the law by interfering in her decision of whether to bear a child or have an abortion simply because she is indigent and unable to afford private treatment."[167] What was the class that was being discriminated against? Indigent women? Indigent pregnant women? Indigent pregnant women who desire abortions? Are any of these "suspect classes"?[168] What standard of judicial review should have been applied?[169] Deferential? Strict scrutiny? All of these were essential questions, questions that are the sine qua non of any equal protection analysis. Yet the court never mentioned any of these points. Rather it compounded confusion by referring to what was apparently another "defect" in the St. Louis policy and procedure:

> Stripped of all rhetoric, the city here, through its policy and staffing procedure, is simply telling indigent women . . . that if they choose to carry their pregnancies to term, the city will

---

165. The court stated:

> The clinic, which is provided by the city, at least in part, to care for indigent patients, is staffed entirely by faculty and students from the St. Louis University School of Medicine. That university is a Catholic, Jesuit-operated institution, and its faculty manual calls for the discharge of any faculty member who engages in "[a] grave offense in the discharge of University responsibilities, which is clearly against well-established principles of Catholic morality." One witness, a Jesuit professor at the university, testified that the performance of an abortion by a faculty member would be a "gravely immoral [act] by Catholic standards." As such, of course, it would subject him to discharge.

*Id.*

166. *Id.* at 544 (footnote omitted). There was no argument that private abortions were unavailable.

167. *Id.*

168. Indigency alone has never been considered a basis for suspect class treatment. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28-29 (1973).

169. "In modern times, the sine qua non of equal protection analysis is a careful selection of the appropriate degree of judicial scrutiny." Uddo, *Fifth Circuit Symposium: Constitutional Law*, 23 Loy. L. Rev. 849, 853 (1977).

> provide physicians and medical facilities for full maternity care: but if they choose to exercise their constitutionally protected right to determine that they wish to terminate the pregnancy, the city will not provide physicians and facilities for the abortion procedure . . . .[170]

Again, the court failed to explain the relevance of this analysis. Was the court suggesting that the classification was indigent pregnant women who seek abortions as opposed to indigent pregnant women who seek full term delivery? Would the answer to that question shed light on the degree of scrutiny applied by the court? Or is the court suggesting that *Roe* not only created the right to choose abortion, but also the right to have it publicly financed? Unfortunately, the court never answered any of these questions, but, *sub rosa*, applied what can only be called a very rigid standard of scrutiny. Rigid because under the more acceptable[171] rationality standard, the court would have had to conclude that a state may *rationally* prefer childbirth to abortion as a matter of state policy as long as it does not deny women the choice to abort. Any other reading of *Roe* is baseless.

The court did not stop with its perplexing equal protection "analysis." Two of the three judges decided to punish Mayor Poelker for adopting this policy that mysteriously offended the equal protection clause.[172] Contrary to the common law and American federal authority, the court awarded attorney's fees to plaintiffs.[173] The court justified its action under an exception to the general rule that allows awarding of attorney's fees "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' "[174] This exception is rarely invoked, and

---

170. 515 F.2d at 544.

171. Because the court cannot seriously contend that any of the various suggested classes are suspect, nor that a fundamental right has been denied, the appropriate standard of review is the "rationality test." *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

172. This was in addition to the broad remedy ordered by the court:

> We hold that both city owned hospital facilities must be made available for abortion services . . . .
>
> . . . In addition . . . , this relief should, at a minimum, impose upon the city the duty to obtain the services of responsible physicians and other necessary personnel whose personal views on abortion do not prohibit them from providing an abortion. It must also provide the necessary equipment and facilities to accomplish the goal.

515 F.2d at 546.

173. *Id.* at 546-48.

174. *Id.* at 547 (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)). The court also cited F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974). *Neither* of these Supreme Court cases awarded attorney's fees; they only mentioned the existence of the exception relied upon by the circuit panel.

when it is, the case is exceptional.[175] Moreover, the decision is usually within the discretion of the *trial* court and seldom made, in the first instance, by an appellate court.[176] Contrary to widely accepted rules of federal procedure, the appellate court in *Poelker* awarded attorney's fees even though the issue was not raised at trial, but was raised for the first time on appeal.[177] Furthermore, the argument on appeal was to award fees under the "private attorney general" theory, not bad faith. Since an intervening Supreme Court decision had rejected the use of the "private attorney general" approach except where provided by Congress,[178] the appeals court, *sua sponte*, awarded fees on the bad faith theory *without* prior fact finding, notice to the defendants, or proper arguments before either the trial court or the court of appeals. This clearly abusive procedure was forcefully objected to by Judge Van Oosterhout in his dissent:

> It is unfair to the trial court and the litigants to allow the recovery of attorneys' fees on the basis of an issue not raised in the trial court or properly raised upon appeal. Under such circumstances, the litigants are not afforded a fair opportunity to meet the issue by evidence or briefs. Upon the original submission of the appeal the bad faith issue was not briefed.
>
> No fact finding on the bad faith issue was made by the trial court . . . .
>
> We have no right to try cases de novo. Thus if contrary to what has heretofore been said, the bad faith exception is properly before us, the case should be remanded to the trial court for determination of such issue.

---

175. "But only in exceptional cases and for dominating reasons of justice can the exercise of the power by the district court be justified." 6 Moore's Federal Practice ¶ 54.77[2], at 1709-10 (2d ed. 1976). The case that the *Poelker* court cites as an example of what is exceptional is Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963). *Bell* involved a litany of racially discriminatory actions by the county school board clearly directed toward the preservation of a segregated school system.

176. There is a serious question concerning whether an appellate court can award attorney's fees in its *discretion*. It has limited statutory authority to do so but only when affirming the lower court. In *Poelker* the appeals court was reversing the lower court judgment. The Moore treatise says: "And on *affirmance* of a judgment the Supreme Court or a court of appeals has the *statutory* power to award counsel fees to the prevailing party in exceptional cases." 6 Moore's, *supra* note 175, at 1711-12 (emphasis added). The statute says: "Where a judgment is *affirmed* by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs." 28 U.S.C. § 1912 (1976) (emphasis added).

177. *See, e.g.*, Smith v. American Guild of Variety Artists, 368 F.2d 511, 514-15 (8th Cir. 1966), *cert. denied*, 387 U.S. 931 (1967), and cases cited therein.

178. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 267-71 (1975).

> The discretion for awarding attorneys' fees under appropriate circumstances . . . rests in the trial court subject to review for abuse of discretion. We cannot substitute our discretion for that of the trial court.[179]

Given this dramatic departure from ordinary notions of justice and procedure, one might assume that the argument against Mayor Poelker was overwhelming. Certainly it was not. The court's condemnation of a popularly elected official's implementation of a publicly approved policy stems from an overly generous assumption that *Roe v. Wade* is somehow a "clear" decision. The court suggested that state and city officials had "delayed complying with the *clear* dictates of the Supreme Court" and had "obstinately continued to implement and enforce statutes, regulations and policies designed to circumvent the constitutional law declared by the Supreme Court."[180] "More specifically," the court continued, the "history of this particular litigation reveals a wanton, callous disregard for the constitutional rights of indigent pregnant women continuing long after those rights had been *clearly* enunciated by the Supreme Court . . . ."[181] What clarity there might be in the Supreme Court decisions does not relate to the questions that were raised in the *Poelker* case. Neither *Roe* nor *Doe* nor any other Supreme Court decision prior to *Poelker* had made it *clear* that the freedom to choose abortion included a right to have it publicly subsidized.[182] To require any official to so conclude under pain of being held in bad faith is unreasonable at best. Only if one assumes, as apparently this court did, that the invocation of the word abortion somehow suspends all of the ordinary rules of procedure, constitutional analysis, and fairness can one agree with the *Poelker* result. In fact, the Supreme Court said as much when it reversed *Poelker* in *Poelker v. Doe.*[183]

Contrary to the circuit panel's conclusion that *Roe clearly* required the reversal of Mayor Poelker's policy and his punishment for acting in "bad faith," the Supreme Court said:

---

179. 515 F.2d at 549.

180. *Id.* at 547 (emphasis added).

181. *Id.* (emphasis added).

182. One comment writer noted the uncertainty of *Roe* and *Doe* on this very point:

> *Roe* and *Doe* have left unanswered as many questions as they settled. The critical issues remaining to be resolved now appear to be . . . (2) whether Medicaid payments for indigents can properly be limited to reimbursement for therapeutic abortions, . . . (5) whether hospitals may be required to make their facilities available for abortions . . . .

Note, *Implications of the Abortion Decisions: Post* Roe *and* Doe *Litigation and Legislation*, 74 Colum. L. Rev. 237, 237 (1974).

183. 432 U.S. 519 (1977).

> We agree that the constitutional question presented here is identical in principle with that presented by a State's refusal to provide Medicaid benefits for abortions while providing them for childbirth. This was the issue before us in *Maher v. Roe* . . . . For the reasons set forth in our opinion in that case, we find no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions.[184]

Apparently, Mayor Poelker's reading of *Roe* and *Doe* was more accurate than the Eighth Circuit's.

Virtually every attempt to place even the most minimal regulations on abortion facilities and procedures has met with judicial hostility. Provisions for adequate emergency services have typically fared no better than absolute prohibition. Moreover, at every step of the way the lower federal court opinions have sacrificed analysis for result and have expanded *Roe* and *Doe* beyond their limits. Although the problem has gone unchecked, it has not been unnoticed. In *Sendak v. Arnold*,[185] the Supreme Court summarily affirmed a three-judge court ruling that an Indiana statute requiring that first trimester abortions be performed in a hospital or a licensed health facility having basic health safeguards and hospital backup was unconstitutional. Justice White, dissenting from the summary affirmance, spoke for himself, the Chief Justice, and Justice Rehnquist:

> There is nothing in the United States Constitution which limits the State's power to require that medical procedures be done safely, and were it not for some language in this Court's recent decisions in cases touching on abortions, the District Court's decision should and would be summarily reversed.
>
> . . . .
>
> Statutes passed by the legislatures of the States may not be so lightly struck down. *Normal principles* of constitutional adjudication apply even in cases dealing with abortion.[186]

Unfortunately, it seems that not all judges agree with this reasoning.[187]

---

184. *Id.* at 521.

185. 429 U.S. 968 (1976).

186. Id. at 969-72 (White, J., dissenting) (emphasis added).

187. In *Collauti v. Franklin*, the appeal from the *Fitzpatrick* decision, *see* notes 151-62 *supra* and accompanying text, the Supreme Court again dashed any hope that it would eventually remedy the problem of judicial excess in abortion cases. 47 U.S.L.W. 4094 (Jan. 9, 1979). The Court affirmed the three-judge panel's invalidation of section 5 of the

B. *Third Party Consent*

Since *Roe* expressly left open the question of the interest of the spouse or parents in the abortion decision,[188] most states enacted regulations to recognize these legitimate concerns. Consistently, however, lower federal courts seemed incredulous that someone other than the woman and her physician would have an interest in the abortion decision. The underlying assumptions regarding marriage and family relationships upon which these courts proceeded are unprecedented and disturbing.

1. Spouse

The interest of the spouse in the abortion decision has fared particularly poorly before the courts. Only one court has recognized the husband as anything more than a menacing interloper in the exclusive domain of woman and physician.[189] A Florida case will serve well to illustrate the point.[190]

---

Pennsylvania abortion law, holding, *inter alia*, that the viability determination requirement was void for vagueness. Unfortunately, the Court engaged in its all too common practice in abortion cases of deciding, in part, upon grounds neither argued before nor relied on by the lower court. In the process, the Court attenuated even further the already minimal protection that *Roe v. Wade* had extended to viable fetuses.

Justice White in dissent found the majority's vagueness objections untenable. In an opinion joined by the Chief Justice and Justice Rehnquist, Justice White said:

> In affirming the District Court, the Court does not in so many words agree with the District Court but argues that it is too difficult to know whether the Pennsylvania Act simply intended, as the State urges, to go no further than *Roe* permitted in protecting a fetus that is potentially able to survive or whether it intended to carve out a protected period prior to viability as defined in *Roe*. The District Court, although otherwise seriously in error, had no such trouble with the Act. It understood the "may be viable" provision as an attempt to protect a period of potential life, precisely the kind of interest that *Roe* protected but which the District Court erroneously thought the State was not entitled to protect. *Danforth*, as I have said, reaffirmed *Roe* in this respect. *Only those with unalterable determination to invalidate the Pennsylvania Act can draw any measurable difference insofar as vagueness is concerned between "viability" defined as the ability to survive and "viability" defined as that stage at which the fetus may have the ability to survive. It seems to me that, in affirming, the Court is tacitly disowning the "may be" standard of the Missouri law [upheld in Danforth] as well as the "potential ability" component of viability as that concept was described in* Roe. *This is a further constitutionally unwarranted intrusion upon the police power of the States.*

*Id.* at 4101-02 (White, J., dissenting) (emphasis added).

This latest Supreme Court edict further substantiates the criticism that, "[a] bird or a blade of grass in a national park is entitled to more legal protection than a five-month old unborn child is entitled to legal protection from a voluntary abortion." Noonan, *Abortion: The Case for a Constitutional Amendment*, New Oxford Rev., Jan. 1978, at 4.

188. 410 U.S. 113, 165 n.67 (1973).

189. *See* Planned Parenthood v. Danforth, 392 F. Supp. 1362, 1369-70 (E.D. Mo. 1975), *rev'd in part*, 428 U.S. 52 (1976).

190. *See also* Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974), *aff'd in part*,

*Coe v. Gerstein*[191] invalidated a state statute requiring the physician of a married woman seeking an abortion to obtain "the written consent of her husband, unless the husband [was] voluntarily living apart from the wife"[192] or the abortion was necessary to preserve the woman's life.[193] The district court treated the entire abortion decision as though the subject of abortion could simply be divided into two issues: Maternal health and fetal protection. Of course, neither of these issues denies the independent, though overlapping, interest of the husband/father. But by relying exclusively upon *Roe* and *Doe*, even though the court recognized their inapplicability,[194] the judges locked themselves into a categorical analysis that simply was not intended to solve this problem. The court concluded that:

> [I]f the State cannot interfere to protect the fetus' interest in its potential life . . . neither can it interfere on behalf of husbands . . . to protect their interests in that potential life until the fetus becomes viable . . . . [I]f the State cannot interfere to protect the pregnant woman's physical or mental health until approximately the end of the first trimester, neither can it interfere on behalf of husbands . . . to protect their interests in her health . . . .[195]

It would be more palatable if the court had stopped there, and we could conclude that it simply missed the point. Continuing, however, the panel recognized that possibly the husband's interests "fall completely outside the categories of protection of maternal health and potential life."[196] Furthermore, the court recognized that "the interest of the husband in the embryo or fetus carried by his wife . . . is *qualitatively* different from the interest which the mother may have in her health and the interest of the viable fetus in its potential life."[197] Yet the court eschewed further analysis of the constitutional significance of this *qualitatively* different interest expressly left open in *Roe* and *Doe* and held the

---

541 F.2d 523 (6th Cir. 1976).

191. 376 F. Supp. 695 (S.D. Fla.) (declaratory judgment granted, injunctive relief denied), *cert. denied for want of jurisdiction*, 417 U.S. 217 (appeal from declaratory judgment must be made to circuit court), *aff'd in part sub nom.* Poe v. Gerstein, 417 U.S. 281 (1974) (denial of injunction upheld), *aff'd in part sub nom.* Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975) (declaratory judgment affirmed), *aff'd sub nom.* Gerstein v. Coe, 428 U.S. 901 (1976).

192. Fla. Stat. Ann. § 458.22(3)(a) (West Supp. 1978).

193. *Id.* § 458.22(3)(c).

194. Gerstein v. Coe, 376 F. Supp. at 697.

195. *Id.*

196. *Id.*

197. *Id.* at 697-98 (emphasis added).

requirement unconstitutional because it permitted a veto of the wife's decision to abort.[198] Thus, the court begged the question. The nature of the husband's interest must be more fully understood before state advancement of that interest can be judged — perhaps the respective husband-wife interests are equally weighty and a balancing procedure is appropriate.

On appeal to the Fifth Circuit,[199] the husband's interest received a somewhat more serious treatment. The appellate court examined more closely the state's justifications for requiring spousal consent. First, the state asserted that the provision was consistent with its general interest in the marriage relationship. Second, the state contended that the statute was necessary to protect the husband's interest in the abortion decision. As to the marital relationship, the circuit panel asserted, somewhat summarily, that this interest was narrow and did not extend to "intrafamilial decision-making processes with regard to child-bearing decisions."[200] Therefore, the "state's societal interest in this aspect of the marriage relationship [was] not sufficiently 'compelling' to justify the statute."[201]

Can the state's interest in marriage be so easily dismissed? Does this analysis really address the larger question of what is the state's interest in marriage? For example, the Supreme Court has said that the state's interest extends to the need to protect the "regularity and integrity of the marriage relation."[202] Accordingly, the traditional state interest clearly transcends the mere formulation and dissolution of the relationship; it is also concerned with marriage as an institution. Under this more accurate understanding of the state's interest, can it be so easily asserted that the state has no interest in requiring that important decisions affecting a marriage be forestalled in the absence of unanimity? Could not a state preserve and protect the integrity of the marriage unit by requiring unanimity on questions of adoption, artificial insemination, and voluntary sterilization? Admittedly, all these questions relate to the "child-bearing" decision, yet they seem vulnerable under a view of marriage that holds the parties to be simply two independent individuals who happen to be cohabitating.

---

198. *Id.* at 698.

199. Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975), *aff'd sub nom.* Gerstein v. Coe, 428 U.S. 901 (1976).

200. *Id.* at 795.

201. *Id.*

202. Estin v. Estin, 334 U.S. 541, 546 (1948).

In bold contrast to the Fifth Circuit's view of the state's interest in marriage, the words of the district court in *Planned Parenthood v. Danforth* are instructive:

> Other testimony at the trial merely supports what should be obvious—that those things which foster mutuality and trust in a marriage tend to strengthen the relationship and the institution of marriage . . . . In the area of procreation, which is a fundamental aspect of that relationship, the state's interest in protecting the integrity of the marriage unit and the mutuality of decisions made by the partners to that unit becomes particularly compelling. It is difficult to see how marital harmony could possibly be preserved if husbands were precluded from participating in decisions which affect the very essence of the marriage relationship.
>
> The interest of the state in protecting the mutuality of decisions vital to the marriage relationship is compelling at all times during the marriage. It does not vary in importance at different times during the relationship, and certainly is not subject to distinctions between trimesters of the wife's pregnancy.[203]

Clearly, nothing in *Roe* or *Doe* compelled the Fifth Circuit to reject this more firmly established view of the state's societal interest in marriage.

The second asserted state interest—the husband's concern over the abortion decision—was thought to be more substantial. The court saw both a current and a future interest assertable by the husband: a present interest in the protection of the threatened fetus and a future interest in procreation potential. Since this familial interest in the fetus had only recently been threatened, it was considered de novo. Astonishingly, however, the court rejected the father's interest primarily because the statute did not base its consent requirement on paternity as opposed to status as a spouse: "The statute therefore seems to base the husband's interests upon his marriage to the woman rather than his paternity of the fetus."[204] Without determining the identity of the constitutional defect, the court concluded that "[a]s a consequence, the rights of the husband which arguably spring from his interest in the fetus are of doubtful applicability in this case."[205] Given the opportunity, a state court could certainly have construed the statute to make it consistent with the court's concern,

---

203. 392 F. Supp. 1362, 1370 (E.D. Mo. 1975), *rev'd in part*, 428 U.S. 52 (1976) (citations omitted).

204. 517 F.2d at 796.

205. *Id.*

yet the Fifth Circuit chose to assume,[206] without giving the state courts a chance to give the statute a narrowing construction, that the case of the adulterous progeny invalidated the entire attempt to recognize the admitted paternal interest. Perhaps perceiving the weakness of its conclusion, the court asserted, as an independent reason for invalidation, "that the father's interest in the fetus is not sufficiently weighty to prevent the exercise of the woman's fundamental right."[207] The court reasoned that because the fetus is not a person and therefore not a child, then "a fortiori" the father's interest in the fetus is less significant than his interest in live born children. Of course, *Roe*'s conclusion that a fetus is not protected under the Constitution does not inexorably lead to the conclusion that a fetus is not a child,[208] and it will certainly come as a shock to many fathers that the *Constitution* says they cannot be as concerned about and protective of their children in utero as of their live born children. So too will many courts and commentators be shocked by such a notion since a testator's interest in his children has been recognized to include those who have been conceived but not born;[209] moreover, the parental interest in the life and health of the fetus has been widely recognized in the tort law.[210] Therefore, it seems that the premise upon which the court distinguished prenatal from postnatal children is flawed, and as a result, so too is its preference for the "weightier" maternal interest. There is nothing in constitutional law or logic that can support the position that the mother's interest in a dead baby is somehow "weightier" than a

---

206. The court offered no facts to suggest that its concern had statistical basis. The opinion writers apparently assumed that the incidence of adulterous progeny was significant, but the assumption was unsupported. Hence, the statute was assailed on a hypothetical assumption.

207. 517 F.2d at 796.

208. The Court concluded only that the Constitution does not use the word "person" in a prenatal sense. Roe v. Wade, 410 U.S. 113, 157 (1973). The *Roe* opinion is not so presumptive as to *explicitly* hold that such a finding means the fetus is not a human child. Of course, the effect of the Court's decision would seem to indicate that the Justices joining in the majority opinion hold that as a personal view.

209. Courts and commentators have consistently concluded that when the average testator refers to children in his will he intends to include beings conceived though not born. *See generally* 5 American Law of Property §§ 21.56, 22.42 (Casner ed. 1952).

210. In discussing recovery for injury to a fetus Dean Prosser has said:

> Most of the cases allowing recovery have involved a foetus which was then viable . . . . Many of them have said, by way of dictum, that recovery must be limited to such cases, and two or three have said that the child, if not viable, must at least be "quick." *But when actually faced with the issue for decision, almost all of the jurisdictions have allowed recovery even though the injury occurred during the early weeks of pregnancy, when the child was neither viable nor quick.*

W. Prosser, Handbook of the Law of Torts 337 (4th ed. 1971) (emphasis added).

father's interest in a live one. As Justice White has recently said, "[i]t by no means follows, from the fact that the mother's interest in deciding 'whether or not to terminate her pregnancy' outweighs the *State's* interest in the potential life of the fetus, that the husband's interest is also outweighed and may not be protected."[211]

Finally, the Fifth Circuit examined the husband's interest in the procreative potential of his marriage. It recognized abortion and procreation as competing fundamental rights but concluded that since procreation takes a willing partner, cases recognizing the fundamentalness of procreation[212] "merely safeguarded . . . procreative potential from state infringement."[213] Consequently, the right to procreative potential is less weighty than the right to abort.

The court's grounds for decision are nothing more than conclusions and are not analytical statements of constitutional principle. What did the court mean when it said that "we do not read *Skinner* to permit state infringement upon the woman's fundamental right to abortion"?[214] Why did the court read *Skinner* so narrowly and *Roe* so broadly that the abortion right was expanded to exclude the entire spousal interest—a result not mandated by *Roe*? The long constitutional tradition of which *Skinner* is only a small part[215] seems to clearly outweigh, in history, precedent, and fact, two relatively infant decisions[216] that broke entirely new ground and were unsupported by, and in fact contrary

---

211. Planned Parenthood v. Danforth, 428 U.S. 52, 93 (1976) (White, J., concurring in part, dissenting in part).

212. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942); cases cited at note 215 *infra*.

213. 517 F.2d at 797.

214. *Id.*

215. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 651 (1972):

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska*, *supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, *supra* at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

216. Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

to, any legal, moral, or historical tradition. Yet the word abortion seems to turn constitutional law on its ear, achieving balancing acts that defy the law of gravity.

2. Parents

While some courts have been mildly more sensitive to the role of parents in the abortion decision, many courts have rejected parental involvement, and others have allowed only minimal consultation. Though there are many cases that represent the attitude of the lower federal courts toward a state's attempts to involve parents in the minor's abortion decision,[217] *Baird v. Bellotti*[218] is most representative of the judicial recalcitrance that has continually rejected the traditional parental role. In the district court's first brush with this case, it faced a challenge to a Massachusetts statute that provided:

> If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.[219]

The plaintiff,[220] representing a class, was "Mary Moe," an unmar-

---

217. Gary-Northwest Ind. Women's Serv., Inc. v. Bowen, 421 F. Supp. 734, 736 (N.D. Ind. 1976) (provision requiring consent of minor's parent or person *in loco parentis* during first 12 weeks of pregnancy is unconstitutional), *aff'd*, 429 U.S. 1067 (1977); Foe v. Vanderhoof, 389 F. Supp. 947, 955 (D. Colo. 1975) ("We have been shown no distinction in regard to either of these interests between the pregnancy of a minor and that of an adult which would justify the difference in treatment contained in the statute."); Wolfe v. Schroering, 388 F. Supp. 631, 636-37 (W.D. Ky. 1974) ("[T]he broad provision as written gives power to the . . . parent to withhold consent without any reason."), *modified*, 541 F.2d 523, 525 (6th Cir. 1976) ("[T]here can be no assurance that the 'veto' of the parents or guardian, purportedly to protect maternal health, is not designed to protect the unrecognizable interest in fetal life."); Coe v. Gerstein, 376 F. Supp. 695, 698 (S.D. Fla.) ("It follows inescapably that the State may not statutorily delegate to . . . parents an authority the State does not possess."), *cert. denied for want of jurisdiction*, 417 U.S. 279 (appeal from declaratory judgment), *aff'd in part sub nom.* Poe v. Gerstein, 417 U.S. 281 (1974) (denial of injunction upheld), *aff'd in part sub nom.* Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975) (declaratory judgment upheld), *aff'd sub nom.* Gerstein v. Coe, 428 U.S. 901 (1976).

218. 393 F. Supp. 847 (D. Mass. 1975), *vacated and remanded*, 428 U.S. 132 (1976), *on remand*, 428 F. Supp. 854 (D. Mass. 1977), *permanent injunction granted*, 450 F. Supp. 997 (D. Mass. 1978).

219. Mass. Ann. Laws ch. 112, § 12P(1) (Michie/Law. Co-op 1974).

220. Other plaintiffs were: William Baird, "a pioneer and advocate for the free availability of abortions," Parents Aid, a non-profit organization providing abortions for "varying fees, depending on ability to pay," and Gerald Zupnick, a physician and Parents

ried sixteen-year-old living with her parents in Massachusetts. At the time this case began, Mary Moe was eight weeks pregnant and desired an abortion without having to inform her parents of her condition or her desire to abort. The district court agreed that all Mary Moes should be free to abort without parental consultation or consent.[221] The opinion is notable for its unsupported conclusions, both factual and legal. For example, the court casually attempted to diminish the medical significance of the abortion procedure. "There is a possibility of infection and other complications, as with any procedure, and there is a possibility, minor, or very remote, depending on whose testimony is accepted, of subsequent sterility."[222] The court did not say whose testimony it accepted, but it obviously preferred to ignore the magnitude of the problem in order to reach its conclusion.[223] Along the way the two-judge majority continually recognized facts that would support the parental role in the abortion decision, but they nonetheless reached opposite conclusions. As to the emotional stress involved in the abortion decision, they stated: "All experts agreed that pregnancy in an unmarried minor is a period of great emotional stress; that support is needed, and that parental support, if forthcoming, is most desirable. Probably most parents are supportive."[224] Yet amazingly and without support, the court stated: "We are obliged to find, however, that an appreciable number [of parents] are not [supportive], for a variety of reasons."[225] This "finding" colors the remainder of the opinion and creates a judicial view of the parent-child relationship that is jaundiced at best. This view is further advanced by the court's insistence that the rights of minor and parents are necessarily in conflict. The court considered the statute fatally flawed because it recognized

---

Aid's medical director, who performed abortions for them on a fee basis. 393 F. Supp. at 851.

221. *Id.* at 857.

222. *Id.* at 853.

223. The data supporting the conclusion that postabortal complications cannot be taken lightly continues to increase: "The incidence of abortion is increasing at an extraordinary rate. It is estimated that nearly one million abortions were performed in the United States in 1975. An unfortunate aspect of the relatively simple procedures used has been the vast number of complications." Nemec, Prendergast, & Trumbower, *Medical Abortion Complications: An Epidemiologic Study at a Med-Missouri Clinic*, 51 Obstetrics and Gynecology 433, 433 (1978).

The report goes on to enumerate the postabortal complications that were statistically significant: perforation of uterus, cervical lacerations, postabortal hemorrhage, cervical laceration combined with hemorrhage and septic incomplete abortion. All abortions studied were done by vacuum aspiration (considered the safest early gestation period method) under the direction of a board-certified gynecologist. *Id. See also* note 117 *supra*.

224. 393 F. Supp. at 853.

225. *Id.*

independent rights in the parents, and "[t]he question [became], accordingly, do parents possess, apart from right to counsel and guide, *competing* rights of their own?"[226] Why should the court assume that if the state recognizes rights in the parents that they are necessarily *competing*? What accounts for the court's rejection of the traditional view that parents will act in the best interest of their children?[227]

More than once the Supreme Court has recognized a parental interest, presumably promotable by the state, to act broadly on behalf of their minor children. In *Pierce v. Society of Sisters*,[228] the Court said that "those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional [*e.g.*, religious, moral, and patriotic] obligations."[229] What accounts for the parents' loss of this right and high duty at the moment of a most important moral decision? Similarly, Justice Douglas, a principle promoter of the right to privacy, said in his concurring opinion to *Doe v. Bolton*[230] that the protected privacy that permits the woman to decide to abort also includes *"freedom of choice . . . respecting marriage, divorce, procreation, contraception, and the education and upbringing of children."*[231] Can it be seriously contended, or reasonably accepted, that an unwed minor daughter's pregnancy and possible abortion are not matters that fall within the category of child rearing? Astonishingly, two of three judges comprising the district court panel said yes.[232]

Finally, the court concluded that the statute was further defective because it permitted a parental "veto" as opposed to a more limited "consultation."[233] The court was unimpressed by the

---

226. *Id.* at 856 (emphasis added).

227. That tradition is well reflected in the cases cited at note 217 *supra*.

228. 268 U.S. 510 (1925).

229. *Id.* at 535.

230. 410 U.S. 179 (1973).

231. *Id.* at 211 (Douglas, J., concurring).

232. In fact, they suggest that the Constitution requires, as a right superior to any traditionally enjoyed by parents, that minors not only be allowed to decide to abort without parental consultation, but that they be allowed to do so without even *informing* the parents:

> There are also minors who, understandably, do not wish to have their parents know of their condition because of the distress that it would cause them, and the minor's own consequent feelings. While we shall not deal with this aspect further, we note that in a very real sense it precisely fits standard concepts of the right to privacy.

393 F. Supp. at 853.

233. *Id.* at 856-57.

statutory scheme that provided the minor a procedure for overriding a parental decision against abortion—a seemingly reasonable solution to the veto problem.

Having examined the court's startling tunnel-vision in passing upon Massachusetts' attempt to foster and preserve the family as a unit, rather than as diametricaliy opposed individuals, it would be helpful to examine some of the implications of the decision. The most serious implication concerning the immediate effect on minors is well stated in the dissent of Judge Julian:

> In order for consent to be informed, a minor must understand the emotional as well as the physical consequences which may follow from an abortion . . . . No testimony was offered, however, concerning the emotional consequences the abortion may or will have upon Mary Moe . . . . The majority disregard that aspect of informed consent which requires that a minor must understand the emotional consequences which may follow an abortion.[234]

Undoubtedly, the majority's omission was a serious one. Recall that *Roe v. Wade*[235] recognized the magnitude of the abortion decision and implicitly assured emotional assistance in making the decision by requiring consultation with, and the concurrence of, the woman's physician.[236] Unfortunately, however, abortion clinics are primarily business enterprises,[237] and the *Roe* assump-

---

234. *Id.* at 861 (Julian, J., dissenting).

235. 410 U.S. 113 (1973).

236. *Id.* at 163.

237. *See, e.g.*, the district court testimony noted by the dissent in Baird v. Bellotti, 393 F. Supp. at 859-60 n.8. The questioning of one of the plaintiff physicians revealed the following:

> Q. Is there a maximum price for an abortion at Parents Aid Society?
> A. Yes. The abortion fee is on a sliding scale from the patient's ability to pay to a maximum of $150.
> Q. In the case where $150 is charged, what do you receive in that instance?
> A. Usually a third.
> JUDGE FREEDMAN: Is that paid on a monthly basis?
> The WITNESS: No. It is paid on a daily basis. I am given a check at the end of the day.
> Q. What was the amount of the last check you received from Parents Aid Society?
> [An objection is stated and overruled.]
> A. I honestly don't recall the exact figure. I believe it was in the area of $600.
> Q. You have received checks higher than that amount?
> A. Higher and lower, yes.
> Q. Does that constitute reimbursement for two days work?
> A. That is correct.
> . . . .
> JUDGE FREEDMAN: I would be interested, Doctor, in the number of abortions you performed—the percentage of those that incorporate fees

tion that patients will be sensitively counseled by a trained physician prior to making the decision is more illusion than reality. This point was emphasized by Justice Stewart in the *Danforth* case.[238] Referring to the record in that case, Justice Stewart questioned whether "a girl of tender years, under emotional stress" would receive "adequate counsel and support . . . at an abortion clinic."[239] In a footnote, citing the *Bellotti* brief, he quoted:

> The counseling . . . occurs entirely on the day the abortion is to be performed . . . . It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another . . . . Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques . . . .
>
> The abortion itself takes five to seven minutes . . . . *The physician has no prior contact with the minor*, and on the days that abortions are being performed at the [clinic], the physician . . . may be performing abortions on many other adults and minors . . . . On busy days patients are scheduled in separate groups, consisting usually of five patients . . . . After the abortion [the physician] spends a brief period with the minor and others in the group in the recovery room . . . .[240]

This is hardly a setting for sensitive, personal counseling preferable to parental involvement.[241] Can it be that the Constitution prevents a state from assuring the parents a role in helping their minor daughter face such a difficult decision in such an impersonal environment? To a large extent the Supreme Court has

---

of the maximum $150 as opposed to those that are actually free.

The WITNESS: As I said before, it is not always free or $150. It is on a sliding scale basis. If you are asking me how many patients pay the total of $150 fee—

JUDGE FREEDMAN: Yes. How many pay no fee on a percentage basis?

The WITNESS: I would say probably about two-thirds pay the $150 fee and probably about 15% are done for free, and then there is a scale in between on the other patients . . . .

. . . .

Q. When the patient walks into the operating room, typically that is the first time she has met you?

A. Usually, yes.

JUDGE FREEDMAN: How long does the typical abortion procedure last?

The WITNESS: The average technical part of the procedure is five to seven minutes.

238. Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

239. *Id.* at 91 (Stewart, J., concurring).

240. *Id.* at 91 n.2 (emphasis added).

241. On the need for effective pre-abortion counseling see note 124 *supra*.

answered that question in the negative and has cast doubts on *some* of what the district court did in *Baird*.[242] Without testing the merits of the statute, the Court unanimously concluded that the statute was susceptible to a narrowing construction that could clearly preserve its validity, and such a construction had been advanced by the officials charged with enforcing it.[243] Accordingly, the district court had erred in not abstaining from deciding the merits "pending authoritative construction . . . by the Supreme Judicial Court of Massachusetts."[244]

Subsequently, the district court certified certain questions concerning the construction of the statute to the Massachusetts Supreme Judicial Court.[245] Plaintiffs in the initial action requested a stay against the operation of the statute as construed pending the district court's determination of its constitutionality.[246] Once again the district court favored the pro-abortion argument and ignored the legislative will; it stayed the operation of the statute. The court gave three reasons for its action. First, the statute as construed did not expressly advise parents that they could consider only the minor's best interest. Since the statute would be read by parents who might be ignorant of the effect of the Massachusetts court's construction, minors might well be forced to go to court to enforce their rights—an eventuality which the district court felt would place a substantial, and therefore unconstitutional, burden upon obtaining an abortion.[247] Second, the state court's interpretation was not clearly consistent with the Supreme Court's suggestion as to what would be permissible, in that the state court saw parental consultation as required in every case; even in cases where the minor requests a court order for an abortion, her parents would have to be *notified*.[248] Third, the state court had rejected the proposition that a "mature minor" could give consent to an abortion even if her parents and the court decided that a contrary decision would be in her best interest.[249] Here the district court admitted that it did not perceive the constitutional significance of this point. Nonetheless, it was thrown

242. *See* Baird v. Bellotti, 428 U.S. 132 (1976), *vacating and remanding* 393 F. Supp. 847 (D. Mass. 1975), *on remand*, 428 F. Supp. 854 (D. Mass. 1977), *permanent injunction granted*, 450 F. Supp. 997 (D. Mass. 1978).

243. 428 U.S. at 143, 146-48.

244. *Id.* at 134.

245. Baird v. Attorney Gen., 77 Mass. Adv. Sh. 96, 360 N.E.2d 288 (1977).

246. Baird v. Bellotti, 428 F. Supp. 854, 855 (D. Mass. 1977) (on remand), *permanent injunction granted*, 450 F. Supp. 997 (D. Mass. 1978).

247. *Id.* at 855-56.

248. *Id.*

249. *Id.*

in for good measure. In sum, the district court felt that the stay would be appropriate because these points demonstrated a probability of success on the merits by the plaintiffs.

What the majority did not discuss was the failure of the plaintiffs to carry their burden of proof consistent with a request for a preliminary injunction. That burden requires that the plaintiffs prove a *substantial* likelihood of their prevailing on the merits; *and* that without the injunction, they would suffer *irreparable* harm. Of course, the plaintiff's "failure" might better be characterized as the court's kindness, for, in fact, the majority very nearly relieved them of that burden altogether. In its opening comments, the opinion reverses standard procedure and refuses to "[hypothesize] the constitutionality of the statute."[250] Of course, that is precisely what the court must hypothesize.[251] To do otherwise assumes that the statute is unconstitutional and shifts to the defendant the burden of proving that the injunction *should not* issue.

The dissent of Judge Julian correctly pointed out this inexplicable flaw in the majority's analysis. Additionally, Judge Julian demonstrated how the three points raised by the majority were without merit. As to the concern that the statute did not explain on its face the standard to be used by parents, Judge Julian responded: "It is an established rule of law that a state court's interpretation of its own state statutes is binding on the federal courts."[252] Therefore, the statute was comprised not just of the words in the law itself; rather, it included the construction given to it by the highest state court. So, as construed, the proper parental standard was part of the statute, and the court should have considered it as such. Similarly, a "state court's construction . . . is deemed to be notice to all concerned of what the statute provides,"[253] and it is no defect in the statute that parents must know the construction in order to apply the proper standard.[254] Regarding the majority's second point, Judge Julian again went to the heart of the issue: the majority had misread *Danforth*. The Massachusetts Supreme Judicial Court had not read the statute to require parental *consent*, only parental

250. *Id.* at 855.

251. The presumption of constitutionality exists in all cases; the burden to show otherwise is on the plaintiff. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425 (1961); 16 C.J.S. *Constitutional Law* § 99 (1956).

252. 428 F. Supp. at 858 (Julian, J., dissenting).

253. *Id.*

254. *Id.*

*consultation. Danforth* had condemned only a requirement of consent, since that would amount to a veto. "The Massachusetts statute as construed [did] not create any such absolute power."[255] Examining the third asserted basis for granting the injunction, Judge Julian confessed: "[I]t is still unclear to me what that third reason might be."[256] Perhaps the majority's uncertainty as to the constitutional significance of this point emanated from the realization that it had none. Finally, and most profoundly, the dissent questioned how the majority could find—though not demonstrate—that failure to stay the statute would cause the plaintiffs irreparable harm, without even considering what harm would accrue to the defendants.[257] Judge Julian examined that issue much more closely. The only harm that could have been suffered by most of the plaintiff class was the necessity of complying with the statutory mandate; and "requiring the minor to comply with minimal legal procedures, though perhaps inconvenient, or even unpleasant, [did] not constitute irreparable harm."[258] If, in a rare case, a minor's parents and a state judge concur that an abortion would not be in her best interest, the result is still not irreparable harm. "Certainly enforcement of a state statute which prevents a minor from undergoing a surgical procedure which is found by both her parents and the Court to be contrary to her own best interests, cannot sensibly be said to cause her irreparable harm."[259] As to plaintiffs Baird and Zupnick, their possible loss of income because some minors might forego abortions "would certainly not be ruinous."[260]

In stark contrast, however, Judge Julian demonstrated how staying the operation of the statute left a pregnant unmarried minor who would admittedly "profit from parental support and guidance at this critical juncture in her life"[261] in an emotional state that might cause her to act against her best interest and might produce physical or emotional problems for life. In a far too

---

255. *Id.* at 859.

256. *Id.*

257. It should be noted that in addition to the state-defendant, Jane Hunerwadel, an intervenor-defendant, was representing "parents of all nubile minor females in Massachusetts who may . . . wish to have an abortion without informing them." Baird v. Bellotti, 393 F. Supp. 847, 850 (D. Mass. 1975), *vacated and remanded*, 428 U.S. 132 (1976), *on remand*, 428 F. Supp. 854 (D. Mass. 1977), *permanent injunction granted*, 450 F. Supp. 997 (D. Mass. 1978).

258. 428 F. Supp. at 859 (Julian, J., dissenting).

259. *Id.*

260. *Id.*

261. *Id.*

infrequent display of judicial courage, Judge Julian concluded with a statement of what was really at stake in the district court's action:

> The action of this Court . . . removes for an indefinite period the only legal barrier in this state against the exploitation of pregnant adolescents by operators of unregulated and unsupervised abortion facilities who may be motivated by concerns which are far removed from the minor's own best interest. The stay granted by the majority is legally unjustified and does not serve the best interests of either the minor or the public.[262]

Through their Procrustean efforts, the *Baird* majority managed to delay indefinitely the effect of a statute that the Massachusetts legislature had intended to implement as a protection of the vulnerable pregnant minor as long ago as November 1974. Along the way, they also advanced the rather startling assumption that abortion clinics and hired abortionists are better able to protect the minor's interests than are her parents. Why the court was so willing to assume the worst about parents and the best about abortion clinics—all contrary to the judgment of the people of Massachusetts—is indeed perplexing. The recalcitrance of this court is only thinly disguised as constitutional law.

Spouses and parents have not been well treated by the lower federal courts. Virtually every attempt to recognize their legitimate roles in the abortion decision has been squelched by an unrelenting judicial opposition. Even in those cases where the Supreme Court has delineated areas of valid state interest, especially on behalf of parents, the lower court response has been one of continued hostility.

### C. *Public funds*

Another of the many questions created by *Roe* and *Doe* was whether the "fundamental" right to choose an abortion included a similar right to have it financed by the public fisc. Of course, even though *Roe* and *Doe* did not address the question, traditional statutory interpretation and equal protection analysis would probably have predicted a negative response by the Court to any assertion that publicly funded abortions were *required*. Nonetheless, most lower federal courts have found such a right to exist. For the purposes of discussion, these cases have been divided into those arising before and after the Hyde Amendment.[263]

---

262. *Id.* at 860.
263. Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976).

1. Before the Hyde Amendment

In *Doe v. Wohlgemuth*,[264] plaintiff welfare recipients challenged Pennsylvania's policy of not reimbursing abortion costs for elective abortions.[265] The plaintiffs objected upon both statutory and constitutional grounds, alleging that the state policy was proscribed by Title XIX of the Social Security Act[266] (Medicaid) and the equal protection clause of the fourteenth amendment. Recognizing the flexible nature of the Medicaid program and the significant latitude left to the states under that program, the district court concluded that the Social Security Act did not require Pennsylvania to pay for elective abortions.[267] To buttress this conclusion the court alluded to an amicus curiae brief filed by the United States in a similar case. That brief presented the government's position that "in substance, . . . the Social Security Act *did not require*, but would not prevent, a Federally funded State Medicaid Program to pay for abortions that were not medically indicated."[268] Unfortunately, however, the court's constitutional analysis was not as clear nor as thorough as its statutory analysis. At first, the two-judge majority seemed to perceive what was at issue when it said:

> Whatever may be the private view of an individual or group of individuals, or the members of this Court, we are bound by the now established principle of law that *a negation of an individual's choice in the matter of abortion during the first trimester of pregnancy is an unwarranted invasion of that person's fundamental rights . . .*.[269]

The court seemed to clearly understand that the "fundamental right" was the *choice* to abort, not the abortion itself, and that only the *negation* of that choice by the state would run afoul of the constitutional protection. Clearly, the state's failure to provide the service is not a negation of that choice. Yet the court went on to hold the state policy violative of equal protection.[270] In the process, the court managed to be singularly confusing as to how it reached its conclusion. For example, the two-judge ma-

---

264. 376 F. Supp. 173 (W.D. Pa. 1974), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 432 U.S. 438 (1977).

265. The state would pay for abortions that were medically documented as necessary to preserve the life or health of the mother or to avoid the birth of an infant with serious physical deformity or mental deficiency. *Id.* at 175.

266. 42 U.S.C. § 1396 (1976).

267. 376 F. Supp. at 186.

268. *Id.* at 178.

269. *Id.* at 179 (emphasis added).

270. *Id.* at 191.

jority continually blurred the distinction between equal protection and due process and never clearly identified the appropriate standard of judicial review. For the majority, the classification was one between indigent women who choose to carry their pregnancies to term—for whom the state will pay medical expenses—and indigent women who seek abortions without valid medical justification—for whom the state will not pay. Clearly, this is not a suspect classification; therefore, it is not subject to rigid scrutiny.[271] Accordingly, the court purported to apply "traditional Equal Protection standards," seeking only a "legitimate State interest."[272] Under this standard the legislative choice of means is given great deference, and the state interest is presumed legitimate.[273] Inexplicably, however, the court found all of Pennsylvania's asserted interests to be invalid.[274] Perhaps the explanation lies in the court's confusing revision of its view of the right created by *Roe* and the scrutiny required:

> During this first trimester, State regulations impinging *in any manner* with a fundamental right must be examined with close scrutiny by the Courts.
>
> . . . .
>
> Therefore, since the [Pennsylvania program] serves to regulate the elective decision of the pregnant woman and her doctor . . ., they [*sic*] are too broad and overreach the State's legitimate interest.[275]

Accordingly, the court found the state's justification of its distinction, as one not based upon indigency but upon a valid distinction between necessary and nonnecessary medical services, insufficient. The court concluded that *Roe* made *all* abortions necessary:

> We believe, however, that the Supreme Court in Roe v. Wade

---

271. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

272. 376 F. Supp. at 186.

273. Thus if a classification is of this [economic and general social welfare] type the Court will ask only whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution. So long as it is arguable that the other branch of government had such a basis for creating the classification the Court will not invalidate the law.

J. Nowak, R. Rotunda, & J. Young, Handbook on Constitutional Law 524 (1978). *See also* McGowan v. Maryland, 366 U.S. 420 (1961).

274. 376 F. Supp. at 188-92. Among those interests discussed and rejected were state fiscal integrity, a need to limit abortions subject to state financing, and a desire to fund only *necessary* medical procedures.

275. *Id.* at 189-90 (emphasis added).

> . . . recognized that abortion is a necessary medical service for it may prevent specific and direct harm which is medically diagnosable (e.g. psychological harm), may protect the woman's future mental and physical health, and may prevent the distress associated with the unwanted pregnancy and child . . . . The State's classification of what is medically necessary must have some reasonable relation to the rationale behind the classification, and the non-therapeutic abortion, in the light of the *Roe* decision, cannot be validly classified as unnecessary.[276]

The dissent by Judge Weis answered well the anomalous reasoning of the majority. Judge Weis made it clear that the state program refused to pay for only those abortions "where there is no threat to the life or health of the mother and the election of an abortion is purely because of personal preference."[277]

> The issue is whether the Constitution has thrust upon Pennsylvania an affirmative burden to pay for an elective abortion because the legislature has decided that the State will pay for those abortions for the indigent arising from medical necessity.[278]

The dissent concluded that the Constitution required no such result. *Roe* simply did not make "all abortions, elective or not, into medically necessary ones."[279] Therefore, traditional notions of equal protection should have been applied, and the state determination should have been validated. "[T]he State is presumed to have acted within its constitutional powers, even though in practice some inequality may have resulted . . . . A statutory discrimination may not be invalidated if any set of facts may reasonably be conceived to justify it."[280]

On appeal the Third Circuit disagreed with the district court's statutory interpretation.[281] The appellate court concluded that the Social Security Act, even though it was intended to give states great flexibility in their Medicaid programs, required that once a state decided pregnancy was a condition for which treatment was "necessary" under the Act, elective abortion could not be excluded as one means of treatment. The court held that the Act required "that once the state [had] decided to finance full-term delivery and therapeutic abortion as methods for the treatment of pregnancy, it [could not] decline to finance non-

---

276. *Id.* at 190.
277. *Id.* at 192-93 (Weis, J., dissenting).
278. *Id.* at 193.
279. *Id.* at 195.
280. *Id.*
281. Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 432 U.S. 438 (1977).

therapeutic abortions."[282] Dissenting from the appellate court's decision, Judge Kalodner noted the weight of judicial authority against the majority's conclusion.[283] He criticized the failure of the majority to recognize and follow the clear statements of the Solicitor General of the United States and the Medical Assistance Services Administrator of H.E.W. that Title XIX was neutral on the question of Medicaid payment for non-therapeutic abortions.[284] Additionally, Judge Kalodner felt that the majority's interpretation was without support in either the text or legislative history of the statute. Obviously, Judge Kalodner had demonstrated the majority's unusual concern with result—so strong that it led two judges to ignore precedent, procedure, and accepted rules of statutory interpretation.[285]

A similar case, *Wulff v. State Board of Registration for Healing Arts*,[286] involved an attack by two physicians on a Missouri statute that, *inter alia*, limited state Medicaid reimbursement for abortions to those that were "medically indicated."[287] Granting a motion to dismiss for lack of standing, the district court con-

---

282. *Id.* at 622. The court limited its discussion to the statutory question and did not discuss the constitutional issue upon which the lower court relied.

283. *Id.* at 624 (Kalodner, J., dissenting). At the time only two other circuits had faced the question; neither accepted the argument that Title XIX required funding of nontherapeutic abortions. *See* Roe v. Ferguson, 515 F.2d 279 (6th Cir. 1975); Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974). Judge Kalodner also pointed out that all three judges in the lower court had agreed that Title XIX was not offended by the Pennsylvania policy. 523 F.2d at 624-25. *See* Doe v. Wohlgemuth, 376 F. Supp. 173 (W.D. Pa. 1974) (Weis, J., dissented from the holding of unconstitutionality).

The majority could rely upon only one district court decision, and a weak one at that. In Roe v. Norton, 380 F. Supp. 726 (D. Conn. 1974), *rev'd*, 522 F.2d 928 (2d Cir. 1975), the court was presented with the issue of whether Title XIX *prohibited* federal reimbursement for elective abortions. The court held that the Act must be construed to *permit* payment. *Id.* at 730. In dictum the court went on to say that the Title "must be construed . . . to prohibit state regulations that impair a woman's exercise of her right, in consultation only with her physician, to have an [elective] abortion." *Id.*

284. [T]he Solicitor General in his Amicus Curiae Memorandum specifically opined that "the Social Security Act does *not* require a federally-funded state medicaid program to pay for abortions that are not medically indicated," and, the federal agency which administers the Medicaid program, in a statement on its "position" on abortion, made it clear that a Medicaid state has the option of funding abortions, and if it does, "the federal Government shares the cost with the State."

523 F.2d at 629-30 (citations omitted).

285. "The majority's disregard of the stated views of the federal agencies concerned with administration of Title XIX, contravenes the settled rule that construction of a statute by an agency charged with its administration should be accorded great deference, absent compelling indications that it is clearly wrong." *Id.* at 630 (citations omitted).

286. 380 F. Supp. 1137 (E.D. Mo. 1974), *rev'd sub nom.* Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1975), *modified*, 428 U.S. 106 (1976).

287. *Id.* at 1142 (quoting Mo. Ann. Stat. § 208.152(12) (Vernon Supp. 1979)).

cluded that the state Medicaid payments were made for the benefit of the needy recipients, not the physician;[288] therefore, unless some exception to standing rules could be articulated, the needy individual would be the best party to object to the policy. As to exceptions to this general standing rule, the court concluded that the affected individual was not precluded from asserting her own rights, and third-party physicians were not better able to represent these interests or constitutional rights.[289] The court found no direct injury to the physicians. Unlike *Doe v. Bolton*,[290] the statute in *Wulff* related only to payment for abortion services and imposed no criminal penalty for performing an abortion. "The only possible detriment the plaintiffs in the instant case can suffer . . . is the possibility that their patients who are eligible for medical assistance . . . will not be able to pay for the services the plaintiffs have rendered to them in giving them an abortion operation."[291] Therefore, the court concluded that the physicians did not meet the standing tests imposed by the Supreme Court to assure the best presentation of constitutional questions.[292]

---

288. 380 F. Supp. at 1142.

289. In the instant case, the plaintiff-physicians have not been convicted as accessories to a criminal offense as the plaintiff-physician was in Griswold v. Connecticut . . . . The plaintiff-physicians here do not present a unique situation such as was presented to the court in Barrows v. Jackson . . . and they are not being sued for damages as in *Barrows*, where a judgment against them would constitute a direct pocketbook injury. Also in *Barrows*, the Supreme Court felt it would be difficult if not impossible for the Negroes whose rights were being asserted by the defendant therein to present their grievance before any court. This is not the situation here for in the instant case the persons whose rights the plaintiffs are really asserting (their patients who are eligible to receive Medicaid payments) have a statutory right to a hearing before a state agency . . . where they can present their grievance and if not satisfied they can carry their grievance on to the appropriate court. Neither are the plaintiff-physicians herein subject to the direct operation of any criminal anti-abortion statute as . . . in Roe v. Wade . . . and Doe v. Bolton . . . and, therefore, cannot assert a sufficiently direct threat of personal detriment as the plaintiff-physicians in those cases could.

*Id.* at 1144.

290. 410 U.S. 179 (1973).

291. 380 F. Supp. at 1144.

292. Keeping in mind that it is the welfare recipient in whose behalf medical assistance payments under [the statute] are made and that it is the welfare recipients and not their physicians who have a right to a hearing if their medical assistance claims are denied, and that the plaintiff-physicians are not prohibited from performing abortions, this Court finds that the standing requirement of Flast v. Cohen . . . that there be a logical nexus between the status asserted by the plaintiffs and the claim they seek to have adjudicated is not satisfied by the litigative posture of the plaintiff-physicians herein, and, therefore, they lack standing to challenge the constitutionality of the statute in question here.

*Id.* (citations omitted).

With remarkable ease the Eighth Circuit reversed the lower court's dismissal.[293] For the circuit panel, it seemed quite clear that *Roe* and *Doe* had changed the traditional rules regarding standing to assert the interests of third parties. Unfortunately, the panel's discussion dealt with cases involving the direct regulation of physicians and their role in abortions but not the more sensitive issue of when a party may assert the rights of others not before the court. In *Wulff* such a discussion was essential because the portion of the statute under discussion clearly involved, most directly, the rights of Medicaid *recipients*. The panel's more egregious error, however, was in reaching the merits of the case rather than reversing the dismissal and remanding the case to a district court panel. The judges seemed undaunted by the fact that there was no record, no fact-finding, and no lower court discussion of the merits *at all*. Nevertheless, the court, with some degree of arrogance, concluded: "There is little direct authority for the propriety of our reaching the merits. Nevertheless, we are satisfied that under the circumstances of this case and in the interest of judicial economy and logic we should now address the merits of this controversy."[294] And what were the circumstances that made it so clear that this extraordinary departure from accepted judicial procedure was required to serve "economy and logic"?

> Mr. Justice Clark in writing for the Supreme Court has indicated that effective judicial administration requires disposal of the case on appeal rather than remanding, *where the point to be decided is clear* . . . .
>
> . . . .
>
> The statute in question is *obviously unconstitutional*, and it is our view that the case might well have been decided [without the need for a three-judge panel] . . . . Accordingly, we choose to make final determination of this case.[295]

Then, with an embarrassing paucity of analysis the opinion writer, doggedly pursuing a conclusion, summarily decided: "[T]he statute here provides medical payments if the pregnancy is carried to term or for therapeutic abortions but not if a nontherapeutic abortion is performed. This classification is a clear violation of the Equal Protection Clause of the Fourteenth Amendment."[296] Amazingly, the court discerned this unquestioned lucid-

---

293. Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1975), *modified*, 428 U.S. 106 (1976).
294. *Id.* at 1214.
295. *Id.* at 1214-15 (emphasis added) (citations omitted).
296. *Id.* at 1215.

ity and "obvious unconstitutionality" in a case concerning facts *never touched* on by any of the Supreme Court's abortion decisions and certainly not mandated by any analogous decisions.[297]

On certiorari the Supreme Court affirmed the circuit panel on standing[298] but firmly reversed its inappropriate pursuit of the merits:

> [P]etitioner [defendant] filed in the District Court only a pre-answer motion to dismiss for lack of standing. He filed no answer, and no other pleading addressed to the merits. He did answer some interrogatories . . . but stipulated to no facts, and gave no intimation of what defenses, if any, he might have other than the plaintiffs' alleged lack of standing. The District Court granted his motion to dismiss and no more . . . . [O]n appeal petitioner limited himself entirely to the standing determination that underlay it. *In short, petitioner has never been heard in any way on the merits of the case.*[299]

But what about the circuit court's confidence in the "obvious unconstitutionality" of the statute and its concern for economy and logic? "The issue resolved by the Court of Appeals has never been passed upon in any decision of this Court. This being so, injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard."[300] Hence, the circuit panel's alleged concern for judicial

---

297. For a full discussion of the Court's view of classifications based upon wealth, see San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

298. Singleton v. Wulff, 428 U.S. 106, 118 (1976) (plurality opinion). In affirming the standing portion of the case, the Supreme Court again demonstrated its peculiar solicitude for the pro-abortion position. To allow these plaintiffs standing the majority had to dilute a rigidly held exception to the Court's general prohibition of the assertion of third-party rights. Justice Blackmun, writing for a plurality, described the exception as being one initially dependent upon a special relationship between the party before the court and the third-party right-holder. He went on to say:

> Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is *some genuine obstacle* to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, . . . and the party who is in court becomes by default the right's best available proponent.

*Id.* at 116 (emphasis added).

Mr. Justice Powell, speaking for three other justices, dissented from this part of the Court's opinion:

> On their facts [prior cases] indicate that such an assertion is proper, not when there is merely some "obstacle" to the rightholder's own litigation, but when such litigation is *in all practicable terms impossible*. Thus, in its framing of this principle, the plurality has gone far beyond our major precedents.

*Id.* at 126 (Powell, J., concurring in part, dissenting in part) (emphasis added).

299. *Id.* at 120 (plurality opinion) (emphasis added).

300. *Id.* at 121.

economy resulted in even greater delay and judicial diseconomy. Moreover, the result was injustice—again seemingly produced by the mere mention of the word abortion.

*Roe v. Norton*[301] addressed the same basic funding problem and resolved it in constitutional terms. In its first brush with a Connecticut policy against Medicaid reimbursement for elective abortions, the district court held that Title XIX required such payment.[302] On appeal the Second Circuit reversed, holding the Act to be neutral as to abortion funding.[303] On remand the district court granted a summary judgment to plaintiffs, finding a denial of equal protection.[304] With a familiar disregard for analysis, the district court decided that the distinction between state funding for childbirth and that for elective abortions "infringe[d] upon a fundamental interest";[305] therefore, the state must assert a compelling interest to justify the infringement. There was no suggestion as to how the actual performance of the abortion, as opposed to the right to choose to abort, had become fundamental.[306] Nor did the court suggest how—even if the right is to an abortion—the failure to finance it was an infringement. Perhaps because there were none, the court cited no cases that would support its determination.[307] Having so framed the question, the court virtually assured the condemnation of the policy since almost any asserted state interest would fall as not compelling.

---

301. 380 F. Supp. 726 (D. Conn. 1974), *rev'd and remanded*, 522 F.2d 928 (2d Cir.), *on remand*, 408 F. Supp. 660 (D. Conn. 1975), *rev'd sub nom.* Maher v. Roe, 432 U.S. 464 (1977).

302. Roe v. Norton, 380 F. Supp. 726 (D. Conn. 1974), *rev'd*, 522 F.2d 928 (2d Cir. 1975).

303. Roe v. Norton, 522 F.2d 928 (2d Cir. 1975).

304. Roe v. Norton, 408 F. Supp. 660 (D. Conn. 1975), *rev'd*, 432 U.S. 464 (1977).

305. *Id.* at 664.

306. The language used throughout *Roe* and *Doe* emphasizes that the protected right is to choose to abort free of state interference.

> This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, *is free to determine*, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

Roe v. Wade, 410 U.S. 113, 163 (1973) (emphasis added). "Plainly, the Court today rejects any claim that the Constitution requires abortion on demand." Doe v. Bolton, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring). "That right [of privacy] necessarily includes the right of a woman *to decide* whether or not to terminate her pregnancy." Roe v. Wade, 410 U.S. at 170 (Stewart, J., concurring) (emphasis added).

307. Indeed, the only cases that would arguably support the plaintiffs' argument deal with access to government "monopolies"—most often components of the criminal justice system. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

It is submitted that the more appropriate analysis would have isolated the right to choose an abortion as the right made fundamental by *Roe*. Accordingly, failure to fund would not obstruct or deter that right, and traditional equal protection analysis would apply. In this context, the state would have asserted a valid interest—encouragement of childbirth over abortion. However, the court seemed to anticipate this possibility and found such a state interest inadequate: "The state has advanced no interest in not paying for elective abortions that would satisfy the compelling state interest test—*nor even one that would satisfy the less rigorous rational relationship test*."[308] Could this be true? Is it really irrational for the state to prefer childbirth and to reflect that preference in its Medicaid program? In a very telling footnote, the court suggested why it would so decide. "The view that abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy may be gleaned from the various opinions in *Roe* and *Doe*."[309] Of course, no such conclusion can be *gleaned* from those cases. In fact, the contrary seems well supported. The Court in *Roe* was careful to note that the state has an "important and legitimate interest in protecting the potentiality of human life,"[310] and this interest grows in "substantiality as the woman approaches term."[311] Furthermore, the "pregnant woman cannot be isolated in her privacy . . . . [Her] privacy is no longer sole and any right of privacy she possesses must be measured accordingly."[312] There can be no doubt that this language rejects the view of Judge Newman that abortion and childbirth are merely two sides of a coin and that the state cannot prefer and encourage one over the other.

The district court's selective analysis was corrected by the Supreme Court in *Maher v. Roe*.[313]

> *Roe* did not declare an unqualified "constitutional right to an abortion," as the District court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a

308. 408 F. Supp. at 664 (emphasis added).
309. *Id.* at 663 n.3.
310. Roe v. Wade, 410 U.S. at 162.
311. *Id.* at 162-63.
312. *Id.* at 159.
313. 432 U.S. 464 (1977), *rev'g* Roe v. Norton, 408 F. Supp. 660 (D. Conn. 1975).

> value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.[314]

But again, a lower court had, on the thinnest of evidence, adopted an interpretation that favored the pro-abortion position. In the process it frustrated a state policy for more than three years and placed in the law books an influential but incorrect precedent that encouraged similar mistakes[315] pending its ultimate correction.

2. After the Hyde Amendment[316]

In 1976 Congress included in its appropriation act for the Department of Health, Education, and Welfare a provision that specifically withheld any appropriation of money for the payment of elective abortions under state Medicaid programs. The provision reads: "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."[317] Soon after this provision became effective, several attempts were made to enjoin its operation. One such attempt was made before Judge Dooling in the Eastern District of New York,[318] where several plaintiffs, including one indigent pregnant woman, Planned Parenthood of America, and the American Civil Liberties Union, asked the judge to invalidate the Hyde provision. Plaintiffs were in essence seeking not only an invalidation of the Hyde Amendment, but also an order from Judge Dooling directing the U.S. Treasury to reimburse states for elective abortions. The plaintiffs did not seem deterred by the fact that under the U.S. Constitution, our separation of powers prohibits any drawing of money from the Treasury unless it has been properly appropriated. Specifically, article I, section 9, clause 7 provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[319] Presumably, even if the judge found some basis for invalidating the Hyde Amendment, he had no constitutional authority to order the government to pay. Undaunted, Judge Dool-

---

314. *Id.* at 473-74.

315. *See, e.g.*, McRae v. Mathews, 421 F. Supp. 533 (E.D.N.Y. 1976) (use of *Roe v. Norton* to support court's conclusion), *vacated sub nom.* Califano v. McRae, 433 U.S. 916 (1977). *McRae* is discussed at notes 318-39 *infra* and accompanying text.

316. This story is told well by Professor Noonan. *See* Noonan, *Should Congress Investigate the Treasury's Funding of Abortion?*, Human Life Rev., Spring, 1978, at 11.

317. Hyde Amendment, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976).

318. McRae v. Mathews, 421 F. Supp. 533 (E.D.N.Y. 1976), *vacated sub nom.* Califano v. McRae, 433 U.S. 916 (1977).

319. U.S. Const., art. I, § 9, cl. 7.

ing, without reaching the merits, decided that the plaintiffs would probably prevail at trial because the Amendment was unconstitutional.[320] His conclusion was little more than that—a conclusion. Judge Dooling rejected the argument that the Hyde Amendment was part of a valid pattern of encouraging state plans for family planning and discouraging abortions and that such exclusions had been approved in other areas of Medicaid funding.[321] Additionally, he relied upon a variety of lower federal court decisions disallowing state plans to exclude Medicaid reimbursement for elective abortions; however, none of those decisions suggested that Congress must, as a constitutional proposition, pay for elective abortions.[322]

Arguably, though, the real reason why Judge Dooling felt that the Hyde Amendment was unconstitutional was that:

> Divisions between sober and God-fearing people so deep and equal deny to civil authority any power to intervene by direction or indirection, either to compel abortion as a measure of population control or to deny medical assistance to the needy who act on their own beliefs. When the power of enactment is used to compel submission to a rule of private conduct not expressive of norms of conduct shared by the society as a whole without substantial division it fails as law and inures as oppression.[323]

Thus, while it is oppression for substantial numbers of taxpayers to conscientiously object to the funding of abortions with their money, it is not oppression to compel their contributions to such abortions. In other words: "Judge Dooling adopted the argument of Planned Parenthood that, as the morality of abortion was disputed by 'Godfearing people,' the government would be required to be neutral. And 'neutrality' meant the government should be on Planned Parenthood's side and pay for abortions!"[324]

Having decided that the case had merit and should be set for trial, Judge Dooling overcame the "appropriations" problem by concluding that the Hyde Amendment "sought only to restrict the circumstances in which the funds can be used to pay pro-

---

320. 421 F. Supp. at 541.

321. Legion v. Richardson, 354 F. Supp. 456 (S.D.N.Y.), *aff'd mem. sub nom.* Legion v. Weinberger, 414 U.S. 1058 (1973), was cited as an example of permissible exclusions from Medicaid reimbursement. 421 F. Supp. at 541. The *Legion* court had approved "Congress' exclusion of Medicaid funds for long-term in-patient treatment of insane people between the ages of 21 and 65. 354 F. Supp. at 458-59.

322. *See* 421 F. Supp. at 541 and authorities cited therein.

323. *Id.* at 542.

324. Noonan, *supra* note 316, at 16.

viders of lawful abortional services."[325] The money, he suggested, had been fully appropriated, and if the Hyde restriction is declared unconstitutional, as he concluded it would, the already appropriated funds would simply be freed. "Payment of funds [would] follow, but not by an act equivalent to appropriation."[326]

To reach this conclusion Judge Dooling had to ignore congressional rules and traditions that clearly considered amendments to appropriation bills as part of the bill and thus a limit on the appropriation itself.[327] When the Hyde Amendment was offered under House Rule XXI,[328] the Holman Rule, it was accepted as "being germane to the subject matter of the bill" and as "retrench[ing] expenditures by . . . the reduction of amounts of money covered by the bill."[329] Such being the case, the Hyde Amendment must be read as an explicit statement by Congress that *no* funds have been appropriated for the proscribed purpose, *i.e.*, elective abortions. To invalidate the amendment and order payment is tantamount to judicial usurpation of a power textually committed to Congress.

Attempting to bolster his unusual conclusion, Judge Dooling cited *United States v. Lovett*[330] for the proposition that "the section [was] a constraint on the use of *appropriated funds*, and, if the constraint [was] one that [could not] be lawfully imposed for constitutional reasons, as it was in *Lovett*, then there [was] no bar to the payment of the money for abortional services."[331] A closer examination of *Lovett*, however, belies this conclusion. *Lovett* did not involve the rejection of one portion of an appropriations act to reach funds appropriated by that act. Rather, Robert Lovett, an executive assistant to the governor of the Virgin Islands, and two other government employees were considered "subversives" by the Un-American Activities Committee. Because the government refused to fire them, Congress in the Urgent Deficiency Appropriations Act of 1943[332] prohibited payment of their salaries. The three continued to work for the government

325. 421 F. Supp. at 540.

326. *Id.* at 540-41.

327. *See, e.g.*, 7 C. Cannon, Cannon's Precedents of the House of Representatives § 1643 (1936).

328. Rules of the House of Representatives, H.R. Doc. No. 663, 94th Cong., 2d Sess. 561 (1977).

329. *Id.* at 563.

330. 328 U.S. 303 (1946).

331. 421 F. Supp. at 541 (emphasis added).

332. Pub. L. No. 78-132, § 304, 57 Stat. 450 (1943).

and sued for their compensation in the Court of Claims.[333] That court decided that the claimants were entitled to the money but did not order Congress to appropriate the funds. The court said instead that:

> Congress, by enacting Section 304, did not foreclose itself from thereafter appropriating for the payment of these salaries. Congress even now may appropriate, and authorize a selected disbursing agency to pay them. Claims therefor, presented to Congress, may be satisfied by an appropriation to pay them, as claims. Judgments, recovered here, may be satisfied by any appropriation out of which the judgments may be by Act of Congress, payable.[334]

The Supreme Court affirmed the Court of Claims and held the salary prohibition an unconstitutional Bill of Attainder, forbidden by article I, section 9 of the Constitution.[335] But again, no order was made to appropriate or pay the funds. That determination was properly left to Congress. The Court merely allowed compensation; it did not reach back to the appropriation, stripped of the salary prohibition, and order payment as though the funds had been appropriated and illegally constrained.

Clearly, Judge Dooling misunderstood *Lovett* and "ignored the House's own understanding of its legislative process: that a vote for an amendment to an appropriation act, forbidding use of appropriated funds for a given purpose, was a vote not to appropriate for that purpose."[336]

Perhaps this case would deserve less attention if it had not taken two additional steps that seem particularly inappropriate. First, Judge Dooling found irreparable harm sufficient to enjoin the Amendment even though a three-judge court (of which Judge Dooling was a member) had previously enjoined the State of New York from refusing to pay for elective abortions.[337] That injunction was still in effect and was adequate assurance that no harm, much less irreparable harm, could have come to indigent women seeking free elective abortions. The latter injunction was unaffected by the Hyde Amendment. Second, and even more surpris-

---

333. Lovett v. United States, 66 F. Supp. 142 (Ct. Cl. 1945), *aff'd*, 328 U.S. 303 (1946).

334. *Id.* at 147.

335. United States v. Lovett, 328 U.S. 303, 315 (1946), *aff'g* 66 F. Supp. 142 (Ct. Cl. 1945).

336. Noonan, *supra* note 316, at 17.

337. Klein v. Nassau Co. Med. Center, 409 F. Supp. 731 (E.D.N.Y. 1976) (per curiam), *vacated sub nom.* Toia v. Klein, 432 U.S. 902 (1977).

ing, Judge Dooling's order operated on the Secretary of HEW *throughout* the United States, a result that would have presumably required a showing of irreparable harm in each state. Yet the opinion refers to only one affidavit from a New Mexico official indicating that that state would not pay for unreimbursed elective abortions.[338] Thus, in one fell swoop a single federal judge in Brooklyn had managed to thwart the expressed will of Congress throughout the entire country.[339]

State and federal attempts to limit the use of tax funds for elective abortions have met with the same judicial frustration that has been demonstrated in other areas of the abortion saga. Unlike any other area of litigation since the anti-union cases, the results have consistently favored one side of the issue.

## Conclusion

The evidence is overwhelming: the lower federal courts have demonstrated a consistent and unexplainable accommodation of the pro-abortion position.[340] Every attempt to affect any aspect of the abortion issue has met with judicial hostility. This hostility threatens the public's perceptions of the courts every bit as much as it threatens the policy-making role of state and federal legisla-

---

338. 421 F. Supp. at 542.

339. To demonstrate the fragility of the *McRae* conclusions, the reader is referred to two other federal district court cases where the judges refused to enjoin the Hyde Amendment for the very reasons that Judge Dooling found unpersuasive. *See* Doe v. Mathews, 422 F. Supp. 141 (D.D.C. 1976), *cert. dismissed sub nom.* Vuitch v. Califano, 434 U.S. 801 (1977); Doe v. Mathews, 420 F. Supp. 865 (D.N.J. 1976). *See also* Noonan, *supra* note 316, at 14-15.

340. For each case discussed, several others could also be used to demonstrate the present trend. *See, e.g.*, Doe v. Charleston Area Med. Center, Inc., 529 F.2d 638 (4th Cir. 1975); Doe v. Hale Hosp., 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974); Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir.), *appeal dismissed*, 419 U.S. 891 (1974); Doe v. Israel, 482 F.2d 156 (1st Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); Lady Jane v. Maher, 420 F. Supp. 318 (D. Conn. 1976), *aff'd mem. sub nom.* Mahoney v. Lady Jane, 431 U.S. 926 (1977); Arnold v. Sendak, 416 F. Supp. 22 (S.D. Ind.), *aff'd mem.*, 429 U.S. 968 (1976); Rodos v. Michaelson, 396 F. Supp. 768 (D.R.I.), *rev'd*, 527 F.2d 582 (1st Cir. 1975); Foe v. Vanderhoof, 389 F. Supp. 947 (D. Colo. 1975); Leigh v. Olson, 385 F. Supp. 255 (D.N.D. 1974); Hallmark Clinic v. North Carolina Dept. of Human Resources, 380 F. Supp. 1153 (E.D.N.C. 1974), *aff'd*, 519 F.2d 1315 (4th Cir. 1975); Doe v. Mundy, 378 F. Supp. 731 (E.D. Wis. 1974), *aff'd*, 514 F.2d 1179 (7th Cir. 1975); Abele v. Markle, 369 F. Supp. 807 (D. Conn. 1973); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973); Doe v. Turner, 361 F. Supp. 1288 (S.D. Iowa 1973).

As with the early anti-union cases, the full extent of adverse federal judicial involvement in abortion cases is unknown since there are probably dozens of unreported cases that confirm a pro-abortion bias. *See, e.g.*, Fox Hill Surgery Clinic, Inc. v. City of Overland Park, No. 77-4120 (D. Kan. July 11, 1977); Fox Valley Reproductive Health Care Center, Inc. v. Arft, No. 78-C-28 (E.D. Wis. March 8, 1978).

tors. Whenever the judiciary so flirts with bias, the entire system, including its indispensable balance, is pushed precariously to the edge of the precipice. Clearly, the time has come for Congress to act. It has been shown that Congress has the power to correct this unfortunate situation. It has also been shown that Congress has the precedent to do so. When the federal courts were threatening the growth of labor unions at a critical stage in their development, Congress reasserted its authority to protect the legislative advancement of a movement with less public support than the one that is now being thwarted. So, just as the Norris-LaGuardia Act checked and balanced judicial excess, so, too, would an act to limit federal court jurisdiction in abortion cases.

To further support the conclusion that a problem exists, one can look to the judiciary itself, where more than once a warning has been heard. Dissenting voices have urged caution and self-assessment. The words of District Judge Allen Sharp are poignant:

> It [the right to privacy] has now become a watery constitutional concept that can run in any direction chosen by at least five members of the highest Court . . . . When such water tends to erode the basic right to life itself under the Fourteenth Amendment, all members of the Judiciary, regardless of where they sit, should be extremely careful. This is manifestly an area for the greatest of judicial restraint.[341]

So too, we can learn from the admonitions of Circuit Judge Adams:

> Powerful responses are evoked by the subject of abortion and it is open to some doubt whether the courts are the institution best equipped to resolve the complex societal interests that exist in the abortion field.
>
> . . . .
>
> . . . [W]e must be mindful that the acts of a popularly chosen legislature are not to be lightly invalidated—surely, not on the basis of what a court or a particular judge deems wise or desirable from the standpoint of public policy.[342]

But perhaps the most consistent critic of this developing trend is

---

341. Gary-Northwest Ind. Women's Serv., Inc. v. Bowen, 421 F. Supp. 734, 737 (N.D. Ind. 1976) (separate statement of Justice Sharp) (citations omitted), *aff'd mem.*, 429 U.S. 1067 (1977).

342. Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554, 586 (E.D. Pa. 1975) (Adams, J., concurring in part, dissenting in part), *aff'd sub nom.* Collauti v. Franklin, 47 U.S.L.W. 4094 (Jan. 9, 1979).

the one who saw the mistake of judicial involvement from the beginning.[343] Since then his voice has been raised—most often fruitlessly—in admonishing his Brothers to take stock. Recently, Justice Byron White said:

> It is truly surprising that the majority finds in the United States Constitution . . . a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child. Such a rule cannot be found there, nor can it be found in *Roe v. Wade* . . . . These are matters which a State should be able to decide free from the suffocating power of the federal judge, purporting to act in the name of the Constitution.[344]

Justice White has also recognized the apparent shift in ordinary legal rules when abortion is the issue: "I am not yet prepared to accept the notion that normal rules of law, procedure, and constitutional adjudication suddenly become irrelevant solely because a case touches on the subject of abortion."[345]

These, however, are the unheeded words of the minority. Counterposed to them are the constant statements, seen throughout, of those jurists who have plunged unhesitatingly and self-assuredly into this sensitive issue. Indicative of that view is Justice Thurgood Marshall:

> When this Court decided *Roe v. Wade* and *Doe v. Bolton*, it properly embarked on a course of constitutional adjudication no less controversial than that begun by *Brown v. Board of Education*, 347 U.S. 483 (1954). The abortion decisions are sound law and undoubtedly good policy . . . . The logic of those cases inexorably requires invalidation of the present enactments. Yet I fear that the Court's decisions will be an invitation to public officials . . . to approve more such restrictions . . . . When elected leaders cower before public pressure, this Court, more than ever, must not shirk its duty to enforce the Constitution for the benefit of the poor and powerless.[346]

Even ignoring the judicial arrogance that congratulates itself on rejecting the policy-making role of all fifty state legislatures and Congress, and focusing only on the words "undoubtedly good

---

343. Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting): "As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court."

344. Planned Parenthood v. Danforth, 428 U.S. 52, 93 (1976) (White, J., concurring in part, dissenting in part).

345. *Id.* at 98.

346. Beal v. Doe, 432 U.S. 438, 461-62 (1977) (Marshall, J., dissenting).

policy," there is still cause for concern. Where shall the writer of those words direct us for the affirmation of the truth of his conclusion? Certainly not to the legislatures of the several states. Before 1973 every state denied emphatically the wisdom of the pro-abortion policy, and since that year the states have tried valiantly to protect woman and fetus against exploitation and harm. Similarly, the "undoubted" wisdom of abortion is not affirmed in the hearts and minds of the American people, who have rejected the utilitarian solution to hard problems that is offered by the abortionists.[347] Neither can this "undoubtedly good policy" find support in the halls of Congress—the real policy-makers of this nation. Time and time again Congress has rejected the wisdom of fetacide.[348] Even less can the conclusion be affirmed by the grim statistics of abortion—each year there are over one million aborted lives[349] and countless complications[350] for the women who have abortions. Nor can the wisdom be affirmed by those who candidly react to their daily involvement in abortion.[351]

---

347 For a recent and thorough analysis of current public opinion in the United States on a variety of abortion questions, see Blake, *supra* note 4, at 64.

Some of the more interesting results of Blake's analysis are: (1) In answer to the question of whether there should be legal restraints on abortion, 53% of the men and women surveyed said yes, and 40% said no. (September 1974). *Id.*, Table 2, at 70. (2) In answer to the question "Are you in favor of a law which permits a woman to have an abortion even if she is more than three months pregnant?", 73% of the women and 58% of the men said no. (1975). *Id.*, Table 3, at 71. (3) In answer to the question of whether a woman should be allowed to have an abortion if her husband opposes it, 56% of the women and 52% of the men answered no. (1975). *Id.*, Table 7, at 75. None of the questions asked elicited a majority response in favor of abortion. For an excellent commentary on the Blake statistics, see Noonan, *The American Consensus on Abortion*, Human Life Rev., Winter, 1978, at 60.

348 In its most recent session, Congress (1) continued its ban on free abortions under Medicaid, except in cases of rape, incest, or threat to the mother's life; (2) applied those same restrictions to military personnel and dependents, and to Peace Corps personnel; (3) amended a new pregnancy disability law to allow employers the option to refuse to pay for workers' abortions in most cases. New Orleans States-Item, Oct. 17, 1978, at 3, col. 1.

349 The total number of reported abortions in the United States exceeded 1,000,000 in both 1975 and 1976. Sullivan, Tietze, & Dryfoos, *Legal Abortion in the United States, 1975-76*, 9 Fam. Plan. Perspectives 116, 116 (1977). In Washington, D.C., in 1975, there were twice as many reported abortions as live births. American Medical News, Aug. 25, 1978, at 18, col. 4.

350 *See* note 223 *supra*.

351 After New York enacted a liberalized abortion law, the medical profession found it difficult to assemble a nursing staff for abortion units. Commenting on the problem, three registered nurses said:

> In nursing, our aim has been *life*. Our experience in labor and delivery pledge us to the *creation of life*. Our endeavors to care for medical and surgical patients are to *preserve life*. Our struggle to nurse the geriatric patient is to *extend life*.
>
> The abortion patient presents a completely contradictory charge: to *take*

Indeed, the only affirmation possible comes from the subjective perception by some that this is the way it should be. Unfortunately, that perception has been too influential in recent lower federal court incursions into the abortion issue. But should we expect any more from a judicial enterprise that got its start with a wink from the bench?

---

*life.* Many nurses find this hard to rationalize.

. . . .

. . . [I]t is [difficult] to solicit nursing personnel to minister abortion patients. Many nurses have expressed their qualms, especially when they encounter a large, dead fetus. They must be able to separate their own feelings about abortion from the responsibilities for good nursing.

Yaloff, Wade, & Burlingame, *Nursing Care in an Abortion Unit,* 14 Clinical Obstetrics & Gynecology 67, 68 (1971).

Senator EAST. Gentlemen, I wish to thank you all for your valuable testimony. As I have indicated, your written statements will be made a part of our permanent record.

As I have indicated, time always in this sort of thing becomes very precious. I would anticipate we need to wind up this phase of the discussion around 11:30 so that we can devote an hour and a half to our second panel.

Senator Baucus and I will rotate our time. I shall take about 10 minutes, which will take us to 5 after the hour, and then we will let Senator Baucus have his swing at this. So, gentleman, you are now fair game, if you will, for our questions.

A point I would like clear up—and I suppose I am directing this comment particularly at Professors Bork and Cox—is this. I sense in both of you—certainly very strongly in Professor Bork, and I will just state my postion and let you respond to it, if you will, please—a general unhappiness with *Roe* v. *Wade,* not maybe so much with the policy result, but that it is not good constitutional law. Certainly with Professor Bork there is no desire to defend the way in which the Court has proceeded to involve itself in this issue.

I sense also with you, Professor Cox, certainly not a great deal of glee in having to defend their intervention in this particular matter and that it does become an example, it would seem, of inappropriate exercise of judicial power.

I am reminded, of course, that in the dissent in *Roe* v. *Wade,* William Rehnquist and Byron White, two members of the Court, both described this as an improvident and extravagant use of the power of judicial review, both of those distinguished gentlemen suggesting that something was very much amiss in what was going on.

Many Americans—and I will include myself in that category, it is probably no great secret—share that concern.

What we are trying to do is to find some sort of reasonable, prudent, modest way out of it.

We have various kinds of alternatives in dealing with this sort of thing. You can make sure that future Court appointees think prop-

erly, but then that is always fraught with difficulty lest you try to skew it too much to your own political predilections.

You can withdraw Court jurisdiction. Obviously, Professor Cox has deep reservations about that as a remedy. We have, of course, the route of constitutional amendment, which the two of you do not rule out as a possibility here. Though I would argue, on a hierarchy of remedies, that is a pretty severe kind of thing, where you reach a point that you acknowledge the Court has done a very radical and, if you will, unprincipled thing by intervening in this way. We are trying to find some sort of reasonable, prudent way out of it.

Constitutional amendments up the ante very high. First of all, there is the difficulty of achieving it, which is not necessarily a bad thing; but, second, it would, interestingly, invert *Roe* v. *Wade* and give you a national policy wholly different in scope.

It seems to me that the human life bill has a couple of advantages. One, it is a relatively modest remedy. All we are really doing, I would argue as a defender of the bill, is inviting the Court to reconsider what it had done. It had indicated in the majority opinion that it could not define "life," and the implication is very strong—overwhelming—that if they had known when life begins they would have come to a different result. We look upon that—at least I do and many others—as, if you will, a tacit invitation that perhaps we might begin to exercise our prerogative. It certainly would be an appropriate, or certainly not an inappropriate, legislative function to look into this matter, to determine, if in fact we can determine, when life begins.

If we say we can, we are not overruling the Court. They will have another shot at it. We have not taken away their appellate jurisdiction. We are simply suggesting, well, let us try it. This is a gentle prodding of the Court to reconsider.

They can reconsider on due process grounds. Who knows? They might even, in reconsideration, get into equal protection questions.

It seems to me all four gentlemen are suggesting that we start with not a very good decision. And we start with a legitimate desire on the part of many—even the opponents here—to do something about it.

A statute that invites the Court to reconsider I would consider, Professor Cox, a very modest remedy, as opposed to the alternatives. All we are doing here is trying to enlist them in a little dialog on this very profound public issue and get them to look at it again.

They could ultimately hold the bill unconstitutional. Perhaps they would. We do not eliminate that option. Then the alternative would be, for those who feel strongly about it, to go for a constitutional amendment—a right to life amendment. But that is stronger medicine than this.

I am very sensitive—indeed, totally resistant—to the notion that what we are doing here is "radical and unprincipled." I would say it is very prudent, very modest, and merely a testing of the constitutional waters to see if the Court might not reconsider what we all seem to be agreed upon was a very poor decision in terms of the whole concept of the power of judicial review, going back to *Marbury* v. *Madison*, going back to The Federalist, No. 78.

Now, I have said my piece. Perhaps, Professor Cox, since I spoke a little bit more critically of your analysis, you might respond to that. Where do you think that I go awry on this thing?

Mr. Cox. I think—without intending to be impolite at all, Senator, and with respect—that you go awry at just about every step of your statement.

First, a constitutional amendment may be difficult to achieve, but it is a modest way of correcting a Supreme Court error, and it is one that has a good many instances of precedent in our history.

The 11th amendment resulted that way, and the income tax amendment resulted that way—certainly, those two; whether there are others, I do not recall at the moment.

An amendment could easily be phrased in a way which would provide that nothing in the 14th amendment should be deemed to deprive the States of power to enact and administer laws prohibiting abortion, if that is the purpose of S. 158. Such an amendment would not attack any basic constitutional principle.

Second, here the langauge is hardly phrased in terms of, "Please reconsider." It is phrased in terms of, "Life shall be deemed"—not even of factfinding—"to begin at the moment of conception." And the term "person" is defined for the Court, instead of leaving the definition of constitutional terms to the Court, which I think is where it belongs if the Constitution is to have any meaning.

Now, when I called it unprincipled, I am sure you understood, Senator—and I want to make it clear to everybody else—I am not using the word in the sense that charges anybody with lacking moral principle. I call it unprincipled because I do not think that you or anyone else would be willing to generalize the principle on which the bill necessarily rests; that is, that Congress can define the terms in the Constitution.

Think about what that means. That would mean that the Congress, by simply majority, could declare that separate education shall be deemed equal education; or that probable cause to arrest a person or search their houses, papers, or effects, "shall be deemed to be the opinion of a police officer that the search or seizure will advance the administration of justice;" or that aid to secretarian schools shall not be deemed an establishment of religion.

Once one gets into this business—it seems to me, with all respect—it is the most radical thing in the world, and any generalization of your approach would undermine our whole constitutional system.

Senator EAST. I guess the quarrel I have with you, Professor Cox, with all due respect to you, is this: The words "radical and unprincipled" I do not consider appropriate to this kind of dialog, because I would not use those words to describe your position, nor have I used them to describe *Roe* v. *Wade* really, and if they fit anywhere, they probably fit there. "Radical and unprincipled" suggest something totally unwarranted and wholly indefensible.

Now, on any major constitutional policy question, fair-minded reasonable minds can differ. I am a little in agreement with Professor Uddo that sometimes the opposition engages in some rhetorical overkill with this, with ridicule on top of it, which I find unbecoming to people skilled in the academic community.

What we are trying to do is not to label one another or to ridicule one another but to engage in a genuine, academic, intellectual—I would hope—dialog on what it is we are doing.

I do not think your position is extremist, and I do not think my position is extremist. I think what we are doing is working within the framework of the U.S. Constitution and trying to figure out where we might go. To inflame it with excess rhetoric I am not quite sure contributes to the dialog.

I do not wish to overstate my case, but I want to get on the record with it—that extreme labels and the use of ridicule in this very important debate, I find, obscure and make more difficult good discussion. It reduces it then to name-calling and to ridicule, which I have never found in my own teaching experience a good tool of instruction.

Mr. Cox. Let me emphasize again, Senator, as I tried to say a moment ago, I did not mean to use those words in any way that implied any personal——

Senator EAST. Well, they were there, and I heard them.

Mr. Cox. No, no—I used them, but I am sure you also heard me say that they did not imply any personal lack of respect for you or any question about your behaving as a man of principle.

Senator EAST. Of course, in response, you can say that, when you describe the opposition position as being of that character—I see you are now wishing to withdraw that and to deny it, and I respect that and accept it, but——

Mr. Cox. No, sir, I did not withdraw it.

Senator EAST. I do not quite know where you are with it, then. You are saying it does not apply to me personally. I presume that it applies to others——

Mr. Cox. I said that by "unprincipled" I meant a proposal resting on a principle which I thought not even the sponsors would be willing to generalize. "Lacking in principle" might have been better words, but I thought they were equivalent.

By "radical," I mean that it seems to me that the proposal goes outside the established framework of the Constitution—that it would undermine the established constitutional framework. Thus, that seems to me the most apt word I can think of for describing something that does not stay within the framework of our institutions.

Mr. UDDO. Mr. Chairman, might I just try to respond to something Professor Cox said?

First of all, I think the examples he gives of the "slippery slope" that this might put us on are a bit overdone. I think most of the examples, if not all of the examples, he uses are instances where the factfinding would be irrational and the Court would not have to defer to the factfinding. Clearly, "separate but equal" could not be equal, and that would be an irrational factfinding.

On defining terms in the Constitution, in 1971 in the Cincinnati Law Review, Professor Cox proposed, under section 5—proposed, I presume rhetorically—the Speedy Trial Act of 1971 where the sixth amendment guarantee of a speedy trial could be defined by Congress as to what would constitute a speedy trial, and suggested even that it may differ with the Court's view of what a speedy trial would be. I suspect that if this proposal is radical, so was that one.

Senator EAST. Professor Bork, I will let you respond, and then I will turn it over to Senator Baucus.

Mr. BORK. I think you are quite right about my attitude toward *Roe* v. *Wade*, which I think is in the running for perhaps the worst example of constitutional reasoning I have ever read. I would not say it is the worst, but it is certainly in the running.

In one sense, I certainly do not think this proposal is radical and unprincipled because I think Congress has done it before, and I think the Court has accepted it before.

I think it is a mistake; I think it should not have been done then, and I think it should not be done now. But I do think it is healthy to have a political response to a Court that is trenching upon the proper preserve of democratic government and is doing it repeatedly, and it has done it in this case egregiously.

So I think this kind of debate and this kind of proposal is entirely proper, even though I hope the form this response takes does not become law.

You have referred to the statute, S. 158, as an invitation to reconsider. If it were a sense-of-the-Congress resolution which expressed Congress strong feeling the *Roe* v. *Wade* is wrong, I would think that was entirely proper.

You said the Court could declare S. 158 unconstitutional. My fear is that they might declare it constitutional and thus ratify what they have done in the past, which is to give Congress control over the meaning of the terms of the Constitution, which I think is quite bad.

The problem, of course, is more widespread with the Court than simply the abortion decision, and I think I would shift the emphasis that Professor Cox has given to this problem somewhat. He has spoken of the Court as a bulwark of our liberties, which indeed it is, but the Court can also be a threat to democratic government, as it has been in this case, and then we have a real problem about what to do with the Court. It is very hard to cope with that problem.

Senator EAST. Thank you.

Senator Baucus?

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Nagel and Mr. Uddo, in your statements where you invite Congress to engage in a dialog with the Court, neither one of you ever mention the amendment process. Isn't that the process that our constitutional framers provided for overruling or overriding constitutional decisions of the Court?

Mr. NAGEL. Mr. Baucus, in my statement I did say that the proper exercise of Congress enforcement power under section 5 of the 14th amendment is not amending the Constitution. It is enforcing the Constitution. I think that is a sufficient answer to your question.

Of course, Congress can go by way of the amendment process if it wishes, but it is not required to do that as long as it is operating properly within its power under section 5, which is a part of the Constitution.

Mr. Bork just said—and I agree with him—that given the current Supreme Court caselaw on Congress authority under section 5,

Congress can proceed here without any fear of amending the Constitution.

Senator BAUCUS. With all respect, I do not think you answered the question. The question is: Why is not the amendment process generally a more appropriate route for the Congress and the States to follow in trying to override the constitutional decisions of the Court?

Mr. UDDO. Could I take a shot at that?

Senator BAUCUS. Surely.

Mr. UDDO. I think the answer to that is the unique way the *Roe* v. *Wade* was decided. Justice Blackmun's opinion categorically admitted that judiciary was incapable of making the factual determination of when life begins.

I would point out two things: He said that the judiciary was incapable of making that determination. He did not say everyone was, and he did not say Congress was incapable of it. In addition, he said, "at this time in the development of man's knowledge."

It seems to me that Justice Blackmun was saying that we do not know all we might ought to know about this. Unfortunately they went on and decided the case anyway. But I think that left open a very critical factual determination which invites the exact kind of exercise of section 5 power that S. 158 represents.

Had the case said that life does not begin until such-and-such a point, it may have been a different problem, but it seems to me it left wide open a factual question which Congress is uniquely equipped to answer.

Senator BAUCUS. Let my tread on some sensitive ground—the dialog between Professor Cox and the chairman about the use of the word "unprincipled."

I would like to determine the principles that you would apply in helping us determine when the Congress should attempt to amend the Constitution, by means other than the amendment process or the judicial nomination process.

Mr. UDDO. I would endorse most of what Professor Cox has written on that subject; that is, in those areas where Congress, as a coenforcer of the 14th amendment, can amass legislative facts and make determinations on those facts, to help make decisions about 14th amendment rights, I think that it is perfectly appropriate.

Senator BAUCUS. As I understand you then, the general principle embodied in *Marbury* v. *Madison* applies to most constitutional protections except the protections of the 14th amendment?

Mr. UDDO. No, I think *Marbury* v. *Madison* applies to all protections.

Senator BAUCUS. Does section 5 give Congress more power to override the Court in the 14th amendment area than the Congress has with respect to other constitutional rights?

Mr. UDDO. I would be careful about using the word "override." I am not so sure that that is what this bill does. What I would say is that, clearly, section 5, being part of the 14th amendment, explicitly recognizes a different role for Congress in enforcing that amendment—the debates of the 14th amendment and the contemporary commentary make it clear that Congress was to be coenforcer.

In fact, some of the commentary suggests that it was more to expand Congress power than the Court's because there was a general distrust of the Court at the time.

So my answer would be that those situations which are uniquely fitted for the kind of things that Congress can do such as fact-finding carves out a role for congressional determinations.

Senator BAUCUS. It seems to me that if you agree that *Marbury* v. *Madison* is an overriding principle that should also apply to the 14th amendment rights then the basic question is: What does the term "enforce" mean? When does enforcement become an act of overruling the Court, and when is enforcing the act enforcing of rights that have been prescribed by the Court?

Mr. UDDO. I think, in 158, the distinction I would make is that the first part defining "life" is very clearly within the enforcement provision. I think the determination on "personhood"——

Senator BAUCUS. Excuse me. At that point, why is that enforcement?

Mr. UDDO. It is defining rights. It is defining and expanding the area of rights for the unborn.

On the question of defining "personhood," I think that is a clear instance where Congress determination would come into conflict with what the Court said in *Roe* v. *Wade*, and there I think I would very freely admit that *Marbury* v. *Madison* will prevail.

If 158 is passed and it gets before the Supreme Court—which certainly it will—and the Court decides that Congress information about personhood is incorrect, it seems quite clear to me that *Marbury* v. *Madison* will prevail.

Senator BAUCUS. I find one point intriguing. Your view seems to be that constitutional rights should be defined more by Congress, the legislative branch, than is currently the case.

If, for example, this bill becomes a law, and if, as Professor Bork worries, the Supreme Court might uphold it, would you be in here arguing just as strenuously for a bill which would undo—say, the opposite of this bill—that is, under the 14th amendment, this Congress now finds that at some future date—1984 or 1985—that the rights of the unborn do not go this far?

Mr. UDDO. Would I be arguing in favor of that bill?

Senator BAUCUS. Yes. Would you argue that that would be a constitutionally permissible exercise of power?

Mr. UDDO. Of course. I would have to.

Senator BAUCUS. Does that not bother you a little bit? You have a very strong personal concern for the rights of the unborn. That comes through in your statement.

Mr. UDDO. Yes.

Senator BAUCUS. Do you want a process where, by a 51-percent majority, Congress could so easily undo protected constitutional rights?

Mr. UDDO. We could have done that with the public accommodations provision of the Civil Rights Act and most of the civil rights legislation. I do not think that that is a good thing—that it can be undone by a majority vote—but it is a fact of life. That is the way legislation is.

Senator BAUCUS. But you do favor a more transitory constitutional right, then?

Mr. UDDO. No, I did not say that.

Senator BAUCUS. Or one that is more illusory, because you feel Congress should take a more aggressive role in defining constitutional rights?

Mr. UDDO. I did not say I favor it. I am here to speak about S. 158, not what I think is the ultimate solution to the abortion question or the best way to solve it.

Senator BAUCUS. What I am trying to drive at is what your principle is.

Mr. UDDO. My principle is that the cases that I have read that interpret section 5 would strongly suggest that S. 158 is constitutional.

Senator BAUCUS. Would the panel generally agree that if this bill becomes law States would be prohibited from funding abortions?

Mr. BORK. I think so.

Mr. NAGEL. I agree.

Mr. COX. I think probably so.

Senator BAUCUS. And they would also probably be prohibited from providing funds to medical clinics which distribute IUD's?

Mr. BORK. Yes.

Mr. COX. I would think probably so—yes.

Senator BAUCUS. So the effect of this bill, if it becomes law, is quite different than what the law was prior to *Roe* v. *Wade*—is that right?—insofar as prior to *Roe* v. *Wade* there was no constitutional prohibition against States conducting in such conduct.

Mr. BORK. Prior to *Roe* v. *Wade*, there was no constitutional law about abortion in any direction.

Senator BAUCUS. So the answer is yes?

Mr. BORK. *Roe* v. *Wade* created one direction, and this bill would take it in the other direction, but it would not return it to the pre-*Roe* v. *Wade* situation.

Senator BAUCUS. I am just trying to establish that, if this bill becomes law, it does not place the state of the law as it was prior to *Roe* v. *Wade*—that it goes further insofar as it prohibits State action.

Mr. COX. Indeed. I do not want to put words in his mouth, but as I read Professor Nagel's testimony, he said that the bill does not affect *Roe* v. *Wade*, the only thing it does is prevent States from funding or otherwise giving aid to those who wish to have abortions.

Mr. NAGEL. That is right.

Mr. COX. That is what you said?

Mr. NAGEL. Yes.

Mr. COX. So his position is that it is quite the reverse of simply going back to before *Roe* v. *Wade*—that it does not carry us back to before *Roe* v. *Wade* but does prevent the States from funding abortions.

Again, I really do not want to put words in your mouth, but I thought it was a dramatic——

Mr. NAGEL. I should add that, although I do not think the bill by its own force, reverses *Roe* v. *Wade*—and that is why I think a lot of the reaction describing the bill as a radical departure is extreme, and over-reacting in my judgment, but I do think it might bear on

the Court's reassessment of that decision in light of the different legal issue before it.

So I am not saying that the Court might not come to a different judgment about some similar issues as were decided in *Roe* v. *Wade* if this bill were passed. I am just saying the bill on its own would not reverse *Roe* v. *Wade*.

Senator BAUCUS. Another point I would make here, too, is this: Insofar as this bill would prohibit States from funding abortions and the distribution of IUD's, in a sense it is not returning the determination to the States but is establishing a national policy which prevents States from engaging in certain conduct. The effect of this bill is not to throw the question of abortion back to the States but rather it sets a national policy that would prevent States from funding abortions. That is correct, is it not?

Mr. NAGEL. In my view, that is an unfortunate aspect of the bill.

Senator BAUCUS. It is an unfortunate aspect? Why is that?

Mr. NAGEL. Because I think it ought to be a matter of States in their own judgment to decide on.

Senator BAUCUS. Thank you, Mr. Chairman. I have no more questions.

Senator EAST. Thank you, Senator Baucus.

Senator Heflin, we certainly welcome you here.

We are having two panels here this morning. We were trying to finish this one up roughly around 11:30 or thereabouts, if we could, and then move on to a second one that would take us roughly to 1 o'clock.

We certainly welcome you and would be happy to hear any statement or questions you might have.

## STATEMENT OF SENATOR HOWELL HEFLIN

Senator HEFLIN. I am sorry I have not been able to attend other meetings of these hearings. I have been tied up on some other matters. I am interested very much in this.

I would like to perhaps, from what I understand has been addressed, ask this panel to address the issue of the 10th amendment in relationship to this bill.

As I see this, it is a Federal approach toward solving a social ill, if you classify it as a social ill. In regard to this matter, if we are dealing in a Federal approach, will it set a precedent on the Federal preemption of all matters dealing with life which basically have been reserved to the States? I would like to have some discussion of that aspect of it.

Mr. COX. If I may, Senator, I would think that the answer was that this interpretation of section 5 of the 14th amendment reads section 5 as modifying 10th amendment in some respects.

I remember Senator Ervin was strongly convinced of that, too, and I debated the point, arguing that it did. He argued that it did not and that legislation should not be adopted of that kind.

I would think that, despite some limiting language in the bill, it is very probably that if it were valid its definition of "life" and of "person" would become controlling for the purposes of the equal protection clause and that thenceforth the States would be required to treat the unborn persons the same way they treated born persons for most purposes under the equal protection clause.

And, second, I certainly see no reason why Congress, even if it did not have that effect to begin with, should not follow up with additional legislation regulating the way State law shall deal with these questions of who is a person or what is life.

But I do want to make it plain that I have been somewhat categorical about some things this morning. I do not want to seem categorical on that one because I feel a good deal of uncertainty.

Mr. UDDO. Senator Heflin, I would just say that it is a question that we had not discussed before. I do not see that it is a precedent for federalizing questions dealing with life because I think the bill very clearly attempts to overcome some of the problems that *Roe* v. *Wade* created by taking that away from the States.

It seems to me that this is a fairly modest proposal for returning that to the States. It could be a much more expansive bill and one that involved a great deal more Federal regulation, but I do not think that that is what this bill intends to do.

I doubt seriously that anyone could say today that that would never happen, but, of course, I think that the good judgment of the Congress would see that that is not what this bill is moving toward.

Mr. BORK. Senator Heflin, if I may—I think the version of section 5 of the 14th amendment that is being propounded here in support of this bill not only federalizes the question of life but, indeed, federalizes State police powers.

Under the equal protection clause and the due process clause together, those are turned over to Congress, and there is no State legislation on any topic that I can think of that cannot be federalized if Congress so chooses.

Mr. NAGEL. I would agree with Professor Bork if he were talking about not this bill but other legislation that might follow this bill if Congress were to pass it. But if you are speaking only of this bill, I do not think this bill has those sorts of dramatic effects. I would echo what Professor Uddo said—it would not have those effects as long as Congress exercised some sensitive judgment to the needs of federalism in our system.

Senator HEFLIN. If this bill is passed and declared constitutional, it is then, in effect, a foot in the door as to all aspects of human life probably for police power. It has that potential invoved. I am just interested in that aspect of it. Most of it has been directed strictly at the 14th amendment.

Mr. UDDO. Senator Heflin, as I understood what Professor Bork said, it was that not this bill but the section 5 precedent that is already in existence.

Mr. BORK. No, I meant that, but I also meant that the version of section 5 that many supports of this bill advance——

Mr. UDDO. The second rationale of *Morgan?*

Mr. BORK [continuing]. Would indeed federalize every subject.

Mr. UDDO. But depending on a case that has already been decided?

Mr. BORK. If this bill were declared constitutional on those grounds.

Mr. UDDO. OK.

Senator HEFLIN. Thank you.

Senator EAST. Senator Baucus?

Senator BAUCUS. Mr. Bork, I would like to establish the degree to which constitutional scholars are united or not united on the unconstitutionality of this bill. As you know, 12 constitutional law scholars have signed a letter and 6 former U.S. Attorneys General have signed a letter declaring this bill to be unconstitutional.

In view of Mr. Uddo's statement that perhaps there is not agreement on this question, I am just curious as to whether you think that this is a close question. Would the majority of experts be of the view that this is unconstitutional?

Mr. BORK. I do not know what the universe of experts is, Senator Baucus.

Senator BAUCUS. Say law professors and former Attorneys General—that is a good category—since we cannot ask the Court.

Mr. BORK. I really do not know. I think there is quite a division of opinion, and the discussion is confused or embarrassed by the fact that we fail to note the differences, which are sometimes significant, between a prediction of what the Supreme Court will do in fact, what the Supreme Court has held in the past, and what the Supreme Court would do if it were following the Constitution. Those are not always the same thing.

Senator BAUCUS. Taking all those views together is there any way to generalize?

Mr. BORK. I think the spread of views here today is probably indicative of the spread of views in the law teaching profession generally. I do not think there is unanimity.

Senator BAUCUS. Thank you very much. I know there is not unanimity. I am just curious as to whether——

Mr. BORK. Well, I do not think there is anything resembling an overwhelming sentiment.

Senator BAUCUS. Would it be 50–50?

Mr. BORK. That I do not know, sir.

Mr. UDDO. Senator Baucus, why not just say that those 12 people who signed that letter feel that way? Why assume that they can speak for the whole universe of constitutional scholars?

Senator BAUCUS. Obviously, that is why I asked the question.

Mr. UDDO. How will we ever determine whether it is 50–50 or 75–25? Those 12 scholars feel that way. I suggest that of the hundreds who teach constitutional law in this country there is quite a bit of division.

Senator BAUCUS. I hope we are not at the point where constitutional law professors are so different that there is a division of opinion on whether there are 24 hours in a day.

Mr. UDDO. We will not disagree on that.

Senator BAUCUS. All right, thank you.

Senator EAST. Gentlemen, I wish to thank all of you for coming. I regret that the hour continues to press in upon us, but we do appreciate all of your excellent contributions.

Without objection, your prepared statements will be included in the record.

We will now proceed to our next panel since the hour is a little bit after 11:30. I would appreciate it if Dr. Carl Degler, Dr. James Mohr, Prof. William Marshner, and Prof. Victor Rosenblum would please come forward.

I would like to read briefly the background and affiliation of each of these gentlemen, and then we will start in the order in which they are seated.

Dr. Carl Degler is presently the Margaret Byrne Professor of American History at Stanford University. He is the author of many works, including "Neither Black Nor White" which was awarded the Pulitzer Prize in 1972.

Prof. James Mohr is a professor of history at the University of Maryland in Baltimore. He is the author of "Abortion in America: The Origins And Evolution Of National Policy, 1800–1900."

Professor Marshner is a professor at Christendom College where he teaches philosophy and theology. He graduated summa cum laude from Gettysburg College and has done postgraduate work at Yale University and the University of Dallas. He is a member of Phi Beta Kappa.

Prof. Victor Rosenblum is a professor of law at Northwestern University. He received his A.B. and LL.B. degrees at Columbia University, his Ph. D. degree from the University of California at Berkeley, and a doctor of humane letters degree from Hebrew Union College.

Professor Rosenblum has also served as a professor of political science at Berkeley and Northwestern, as a Fulbright professor at the University of Louvain in Belgium, and as president of Reed College in Portland, Oreg. He has served as a consultant to the Brookings Institution, the Administrative Conference of the United States, and the National Institute on Law Enforcement and Criminal Justice.

Gentlemen, I welcome you all this morning.

I would encourage you to summarize your remarks and make them as concise as you can. Your written statements will be made a part of the record, so it will save us time, and, not only that, it will save us money in terms of reproduction costs.

We will let the four of you each make your statement, and then those of us up here will proceed with questions.

Dr. Degler, will you please begin?

**STATEMENT OF DR. CARL DEGLER, MARGARET BYRNE PROFESSOR OF AMERICAN HISTORY, STANFORD UNIVERSITY, STANFORD, CALIF.**

Dr. DEGLER. Thank you, Senator.

First of all, I would like to say how much I welcome, not only personally the opportunity to be here, but to recognize that a historian's testimony is being taken into consideration in these hearings, because I do think history has something to say about public policy.

There are two issues which I would like to address this morning. The first is the question of whether or not the legislative history of the 14th amendment provides support for the contention that Congress intended to include the unborn within the amendment's protections against State action. The second is whether or not the general intent of the bill is in line with American traditions.

Until a few months ago, if anyone had asked me if there was any reason for believing that the 14th amendment was intended to

protect the life of the fetus, I would have said I did not believe there was.

A primary reason for my response is that I knew of no such assertion in any of the historical literature on the 14th amendment that I had read, although I have just heard this morning Professor Uddo suggest he had.

Recently, however, I have also learned that the argument had been made by Prof. Joseph B. Witherspoon after a close study of the congressional debates during the passage of the 14th amendment, and his paper had been printed in the Congressional Record in 1976.

Since Witherspoon's case is presumably the best one that can be made, I would like to examine it as a way of setting forth my own view on this historical issue.

Over the past 50 years or so, there have been several controversies among historians as to the intent of Congress in regard to the 14th amendment, such as whether the primary aim was to protect the rights of newly freed blacks or whether it was to protect the rights of corporations as legal persons.

Today, I think it is accurate to say that most historians believe that protection of the rights of former slaves was the primary purpose of the amendment. As already noted, no historian, to my knowledge, has even raised the argument, much less sought to defend the proposition, that a fetus was intended to be protected by any clause of the 14th amendment or that any construction of that amendment could be used to prohibit a State from permitting abortions, as I think S. 158 intends.

I do not think the argument and evidence advanced by Professor Witherspoon in his paper alter in any way the soundness of the traditional interpretation of the 14th amendment in regard to the unborn.

It is true, as Professor Witherspoon points out, that in the 1860's Congress was much concerned with the question of protecting the life and freedom of the newly freed slaves, but at no time did a Congressman explicitly say or even imply that the protections for the former slaves ought to be extended to the unborn.

Professor Witherspoon quotes Representative John Bingham on the sanctity of the family and the responsibility parents have for their children. "The wife," Bingham said, "owes obedience to the husband, and the husband protection to the wife, and both owe protection and care to their children." But it is clear "children," in this context, meant those already born.

Professor Witherspoon then links this discussion of the amendment's concern with the protection of life to the laws then being passed in a number of States to limit abortions.

He professes to see in these State laws an extension of the concern for the freedom of the former slaves, yet there is no mention in the discussion in Congress of these laws, nor is there any reference to abortion or to the unborn in the course of the debate on the 14th amendment.

Professor Witherspoon goes on to say that, since the 14th amendment was ratified contemporaneously with the passage in the State of antiabortion laws, that coincidence—to quote him—"constitutes

a contemporaneous legislative construction by States of the meaning of the amendments they ratified."

That argument falls to the ground, I believe, when it is recognized that the State laws against abortion almost always specify that an abortion could be performed if a physician said that such a medical procedure was necessary to save the mother's life.

So far as I know, no one has suggested that the 14th amendment made or intended any distinction be made between one person and another to the extent that the life of one person could be sacrificed for another, yet that is what we would have if we followed Professor Witherspoon's argument that the construction of the 14th amendment was shaped by the antiabortion statutes of the ratifying States.

Professor Witherspoon then moves on to show from specific actions in the 1860's that Congress intended to place the life of the unborn under the protections of the 14th amendment. The amount of evidence for this eccentric interpretation, I think, is very limited.

For a period of some 15 years, between 1860 and 1875, Witherspoon is able to supply us with only five specific references in which Congress dealt with the question of abortion in any way whatsoever. All five of these actions, as I would like to show, fail to support his argument that Congress intended to treat the unborn as equal to the born.

The first is the District of Columbia Divorce Act of 1860, in which Congress said that the offspring of a second or bigamous marriage, "born or begotten" before the commencement of the suit for divorce, will be deemed the legitimate offspring of the parent who, at the time of the marriage, was capable of making such a marriage.

Professor Witherspoon sees this as an instance in which, as he puts it, "Congress legislated to protect the unborn from the time of its being begotten or conceived in the womb."

He then goes on to say that it shows that Congress, in 1860, considered "the unborn child to be a person from the time of its conception."

Yet, even as the matter is described by Professor Witherspoon himself, it is not at all clear that Congress is talking about the moment of conception. The phrase "born or begotten" is a formulation that does no more than make a distinction between being outside the womb or inside the womb for any length of time, including a period perhaps as short as 1 day prior to birth.

Moreover, the whole purpose of the law was to determine parental responsibility and the legal status of the offspring, providing the offspring was born. If an abortion had ended the pregnancy, this law would not have brought any intervention by the Government. The law offered no protection for the fetus as such.

A second piece of evidence Professor Witherspoon mentions to show that Congress intended to include the unborn within the meaning of the protection of the 14th amendment is the assimilative crimes provision, passed April 5, 1866.

This was a statute that acknowledged Congress acceptance of a State crime committed on its territories or properties within a State's boundaries when Federal law did not deal with the crime.

It is Professor Witherspoon's view that this act constituted acceptance by Congress of the antiabortion laws of the States. I think the professor was probably correct here, but that acceptance in no way committed Congress to equating the life of the unborn with the life of born individuals since not even the State statutes did that. They always permitted an abortion if a doctor certified that the fetus endangered the mother's life.

His third example of an act of Congress that allegedly recognized unborn children as persons under the 14th amendment is a law in which Congress accepted on naval bases in Connecticut, in 1866, the authority of that State's antiabortion law of 1860.

Again, the argument is that Congress was recognizing the equality of the unborn with the born, but there is no other evidence for that assumption.

He also cites the passage of the Comstock laws of March 3, 1973, as a sign of Congress protection of the unborn because that law barred abortafacients from the mails. But that still does not offer us any new evidence as to whether or not Congress was viewing the unborn and born as equal persons under the Constitution.

The Comstock laws also barred contraceptives from the mails, but I do not know that anyone has argued therefrom that Congress sought to include the human egg or human sperm prior to union as a person within the meaning of the 14th amendment.

A similar effort to expand the evidence to cover cases it was not intended to cover appears in a final instance advanced by Professor Witherspoon. In 1864, Congress provided for the establishment in the District of Columbia of a "home for friendless women and children."

Although Professor Witherspoon refers to this act as another instance of the special concern for the unborn child, he has to admit that the purpose of the home was to assist pregnant women in giving birth to illegitimate children and to help in the adoption of such children.

Again, there is no direct mention of the unborn, merely an assertion that a concern for a potential child was equal to the concern for a child already born.

I submit that this evidence—and it is presumably the best and fullest that anyone could find, since that was Witherspoon's intention—is not an adequate basis for overturning the accepted understanding of the intent of Congress in passing the 14th amendment.

Congress clearly meant to protect the life, liberty, and property of all persons, but there has not been any reason, and there is still no reason today, to suppose that Congress intended fetuses to be treated as persons within the meaning of the 14th amendment.

Let me turn now to my second reason for believing this bill is based upon bad history. In determining that all the rights of persons protected by the 14th amendment apply to fetuses, S. 158 would change significantly the way Americans have viewed abortion over the last two centuries at least.

It is now well recognized that the laws of the States did not concern themselves with the question of abortion until 1821 when the first antiabortion law was enacted in Connecticut. Then, in the course of the next 60 years or so, almost all the States passed laws limiting abortions.

It is worth noting that these legal objections to abortion did not spring out of an impatient or eager moral conscience. It took half a century or more for these laws to be enacted, refined, and established in the States. The length of time was not a sign of opposition but a measure of the small popular concern with the issue.

The primary force behind the enactment of the antiabortion statutes seems to have been physicians who believed abortions were wrong and ought to be regulated.

But even the physicians who pushed for these laws did not believe that abortion ought to be prohibited absolutely, as I think S. 158 would do. For, as I have already noted, in virtually every State an abortion to save the mother's life was permitted.

As Prof. John T. Noonan, Jr., a modern opponent of abortion himself, pointed out some years ago, "Under American law"—meaning prior to 1975—"an abortion has never been illegal." That is but another way of saying that in the United States the protection of the fetus has generally been relative rather than absolute, and never has the fetus been placed on a par with legal persons.

Moreover, the law during the 19th century also noticed a difference between the killing of a fetus illegally and homicide. Punishment of the first was almost invariably less than that of the second.

In the late 19th century, some physicians contended that feticide, as they called abortion, and homicide were identical and should be punished alike. But, importantly, no significant body of law or professional opinion followed that suggestion, and neither did the law.

I have dwelled on the attitudes and values expressed in the laws because historians put a great deal of weight on statute law as measures of public values and opinions. Legislatures, after all, are assumed to be representative of the general public. But historians also look beyond the legislative chambers in seeking to recapture past attitudes.

If, in this case, one looks beyond the legislatures, it is possible to show that although there was little vocal opposition to the antiabortion statutes when they were enacted the laws were far from accepted, and that resistance, I think, was sufficiently broad that we ought not to ignore it if we are trying to ascertain what Americans 100 years or so ago thought about abortion.

The evidence to which I refer is the large number of abortions that were performed after the procedure was declared illegal.

Obviously, we have no sure figures on this illegal activity, but studies suggest that about one out of four pregnancies during the 1920's were being aborted, and throughout the last third of the 19th century physicians thought large numbers of women were still seeking abortions and often much more casually, if the doctors are to be believed, than many women do today.

Here is a physician writing in a popular medical advice book in 1870:

> Mine is but the common story of every physician.

he began.

> A woman unknown to the doctor walks into the office inquiring for the physician. She then says, "I want you to produce an abortion for me," as coolly as if ordering a piece of beef for dinner.

the doctor noted.

Another physician about the same time wrote:

> Astonishing as it may seem, many of the women who seek abortions are otherwise quite intelligent and refined, with a keen sense of their moral and religious obligations to themselves and to others, but deem it nothing amiss to destroy the embryo during the first months of its growth.

These two quotations are from the early 1870's, just at the time when the new antiabortion statutes were being enacted.

Yet, 20 years later, after a generation of assertions by doctors of the evils of abortions without a physician's approval and the passage of several dozen antiabortion statutes, one physician was still complaining that many women saw nothing wrong with an abortion early in pregnancy. And these women, he pointedly noted, were neither criminals nor degenerates.

> Many otherwise good and exemplary women.

he observed,

> would rather part with their right hands or let their tongues cleave to the roof of the mouth than to commit a crime, yet they seem to believe that prior to quickening it is no more harm to cause the evacuation of the contents of their wombs than it is that of their bladders or their bowels.

This kind of testimony from physicians of the time probably exaggerated women's casual attitudes. Nevertheless, it seems to me it makes clear that an absolutist prohibition on abortion, such as S. 158 would place upon the States, is hardly within past American attitudes and practice.

S. 158 would introduce a novel and—if I may use this word, Mr. Chairman—even a radical, if you will, conception of the value of a fetus. For the first time, it would compel the States to place the fetus on the same level as the mother and presumably encourage, if not compel, the States to treat the killing of a fetus as equivalent to homicide.

As a historian, I am rather surprised to learn that proponents of this bill are often described as conservatives. By the usual historical definition, a conservative is someone who seeks to continue tradition, to enhance it, because to conservatives the past is a guide to the present. It is radicals who usually seek to overturn the past or to escape it and its wisdom.

Let no one mistake it. This bill is not a conservative measure. It does not conserve, it innovates. Rather than recognizing complexities in human affairs, as conservatives do, it asserts simplicities. Rather than drawing upon our past experience as a people and strengthening the connection between past and present, as conservatives do, it breaks, I think, with our national history. Conservatives, I think, ought to oppose it as a deeply radical measure.

Thank you, sir.

Senator EAST. Thank you, Professor Degler.

Professor Mohr, if you would, please give us your comments. And, again, I would like to encourage you, as much as you can, to state your position extemporaneously and as concisely as you can. Thank you.

## STATEMENT OF PROF. JAMES MOHR, UNIVERSITY OF MARYLAND, BALTIMORE COUNTY, MD.

Dr. MOHR. Thank you, Senator.

I, too, wish to express my appreciation for a chance to speak to this question; and I, too, feel that historical perspective is one of the ways we can, hopefully, at least reconsider some of the difficult issues that we face in current times.

My own view is that one of the best ways to come to grips with some of the problems we face is to try to understand how we got into the situation in the first place.

In this context, I was asked my professional opinion of section 1 of S. 158, the section which asserts that the 14th amendment to the Consitution of the United States was intended to protect all human beings.

As an historian who has written both on the Radical Republican Reconstruction era from which the 14th amendment evolved and on abortion policy in the 19th century, I must say I am uncomfortable with that statement.

I am troubled, for example by the word "intended." An historical scholarship for the last quarter-century has repeatedly demonstrated, the chief intent of the framers and ratifiers of the 14th amendment was to resolve constitutionally what they considered to be the most important problems brought about by the recently concluded Civil War.

Foremost among those problems was the future status of emancipated slaves, particularly since most of those people resided in States which, at that time, were showing little inclination to afford them the rights that accrued to American citizens.

In a sense, the former Confederates were justified in their refusal to grant civil rights to blacks in 1865 because the Supreme Court of the United States had apparently ruled in 1857 in the well-known *Dred Scott* case, prior to the war and prior to the emancipation, that blacks were not and could not be citizens of the United States or the States in which they resided.

The key first section of the 14th amendment was therefore intended in 1866 to alter that situation by eliminating consitutional ambiguities over the legal status of former slaves and by forcing the separate States to grant civil rights to all persons with their jurisdictions—black or white.

The word "person," which appears in that section, was introduced primarily in order that aliens as well as citizens would be protected under the amendment's provisions.

To argue that the framers of the 14th amendment had other intentions, or hidden agendas, or clever conspiracies, or unstated assumptions is, in my view, unwarranted.

I might add that this view of the origins of the 14th amendment has been supported by every historian of the Reconstruction period whom I was able to consult in the past few weeks regardless of where they stood on the modern debate over personhood. It is also, I think, sustained in all of the standard historical discussions of the 14th amendment and its origins.

I am also troubled by the phrase "all human beings" because the 14th amendment does not, in fact, refer to human beings. It refers to "citizens" and to "persons." I know of no direct evidence that

the framers of the 14th amendment ever intended that either of those words should apply to the preborn.

None of the leading historians of the Reconstruction era whom I was able to contact, including many who have done painstaking, detailed research in the Congressional Record, in the debates, on the campaigns for reelection mounted by the framers and at the State level among the legislatures that ratified the amendment—none of these peole knows of any direct evidence.

I would submit that the rights of the preborn were simply not at issue at the time of the framing and ratification of the 14th amendment.

There is, I think, evidence to indicate that they were never intended to be at issue. If I might, I would like to go quickly through some of that evidence.

First, the 14th amendment was framed and ratified by policymakers who had come to maturity in a Nation where abortion prior to quickening—quickening is the first perception of fetal movement, which generally occurs about the midpoint of gestation—had been a perfectly legal and openly tolerated practice.

That position had been inherited from British common law at the time the Republic was founded, and it had been retained as legal policy in the United States long after the English themselves had moved to a new and more restrictive position.

By the middle of the 19th centruy, abortion prior to quickening was a surprisingly common, widespread, and commercialized practice in most of the States that ratified the 14th amendment, and there is no evidence that the legislators considered that an inconsistency when they ratified the amendment.

Second, most 19th century Americans probably considered abortion prior to quickening much closer to contraception than to manslaughter or homicide. Antebellum legislation at the State level, which typically linked those two practices together—that is, abortion and contraception—reflect, I think, that prevailing attitude.

There is strong evidence that abortion played a large role in what is called the demographic transition from high birth rates and high death rates to low birth rates and low death rates that many emerging nations go through, as ours did in the middle of the 19th century.

There is also strong evidence that antebellum State legislatures were far more concerned about that transition in birth rates and about maternal health—femal safety—than they were about the legal status of the preborn.

In short, I think there were no compelling precedents either in statutes or in court decisions indicating that the word "person" in the 14th amendment at the time of its framing and ratification might apply to the preborn.

Third, a group of physicians who were interested in upgrading and modernizing their profession had, for variety of complex reasons, launched a crusade against the practice of abortion in America just prior to the Civil War. Significantly, they continued their efforts unabated after the war, notwithstanding the enactment of the 14th amendment, and, if anything, they intensified their efforts after that amendment was passed.

It apparently never occurred to them—even these people who had a strong interest in changing the Nation's abortion-related policies—that the 14th amendment had either advertently or inadvertently guaranteed due process and equal protection to the preborn.

While physicians were successful in their efforts to persuade policymakers to move away from common law tolerance toward a more restrictive official policy by the end of the 19th century, they never claimed that the adoption of the 14th amendment had any bearing on their crusade one way or the other.

Fourth, if legislatures really meant to insure rights for the preborn by ratifying the 14th amendment, they would not have felt compelled to enact the many subsequent pieces of antiabortion legislation that they did. Or, at the very least, they would have grounded that legislation in the first or fifth sections of the amendment itself. They never did that.

Fifth, there is no evidence that the Federal Government ever moved under the 14th amendment to enforce the rights of the preborn, though there is clearly a great deal of evidence that it did move to try to protect the rights of black Americans, who were the objects of their concern.

Nor is there any evidence that any State made such efforts under the 14th amendment. Indeed, the physicians who led the fight to criminalize abortion in the United States constantly complained to one another in their professional journals during the 19th century about the widespread willingness of Ameicans to continue to tolerate abortion as a form of fertility control even after it had been declared illegal. The reluctance of State authorities to enforce their new antiabortion statutes further dismayed the opponents of abortion, as did the difficulty of convicting anyone under them, especially when jury trials were involved.

Finally, and to my mind conclusively, the framers of the 14th amendment began their first key sentence on citizenship with the words: "All persons born * * *"

To 19th century policymakers, at least in my opinion, the concept—the basic concept—of legal personhood was tied up with the process of birth. I do not think this phraseology was accidental.

The careful constitutional lawyers who framed, debated, and ratified the 14th amendment understood the biological processes involved in gestation, they had used the word "begotten" in previous legislation, and they understood the difference between that word and the word "born."

They could have begun the 14th amendment with the words: "All persons begotten," but they did not. In my opinion, the 14th amendment was never intended to apply to the preborn, and to allege otherwise is historically unjustifiable.

I would like to conclude by pointing out an historical paradox in the situation that confronts us today as we discuss this issue in a subcommittee on the separation of powers.

It seems to me that Republican policymakers in the 1860's realized that the only sure method of reversing a constitutional finding of the Supreme Court was to amend the Constitution. This was true no matter how much they opposed that finding, and it is

certainly obvious that the Republican Party of the 1860's and 1870's loathed the *Dred Scott* decision.

But President Lincoln, with his usual political sagacity, recognized the point explicitly, and he cited it publicly as one of the reasons why he elected to pocket-veto the Wade-Davis bill in 1864.

One section of that bill would have enacted emancipation by statute, but the President insisted instead upon a constitutional revision to unwrite the *Dred Scott* case.

His party went on to adopt the 13th, 14th, and 15th amendments, notwithstanding the intervention of a civil war, to insure what they considered to be the most important results of the conflict that they had just been through.

I find it, therefore, ironic that the proposers of S. 158 would cite one of those amendments at this time to justify a tactic that its framers considered insufficient and unacceptable a century ago.

If a majority of the American people wishes to endow the preborn with full civil rights from the instant of conception, a constitutional amendment to that effect should be passed, and that policy should be honored as the law of the land.

But if that is not the case, then it seems to me that the present ruling of the Supreme Court must, and historically should, remain in effect.

Thank you.

Senator EAST. Thank you, Professor Mohr.

[The prepared statement of Professor Mohr follows:]

PREPARED STATEMENT OF PROFESSOR JAMES C. MOHR

MY NAME IS JAMES MOHR. I AM CURRENTLY PROFESSOR OF HISTORY AT THE UNIVERSITY OF MARYLAND BALTIMORE COUNTY.

I WAS TRAINED AS A HISTORIAN OF THE UNITED STATES AT YALE UNIVERSITY, WHERE I RECEIVED MY B.A. DEGREE, AND AT STANFORD UNIVERSITY, WHERE I RECEIVED MY PH.D.

I HAVE PUBLISHED TWO BOOKS ON THE RECONSTRUCTION PERIOD AS WELL AS A STUDY ENTITLED ABORTION IN AMERICA: ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900 (OXFORD, 1978).

SECTION 1 OF S. 158 ASSERTS THAT "THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WAS INTENDED TO PROTECT ALL HUMAN BEINGS." (PAGE 2, LINES 1., 2, AND 3)

AS A PROFESSIONAL HISTORIAN WHO HAS WRITTEN BOTH ON THE RECONSTRUCTION ERA (FROM WHICH THE FOURTEENTH AMENDMENT EMERGED) AND ON THE ORIGINS AND EVOLUTION OF ABORTION POLICY IN 19TH CENTURY AMERICA, I AM EXTREMELY UNCOMFORTABLE WITH SOME OF THE HISTORICAL IMPLICATIONS OF THAT ASSERTION.

I AM TROUBLED, FOR EXAMPLE, BY THE WORD "INTENDED." HISTORICAL SCHOLARSHIP FOR THE LAST QUARTER CENTURY HAS REPEATEDLY DEMONSTRATED THAT THE CHIEF INTENT OF THE FRAMERS AND RATIFIERS OF THE FOURTEENTH AMENDMENT WAS TO RESOLVE CONSTITUTIONALLY WHAT THEY CONSIDERED TO BE THE MOST IMPORTANT PROBLEMS BROUGHT ABOUT BY THE RECENTLY CONCLUDED CIVIL WAR.

FOREMOST AMONG THOSE PROBLEMS WAS THE FUTURE STATUS OF EMANCIPATED SLAVES, PARTICULARLY SINCE THE VAST MAJORITY OF

THOSE RECENTLY FREED PERSONS RESIDED IN STATES WHICH THEN SHOWED LITTLE INCLINCATION TO AFFORD THEM THE RIGHTS ACCRUING TO AMERICAN CITIZENS. IN A SENSE, THE FORMER CONFEREDERATES WERE JUSTIFIED IN THEIR REFUSAL TO GRANT CIVIL RIGHTS TO BLACKS IN 1865, BECAUSE THE SUPREME COURT HAD APPARENTLY RULED IN 1857, PRIOR TO THE WAR AND THE EMANCIPATION, THAT BLACKS WERE NOT AND COULD NOT BE CITIZENS EITHER OF THE UNITED STATES OR OF THE STATES IN WHICH THEY RESIDED.

THE KEY FIRST SECTION OF THE FOURTEENTH AMENDMENT (ANOTHER PART OF WHICH IS ALSO QUOTED IN S. 158, PAGE 2, LINES 9 AND 10) WAS THEREFORE INTENDED IN 1866 TO ALTER THAT SITUATION BY ELIMINATING ANY CONSTITUTIONAL AMBIGUITY OVER THE LEGAL STATUS OF THE FORMER SLAVES (THEY WOULD NOW BE CITIZENS OF THE NATION AND OF THE STATES WHERE THEY LIVED) AND BY FORCING THE SEPARATE STATES TO GRANT CIVIL RIGHTS TO ALL PERSONS WITHIN THEIR JURISDICTIONS, BLACK OR WHITE.

THE WORD "PERSON" WAS INTRODUCED IN ORDER TO PROTECT ALIENS AS WELL AS CITIZENS. TO ARGUE THAT THE FRAMERS OF THE FOURTEENTH AMENDMENT HAD OTHER INTENTIONS, OR HIDDEN AGENDAS, OR CLEVER CONSPIRACIES, OR UNSTATED ASSUMPTIONS IS, IN MY VIEW, UNWARRANTED.

I MIGHT ADD THAT THIS VIEW OF THE ORIGINS OF THE FOURTEENTH AMENDMENT HAS BEEN SUPPORTED BY EVERY HISTORIAN OF THE RECONSTRUCTION PERIOD WHOM I HAVE BEEN ABLE TO CONSULT IN THE PAST FEW WEEKS, REGARDLESS OF WHERE THEY STOOD ON THE MODERN DEBATE OVER PERSONHOOD, AND IT HAS BEEN SUSTAINED IN ALL OF THE STANDARD HISTORICAL DISCUSSIONS OF THE FOURTEENTH AMENDMENT PUBLISHED DURING THE LAST QUARTER CENTURY.

I AM ALSO TROUBLED BY THE PHRASE "ALL HUMAN BEINGS." THE FOURTEENTH AMENDMENT DOES NOT, IN FACT, REFER TO HUMAN BEINGS,

BUT RATHER TO "CITIZENS" AND "PERSONS." I KNOW OF NO DIRECT EVIDENCE THAT THE FRAMERS OF THE FOURTEENTH AMENDMENT EVER INTENDED THAT EITHER OF THESE WORDS SHOULD APPLY TO THE PREBORN.

NONE OF THE LEADING HISTORIANS OF THE RECONSTRUCTION ERA WHOM I WAS ABLE TO CONTACT, INCLUDING SEVERAL WHO HAVE DONE PAINSTAKING RESEARCH BOTH ON THE DRAFTING AND ON THE RATIFICATION OF THE FOURTEENTH AMENDMENT, KNOWS OF ANY.

THE RIGHTS OF THE PREBORN WERE SIMPLY NOT AT ISSUE. MOREOVER, THERE IS COMPELLING EVIDENCE THAT THEY WERE NEVER INTENDED TO BE. LET ME BRIEFLY OUTLINE SOME OF THAT EVIDENCE.

FIRST, THE FOURTEENTH AMENDMENT WAS FRAMED AND RATIFIED BY POLICYMAKERS WHO HAD COME TO MATURITY IN A NATION WHERE ABORTION PRIOR TO QUICKENING (WHICH IS THE FIRST PERCEPTION OF FETAL MOVEMENT AND USUALLY OCCURS NEAR THE MIDPOINT OF GESTATION) WAS A PERFECTLY LEGAL AND OPENLY TOLERATED PRACTICE.

THAT POSITION HAD BEEN INHERITED FROM BRITISH COMMON LAW WHEN THE REPUBLIC WAS FOUNDED, AND HAD BEEN RETAINED AS LEGAL POLICY IN THE UNITED STATES LONG AFTER THE ENGLISH THEMSELVES MOVED TO A MORE RESTRICTIVE POSITION.

BY THE MIDDLE OF THE 19TH CENTURY, ABORTION PRIOR TO QUICKENING WAS A SURPRISINGLY COMMON, WIDESPREAD AND COMMERCIALIZED PRACTICE IN MOST OF THE STATES THAT RATIFIED THE FOURTEENTH AMENDMENT, AND THERE IS NO EVIDENCE THAT LEGISLATORS CONSIDERED THAT AN INCONSISTENCY.

SECOND, MOST MID-19TH CENTURY AMERICANS PROBABLY CONSIDERED ABORTION PRIOR TO QUICKENING MUCH CLOSER TO CONTRACEPTION THAN TO MANSLAUGHTER OR HOMICIDE. ANTEBELLUM LEGISLATION AT THE STATE

LEVEL, WHICH HAD TYPICALLY LINKED ABORTION AND CONTRACEPTION TOGETHER, REFLECTED THAT PREVAILING ATTITUDE.

THERE IS STRONG EVIDENCE THAT ABORTION PLAYED AN IMPORTANT ROLE IN THE HISTORIC SHIFT IN THE UNITED STATES FROM HIGH BIRTH RATES AND HIGH DEATH RATES TO LOW BIRTH RATES AND LOW DEATH RATES; THE SO-CALLED DEMOGRAPHIC TRANSITION THAT MANY DEVELOPING NATIONS EXPERIENCE AS THEY MOVE FROM PRE-INDUSTRIAL SOCIAL STRUCTURES TO INDUSTRIAL SOCIAL STRUCTURES.

THERE IS ALSO STRONG EVIDENCE THAT ANTEBELLUM STATE LEGISLATORS, TO THE EXTENT THEY WERE CONCERNED ABOUT ABORTION AT ALL, WERE FAR MORE CONCERNED ABOUT THOSE SHIFTING BIRTH RATES AND ABOUT FEMALE HEALTH THAN THEY WERE ABOUT THE LEGAL STATUS OF THE PREBORN.

IN SHORT, THERE WERE NO COMPELLING PRECEDENTS EITHER IN STATUTES OR IN COURT DECISIONS INDICATING THAT THE WORD "PERSON" MIGHT APPLY TO THE PREBORN.

THIRD, A GROUP OF PHYSICIANS WHO WERE INTERESTED IN UPGRADING AND MODERNIZING THEIR PROFESSION HAD, FOR A VARIETY OF COMPLEX REASONS, LAUNCHED A CRUSADE AGAINST THE PRACTICE OF ABORTION IN AMERICA JUST BEFORE THE CIVIL WAR.

THEY CONTINUED THEIR EFFORTS UNABATED AFTER THE WAR, NOTWITHSTANDING THE ENACTMENT OF THE FOURTEENTH AMENDMENT, AND IF ANYTHING, INTENSIFIED THEIR CRUSADE AFTER 1866-67. IT APPARENTLY NEVER OCCURRED, EVEN TO THEM, THAT POLICY MAKERS HAD ADVERTENTLY OR INADVERTENTLY GUARANTEED DUE PROCESS AND EQUAL PROTECTION TO THE PREBORN BY RATIFYING THE FOURTEENTH AMENDMENT.

WHILE THE PHYSICIANS WERE SUCCESSFUL IN THEIR EFFORTS TO PERSUADE POLICY MAKERS TO MOVE AWAY FROM COMMON LAW TOLERANCE

TOWARD A MORE RESTRICTIVE OFFICIAL POLICY BY THE END OF THE 19TH CENTURY, THEY NEVER CLAIMED THAT THE ADOPTION OF THE FOURTEENTH AMENDMENT HAD ANY BEARING ON THEIR CRUSADE ONE WAY OR THE OTHER.

FOURTH, IF LEGISLATORS REALLY MEANT TO INSURE RIGHTS FOR THE PREBORN BY RATIFYING THE FOURTEENTH AMENDMENT, THEY WOULD NOT HAVE FELT COMPELLED TO ENACT THE MANY SUBSEQUENT PIECES OF ANTI-ABORTION LEGISLATION THAT THEY DID, OR, AT THE VERY LEAST, THEY WOULD HAVE GROUNDED THEIR SUBSEQUENT POLICIES UPON THE FIRST OR FIFTH SECTIONS OF THE AMENDMENT ITSELF. NONE OF THIS WAS DONE.

FIFTH, THERE IS NO EVIDENCE THAT THE FEDERAL GOVERNMENT EVER MOVED UNDER THE FOURTEENTH AMENDMENT TO ENFORCE THE RIGHTS OF THE PREBORN, THOUGH IT TOOK MANY ACTIONS TO TRY TO PROTECT THE RIGHTS OF BLACK AMERICANS.

NOR IS THERE ANY EVIDENCE THAT ANY STATE MADE SUCH EFFORTS UNDER THE FOURTEENTH AMENDMENT. INDEED, THE PHYSICIANS WHO LED THE FIGHT TO CRIMINALIZE ABORTION IN THE UNITED STATES CONSTANTLY COMPLAINED TO ONE ANOTHER ABOUT THE WIDESPREAD WILLINGNESS OF AMERICANS TO CONTINUE TO TOLERATE ABORTION AS A FORM OF PERTILITY CONTROL EVEN AFTER IT HAD BEEN DECLARED ILLEGAL.

THE RELUCTANCE OF STATE AUTHORITIES TO ENFORCE THEIR NEW ANTI-ABORTION STATUTES FURTHER DISMAYED THE OPPONENTS OF ABORTION, AS DID THE DIFFICULTY OF CONVICTING ANYONE UNDER THEM, ESPECIALLY WHERE JURIES WERE CONCERNED.

FINALLY, AND TO MY MIND CONCLUSIVELY, THE FRAMERS OF THE FOURTEENTH AMENDMENT BEGAN THEIR FIRST KEY SENTENCE ON CITIZENSHIP WITH THE WORDS, "ALL PERSONS BORN." (MY EMPHASIS)

- To 19th Century policy makers the concept of legal personhood was tied up with the process of birth. Nor was this phraseology accidental. The careful constitutional lawyers who framed, debated and ratified the Fourteenth Amendment understood the biological processes involved in gestation, at least in a general sense.

They had used the word "begotten" in previous legislation (District of Columbia Divorce Act of 1860), and they understood the difference between that word and the word born. They could have begun the Fourteenth Amendment with the words, all persons begotten. But they did not. In my opinion, the Fourteenth Amendment was never intended to apply to the preborn, and to allege otherwise is historically unjustifiable. Consequently, in my view, the underlying premise of proposed S. 158 cannot be substantiated.

I would like to conclude by pointing out a historical paradox in the situation that confronts us today as we discuss these issues in a Subcommittee on the Separation of Powers. Republican policy makers of the 1860s realized that the only legitimate method of reversing a constitutional finding of their Supreme Court -- however much they loathed that finding -- was to amend the Constitution itself.

President Lincoln, with his usual political sagacity, recognized this point explicitly. He cited it publicly as one of the reasons why he elected to pocket veto the Wade-Davis bill in 1864; one section of that bill would have enacted emancipation by statute, but the President insisted instead upon constitutional revision.

His party went on to adopt the Thirteenth, Fourteenth and

FIFTEENTH AMENDMENTS, NOTWITHSTANDING THE UNPRECEDENTED UPHEAVALS OF THE CIVIL WAR, TO REVERSE THE ANTEBELLUM FINDINGS OF THE SUPREME COURT AND TO INSURE WHAT THEY CONSIDERED TO BE THE MOST IMPORTANT RESULTS OF THE CONFLICT THEY HAD JUST BEEN THROUGH.

I FIND IT IRONICAL THAT THE PROPOSERS OF S. 158 WOULD CITE ONE OF THOSE AMENDMENTS NOW TO JUSTIFY A TACTIC THAT ITS FRAMERS CONSIDERED INSUFFICIENT AND UNACCEPTABLE A CENTURY AGO. IF A MAJORITY OF THE AMERICAN PEOPLE WISHES TO ENDOW THE PREBORN WITH FULL CIVIL RIGHTS FROM THE INSTANT OF CONCEPTION, A CONSTITUTIONAL AMENDMENT TO THAT EFFECT SHOULD BE PASSED AND THAT POLICY SHOULD BE HONORED AS THE LAW OF THE LAND. OTHERWISE, THE PRESENT RULING OF THE SUPREME COURT SHOULD, AND HISTORICALLY MUST, REMAIN IN EFFECT.

THANK YOU.

Senator EAST. Professor Marshner.

## STATEMENT OF PROF. WILLIAM MARSHNER, CHRISTENDOM COLLEGE, FRONT ROYAL, VA.

Mr. MARSHNER. Mr. Chairman, I will try to summarize as much of my remarks as I can.

I think that I have far less stringent conditions than Professors Degler and Mohr for the historical appropriateness—that is to say, the appropriateness to history—of the human life bill, S. 158.

After all, historical interpretation differs in nature from legal interpretation. Whereas historical interpretation establishes only what was explicitly considered in a statute's past, legal interpretation must ponder a statute's relevance to new and unforeseen contingencies. Therefore history cannot settle the scope of the 14th amendment in advance; it can only establish certain parameters of appropriateness.

I think that S. 158 will be historically appropriate legislation if only three claims can be established:

One, that scientific evidence indicating a significant likelihood that actual human life exists from conception was known to physicians and State legislators from the middle decades of the 19th century forward.

Two, that the passage of antiabortion statutes by those legislators in those decades was significantly influenced and motivated by such evidence.

Three, that the medical, moral, and legal climate in which the 14th amendment was ratified was therefore a climate in which it was a settled conviction that the unborn human fetus at every stage of gestation was a human being entitled to protection of life

and, hence, a climate in which absolutely no conflicting right having the character of a privacy right of a woman to abort was conceded to exist by any court or any legislature, State or Federal, in this country or in any Western nation.

I think it well known that these three claims are fully supported by at least one version of the history of antiabortion legislation. It is the version of history which I call the standard history.

The standard history begins with the origins of our civilization in the Judeo-Christian moral tradition, recognizes commitment to protection of fetal life and condemnation of abortion as distinguishing characteristics of that tradition. It notes the passage of these moral attitudes into canon law and into the civil laws of medieval Christendom.

Standard history observes that the extent of the civil protection of fetal life was limted by evidentiary problems stemming from ignorance of reproductive biology.

The rather elastic and subjective test of quickening had to serve both as the indicator of pregnancy and as the indicator of human life in the child. Hence the great project of Western man to protect unborn life through the criminal prosecution of abortion, though never abandoned in principle, was doomed to be thwarted often in practice until better science could equip the law with better arms. That was in the impasse in English common law which the early decades of our own country's history inherited.

Standard history then explores the several medical advances which began in the last decades of the 17th century, which undermined the importance of the quickening test and which eventually established the existence of a distinct being from conception through such discoveries as that of the ovum in 1827.

Standard history continues that as the new knowledge disseminated among American physicians and through them to the general public, the legislatures of the several States were galvanized to pass tougher antiabortion laws.

No less that 30 States and territories passed such laws in the years between 1854 and 1876. The general characteristic of those laws was to drop the quickening distinction.

In other words, the same States which ratified the 14th amendment were busy passing antiabortion bills explicitly designed to protect human beings in their fetal right to life.

The congressional sponsors of the 14th amendment explicitly stated that it applied to "any human being" and to every member of the human race. Therefore, to hold or to deem that the unborn at every stage of gestation are among those protected by the 14th amendment from State action depriving them of life without due process of law is at least plausible on the historical grounds appropriate to legal interpretation.

Whereas, to hold with the Blackmun court, that the 14th amendment not only must not include the unborn but even creates a privacy right to abort them in the teeth of all State statutes contemporary with that amendment, is historically absurd.

Thus far, the standard history. I believe that if the standard history holds up, the three claims necessary and sufficient to establish the historical appropriateness of S. 158 also hold up.

What we need to do, however, is to evaluate a challenge to that standard history, and the challenge takes the form of a revisionist history.

The revisionist picture largely ignores moral and canonical traditions. It holds that certain 14th century precedents in English common law established in fact a woman's liberty to abort at least in the early months of pregnancy.

American women inherited and enjoyed this common law right until it was taken away from them in the last third of the 19th century by some anomalous set of circumstances. What the anomalous circumstances were differs from revisionist to revisionist.

According to some, what triggered the end of the liberty was a rising incidence of abortion-related maternal deaths. So the original and controlling motivation for antiabortion legislation was State concern to protect women's health.

According to another school of revisionism, the antiabortion statutes of the 1860's to 1880's arose out of a combination of nativist depopulation scare with the AMA's struggle to consolidate its power over American medical practice.

Both forms of revisionism challenge the standard history in two ways: first, by replacing the protection of unborn life with other, more transient, motives for the rise of American abortion statutes; and, second, by positing a primordial common law liberty of abortion, which the Supreme Court could plausibly reinvigorate when the transient motives lost their point.

I shall now argue that the revisionist challenge, although it offers some interesting sidelights, fails to dislodge the standard history.

I begin with the contention that State concern to protect maternal health rather than to protect unborn life was the original and controlling motive for antiabortion statutes. The contention is based primarily on a section of the New York revised statutes of 1829 and on an 1858 New Jersey decision, *State* v. *Murphy*.

As a matter of fact, apart from those two, the contention has no basis whatsoever. Even in those, it has no basis.

New York law of 1829 had two antiabortion sections. The first concerned abortion attempted on any woman pregnant with a "quick" child and provided that such action was second degree manslaughter in case either the child or the mother died. The intent to protect fetal life was already clear.

It becomes clearer in the light of the nature of the exception clause. It said that: "unless the same shall have been necessary to preserve the life of such a mother or shall have been advised by two physicians to be necessary for such a purpose." That is a stringent clause. Not appearance of necessity, not advice of physicians for some other purpose, not appearance of necessity for life, the only exception was for objective necessity to avoid the death of the mother.

Had maternal health been the primary issue, the exception would surely have been made for some reasonable appearance or supposition of necessity.

The second antiabortion section in this 1829 law of New York provided a jail term and fine for all other abortional acts—that is, those before quickening—whether successful or not. It is this sec-

tion on which revisionists primarily seize because it is thought to resemble a kind of poison control law.

But this section also carries an exception clause, and it is the same kind of stringent exception clause as found in the previous section. If, despite the fact that the fetus was unquickened and therefore allegedly had no common law standing, his offering an apperance of danger to this mother's life was not deemed sufficient grounds for an exception under this act, then the section as a whole can hardly be interpreted to have maternal health as its primary concern.

I will skip my discussion of *New Jersey State* v. *Murphy*. I will also skip the discussion of State statutes and State court decisions which bear on their face evidence of intention to protect unborn life in these mid-19th century abortion statues.

I want to pass the contention that the AMA promoted antiabortion legislation on its own professional interest as a means of eliminating its competition.

The public reasons published all over the country from the 1840's to the 1870's for which the AMA advocated abortion legislation where clearly centered on the moral duty to stop the slaughter of unborn children. These reasons are frankly noted even in *Roe* v. *Wade*.

So the medical self-interest contention is merely a complement to the standard history, not a challenge to it, unless the revisionists wish to contend that the AMA's publicized reasons were hypocritical. This last contention is not, in fact, made.

So we have, at most, a situation in which sincere scientific and moral conviction coincided with self-interest, which is hardly a rare situation in any epoch.

But even this harmless coincidence cannot really be sustained by the historical record, given the logic of the AMA's alleged situation.

The regular physicians sought to consolidate power in the medical market, we are told, through the legislatures. Why? Well, because they were losing position and losing patients to the quacks, we are told. Why were they losing patients to the quack? Because they would not compete with them for the abortion business, we are told. But why could they not compete? To this question, there is no revisionist answer.

The only answer is the standard historical answer—that they could not compete because they believed it would be scientifically unwarranted and morally bankrupt to do so. At the bottom of the so-called self-interest of the AMA lay nothing but the very same moral principle which lay on the top of its public rhetoric.

Finally, I turn to the contention that a common law right to early abortion had existed some centuries prior to the recent era of abortion prescription.

The contention is quickly disposed of. It is based on mishandling by the revisionists of two 14th century cases, later cited by Coke. Both cases involved indictment of a man for causing an abortion. The first case is extremely confused. The outcome in the second case is clear—the indictment was dismissed: One, because of a defect in pleading; two, because it was impossible to prove that the man had actually killed the child. The case dates, I think, to 1348.

Revisionists conclude from this that abortion was not a crime in 14th century England, but the cases prove the contrary on their face. The second case was not dismissed on the ground that abortion was not a crime in common law but for other reasons. If abortion had not been a crime in common law, there would have been no indictment in the first place.

The distinction between the thing not being a crime and its being a crime for which hardly anyone is ever convicted is neither fine nor fuzzy. The difficulty, the rarity, indeed, the virtual nonexistence of successful prosecution for what is nevertheless a recognized crime does not create a liberty or a right to do that crime. Otherwise, there was until almost the day before yesterday a right to child and spouse abuse.

Revisionist talk of a common law right to abortion is therefore, historically untenable and conceptually disingenuous.

I will pass over other criticisms which I have of this attempt to project back into time something like what we now would speak of as a right to abortion. I conclude simply that the revisionist history of the rise of antiabortion legislation in the United States fails to refute or displace the standard history and that that history speaks loudly in favor of S. 158.

Thank you.

Senator EAST. Thank you, Professor Marshner.

[The prepared statement of Professor Marshner follows:]

## Prepared Statement of Professor William H. Marshner

The Human Life Bill (S. 158) will be historically appropriate legislation if three claims can be established: (1) that scientific evidence indicating a significant likelihood that actual human life exists from conception was known to physicians and state legislators from the middle decades of the 19th century forward; (2) that the passage of anti-abortion statutes by those legislators in those decades was significantly influenced and motivated by such evidence; and (3) that the medico-moral and legal climate in which the 14th amendment was ratified was therefore a climate in which it was a settled conviction that the unborn human foetus, at every stage of gestation, was a human being entitled to protection of life, and hence a climate in which absolutely no conflicting right having the character of a privacy right of a woman to abort was conceded to exist by any court or any legislature, state or federal, in this country or in any Western nation.

As is well known, these three claims are fully supported by what I shall call the "standard history" of anti-abortion legislation.[1] The standard history begins with the origins of our civilization in the Judaeo-Christian moral tradition. It recognizes a commitment to the protection of foetal life and a condemnation of abortion as distinguishing characteristics of that tradition, in deliberate and studied contrast to ancient pagan practices.[2] It notes the passage of these moral attitudes into canon law[3] and

---

[1]Extended presentations of the standard history include Robert M. Byrn, "An American Tragedy: The Supreme Court on Abortion," Fordham Law Review 41 (1973) 807-849); Germain Grisez, Abortion: The Myths, the Realities, and the Arguments (New York: Corpus, 1970) chapters 4 and 5; John T. Noonan, Jr., Contraception (Harvard, 1965) and "An Almost Absolute Value in History," in John T. Noonan, ed., The Morality of Abortion (Harvard, 1970) pp. 1-59; the same standard view is presented in innumerable judicial opinions cited in these works.

[2]Exodus 21:22 (LXX); Galatians 5:20; Didache 2:2; Clement of Alexandria, Paedagogus 2.10; Athenagoras, Embassy for the Christians 35; Tertullian, Apologeticum 1,15; Jerome, Epistle 22; Augustine, De nuptiis et concupiscentia 1.15.17; John Chrysostom, Homily 24 on the Epistle to the Romans; etc.

[3]Council of Ancyra, canon 21 (314 A.D.); Council of Elvira, canon 53 (305 A.D.); Gratian, Decretum 2.32.2.7 (= the canon Aliquando); Pope Gregory IX, Decretales 5.12.5 (= the canon Si aliquis) and 5.12.20 (= the canon Sicut ex).

into the civil laws of medieval Christendom.[4] The standard history observes that the severity of punishment in both sorts of law for the abortion offense depended on a philosophical distinction between the animated and pre-animated foetus, a distinction maintained in large part on the basis of inadequate biology.[5] This history further observes that the extent of civil protection of foetal life was limited by evidentiary problems stemming from the same ignorance of reproductive biology.[6] The rather elastic and subjective test of quickening (sensation of the child's movement in the womb) had to serve both as the indicator of pregnancy and as the indicator of the human life of the child.[7] Hence the great project of Western man to protect unborn life through the criminal prosecution of abortion, though never abandoned in principle, was doomed to be thwarted often in practice, until better science should equip the law with better arms. Such was the impasse in the English common law, during the centuries when these colonies were formed and achieved their independence.[8] The standard history then explores the several medical advances which, beginning in the last decades of the 17th century, first undermined the importance of "quickening" in the eyes of savants and then established the existence of a distinct living being from conception, through the discovery of the ovum in 1827 and other aspects of the fertilization process.[9] As the new knowledge disseminated among American physicians and, through them,

[4]Grisez cites provisions of the Visigothic code, Frankish law, and Anglo-Saxon law prior to the Norman conquest, op.cit., p. 186; the criminality of abortion in the English common law in the high Middle Ages is reflected in the well-known comments of Bracton and Fleta; see Byrn, op.cit., p. 816f.

[5]A full discussion of the Scholastic positions on animation and "formation," as well as the moral and canonical applications of these positions is found in the article, "Animation," in the Dictionnaire de Theologie Catholique I,2, s.v.

[6]Byrn, op.cit., pp. 817-827.

[7]Coke, Third Institute 50 (1644); William Blackstone, Commentaries 1 at *129-30, and 4 at *198; Byrn, loc.cit.

[8]The same impasse is reflected in an 1812 Massachusetts Supreme Court decision, Commonwealth v. Bangs, which remained influential until the 1850s.

[9]Fienus and Harvey had already made observations which cast doubt on the discontinuity alleged to occur at "quickening"; on the discovery of the ovum, see Byrn, op.cit., p. 825. In the United

(Continued)

among the general public in the 1850s and '60s, the legislatures of the several states were galvanized to pass tougher anti-abortion laws, which protected the foetus at every stage of gestation.[10] No less than 30 states and territories passed such laws in the years between 1854 and 1876.[11] In other words, the same states which ratified the 14th amendment were busy passing anti-abortion bills explicitly designed to protect human beings in their foetal right to life. The Congressional sponsors of the 14th amendment explicitly stated that it applied to "any human being"[12] and to every member of the human race.[13] Therefore to hold, or to deem, that the unborn, at every stage of gestation, are among those protected by the 14th amendment from state action depriving them of life without due process of law, is eminently plausible on historical grounds.[14] And to hold, with the Blackmun Court, that the 14th amendment not only must not include the unborn but even creates a privacy right to abort them, in the teeth of all state statutes contemporary with the amendment, is historically absurd.[15] Thus far the standard history.

As I have mentioned, so long as the standard history holds up, the three claims necessary and sufficient to establish the historical appropriateness of S. 158 also hold up. The purpose of the present

(Continued)

States, the accumulating medical evidence against the quickening test was effectively presented by John B. Beck, "Infanticide," in T. R. Beck, ed., Elements of Medical Jurisprudence, 5th edition (Albany, 1835). Thirty years later, a more complete case was made in the seminal works of the Harvard medical professor, Horatio R. Storer. In 1868 Storer collaborated with F. F. Heard to produce the classic treatise, Criminal Abortion: Its Nature, Its Evidence, and Its Law (Boston: Little, Brown & Co.).

[10]The tighter protection was accomplished by dropping references to "quickening" and by wording the statutes in such a way that, in most cases, pregnancy did not have to be proved; attempted abortion or abortifacient action was itself the crime. As to determining what was abortifacient, the progress of the law was helped, paradoxically, by the commercial standardization of abortive pills, potions and procedures in the 1840s.

[11]A detailed survey of these statutes is given in James C. Mohr, Abortion in America (Oxford, 1978), chapters 5 and 8.

[12]Rep. John A. Bingham, Cong. Globe, 39th Congress, 1st session (1866), p. 1089.

[13]Sen. Jacob Howard, ibid., p. 2766.

[14]Grisez, op.cit., pp. 410-423; Byrn, op.cit., pp. 835-9.

[15]Byrn, loc.cit.

testimony, therefore, is to evaluate a challenge to the standard history.

The challenge takes the form of a revisionist history of anti-abortion legislation.[16] The revisionist picture largely ignores the moral and canonical traditions, concentrating instead on the criminal laws. It holds that certain 14th century precedents in English common law (subsequently misused by Coke) established in fact a woman's liberty to abort, at least in the early months of pregnancy.[17] American women inherited and enjoyed this common-law right, until it was taken away from them, in the last third of the 19th century, by an anomalous set of circumstances. Exactly what these circumstances were varies somewhat from revisionist to revisionist.

According to some, what triggered the end of the liberty was a rising incidence of abortion-related maternal deaths. The abortifacient pills and decoctions of the mid-19th century were often dangerous, especially in large doses, and the surgical procedures, innocent of antisepsis, would easily cause infection. Hence the original and controlling motivation for anti-abortion legislation was state concern to protect women's health.[18] With the emergence of safe, modern abortion techniques, this state interest collapses, of course, and along with it, the constitutionality of statutes abridging the common law right to terminate early pregnancy.

According to another school, what put an end to this right (temporarily) was a combination of two factors. First, in the 1840s abortion ceased to be a relatively uncommon thing (the resort of unmarried women desperate to preserve their reputations) and became

[16] The foremost revisionists are Cyril C. Means, Jr., "The Law of New York concerning Abortion and the Status of the Fetus, 1664-1968: A Case of Cessation of Constitutionality," New York Law Forum XIV, no. 3 (Fall, 1968) and "The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Rise from the Nineteenth Century Legislative Ashes of a Fourteenth Century Common Law Liberty?" ibid. XVII (1971); James C. Mohr, Abortion in America, cited above, note 11; and of course Chief Justice Balckmun himself, Roe v. Wade in United States Reports, vol. 410, pp. 113ff.

[17] Means, "The Phoenix," p. 335; cited with approval in Roe v. Wade, p. 135. Mohr seems to agree, speaking passim of early abortion as a "common law right." E.g., in the context of American abortion statutes before 1840, Mohr observes: "the right to attempt an abortion prior to quickening, though challenged in a few states, remained essentially intact. . ." op.cit., p. 119.

[18] Thus Means, "The Law of New York," and Roe v. Wade, p. 151.

instead a common way for middle- and upper-class Protestant housewives to control their family size.[19] This sudden upsurge in feminine demand met with an equal upsurge of medical supply, but -- and here was the rub -- the supply did not come from the nation's regular physicians. These men, the graduates of reputable medical schools, bound by the Hippocratic Oath and influenced by the mounting scientific evidence against quickening, refused to prescribe abortifacients as such and so were losing a steady stream of patients (not to mention a lucrative source of income) to "irregular" physicians or quacks.[20] Now enters the second factor. These "irregulars" (eclectics, botanics, homoeopaths and charlatans) could not be put out of business by licensing restrictions, because licensing did not exist in the laissez-faire medical market of mid-century America. Moreover, the high standing of the "regulars" among learned folk did not extend to the masses. In the popular mind, there was little to choose between regulars and irregulars because, frankly, until the discovery of the connexion between disease and bacteria in the 1860s, the regulars could cure little more than the quacks.[21] Therefore, in order to defend their position in society, the regular physicians espoused the anti-abortion cause as the best way of putting their competition out of business. Soon after the founding of the AMA in 1847, the regulars began in earnest to lobby the state legislatures, often using the nativist argument that abortion was depleting the ranks of the old, Anglo-Protestant stock.[22] Hence, according to this school of revisionism, the anti-abortion statutes of the 1860s to '80s arose out of a combination of nativist depopulation scare with the AMA's struggle to consolidate its power over American medical practice.[23] Today, since the AMA has won its struggle, and since the demand for abortion has risen again, everyone's interests are served by voiding the statutes, restoring the right to abort, and allowing the AMA to reap the profits.

---

[19] Mohr, op.cit., chapter 4.

[20] Ibid., chapters 3, 5, and 6.

[21] Ibid., pp. 32-34.

[22] Ibid., pp. 166-7.

[23] Mohr's thesis is most succinctly stated on p. 258.

Both forms of revisionism challenge the standard history (1) by replacing the protection of unborn life with other, more transient motives for the rise of American abortion statutes, and (2) by positing a primordial, common law liberty of abortion, which the Supreme Court could plausibly reinvigorate, when the transient motives lost their point. And since these transient motives have nothing to do with the aims of the 14th amendment, nor with the determination of when a human life begins, the revisionist history makes S. 158 appear to contain an idea new to serious legislative history, a kind of new foundation for anti-abortion policy.

I shall now argue that the revisionist challenge, although it offers a number of interesting and valuable sidelights on the 19th century struggle, fails to dislodge the standard history.

I begin with the contention that state concern to protect maternal health, rather than to protect unborn life, was the original and controlling motive for anti-abortion statutes. The contention is based primarily on a section of the New York Revised Statutes of 1829 and on an 1858 New Jersy decision, State v. Murphy. Indeed, apart from these two loci, the contention has no basis whatsoever.

The New York law of 1829 had two anti-abortion sections. The first (N.Y. Rev. Stat. (1829) pt. IV, ch. 1, tit. 2, section 9) concerned abortion attempted on "any woman pregnant with a quick child" and provided that such action was second degree manslaughter in case either the child or the mother died. The intent to protect foetal life is already clear, and it becomes clearer in the light of the exception clause: "unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose." The clause is quite stringent, requiring objective necessity or medical judgments of objective necessity of the procedure to avoid the mother's death. A mere threat to her health created no exception at all, no matter how many physicians perceived that threat. If maternal health had been the primary issue, the exception would surely have been made for a reasonable appearance or supposition of necessity, or simply for the advice of two physicians, regardless of whether they advised abortion for life or health-saving reasons. As Robert Byrn has commented, the stringent exception clause can only mean that "The

child's life was considered so precious, that in the view of the legislature, it could not be sacrificed to a lesser value than life itself."[24]

The second anti-abortion section (ibid. tit. 6, section 21) provided a jail term and/or a fine for all other abortional acts (i.e. before quickening), whether successful or not. It is this section on which the revisionists seize, because it is thought to resemble a poison-control law. But this section also carries an exception clause, and, astonishingly enough from the point of view of maternal health, it is the same stringent exception as in the section previously discussed. If, despite the fact that the foetus was unquickened and therefore had no common-law standing, his offering an appearance of danger to his mother's life was not deemed sufficient grounds for an exception, the section as a whole can hardly be interpreted to have maternal health as its primary concern.[25]

The New Jersey case, State v. Murphy, arose under an 1849 statute which made all attempted abortions criminal, made it a crime to offer advice or directions for performing an abortion, and provided penalties in case the woman died. Against revisionist interpretation, the point of the statute itself and of a famous comment on it in Murphy[26] is not primarily to address maternal health but to remedy a defect of the common law, whereby the guilt of the defendent depended wholly upon the relation of his act to the child, irrespective of the consequences to the mother. New Jersey wanted to add additional penalties in case of maternal death, so as to hang that around the abortionist's neck as well.

Finally, if we look at other states, or other dates, the maternal health contention is contradicted by abundant facts. In 1851, the Maine Supreme Court applauded the elimination of quickening from a statute: "There is a removal of the unsubstantial distinction, that it is no offense to procure an abortion, before the mother becomes sensible of the motion of the child, notwithstanding it is then capable

---

[24]Byrn, op.cit., p. 831.

[25]For further remarks, see Byrn, loc.cit.

[26]Andrew Dutcher, reporter, Reports of Cases Argued and Determined in the Supreme Court and the Court of Errors and Appeals of the State of New Jersey (Trenton, 1859), III, p. 114. The comment is quoted in Mohr, op.cit., p. 137.

of inheriting an estate; and immediately afterwards it is a great misdemeanor."[27] In 1881, the New Jersey Supreme Court wrote of the law already discussed: "This law was further extended March 26th, 1872 . . . to protect the life of the child also, and inflict the same punishment in case of its death, as if the mother should die."[28] In 1916 an Alabama court asked: "Does not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life?"[29] These statements, and there are many more like them, flatly contradict the revisionist claim of Roe v. Wade that "the few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo or foetus."[30]

I now pass on to the contention that the AMA promoted anti-abortion legislation in its own, professional interest, as a means of eliminating its competition.

I note first that the public reasons, published all over the country in the 1840s to '70s, for which the AMA advocated abortion legislation, were clearly, directly and unequivocally centered on the moral duty to stop the slaughter of unborn children, from conception forward. These reasons were frankly noted even in Roe v. Wade.[31]

Therefore the medical self-interest contention is merely a complement to the standard history, not a challenge to it, unless the revisionists also contend that the AMA's publicized reasons were hypocritical or insincerely professed. This last contention is not in fact made, however; it has even been denied by a prominent revisionist historian.[32] Therefore we have at most a situation

[27] Smith v. State, 33 Me. 48, 57 (1851); cited in Byrn, op.cit. p. 829.

[28] State v. Gedicke 43 N.J.L. 86, 90 (Sup. Ct. 1881); cited in Byrn, op.cit. p. 828

[29] Trent v. State, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916).

[30] Roe v. Wade, p. 151.

[31] Ibid. pp. 141-142.

[32] Mohr, op.cit., pp. 164-66.

in which sincere scientific and moral conviction coincided with self-interest, hardly a rare state of affairs in any epoch, and hardly a challenge to the standard history.

Secondly, I note that even this harmless coincidence cannot really be sustained, given the logic of the AMA's alleged situation. The regulars sought to consolidate power in the medical market, we are told, through the legislatures. Why? Because they were losing position and losing patients to the quacks, we are told. Why were they losing patients to the quacks? Because they couldn't compete with them for the abortion business, we are told. But why couldn't they compete? To this question there is no revisionist answer; there is only a standard-historical answer. They couldn't compete because the believed it would be scientifically unwarranted and morally bankrupt to do so. At the bottom of the so-called self-interest of the AMA lay nothing but the very same moral principle which lay on the top of its public rhetoric.

I turn, finally, to the contention that a common law right to early abortion had existed for some centuries prior to the "recent era" of abortion proscription.

On one level, this contention is quickly disposed of. It is based on a mishandling by the revisionists of certain 14th century cases, later cited by Coke. Both cases involved indictment of a man for causing an abortion; the outcome of the first case, and even the nature of the surviving report of it, are confused and controversial; the outcome of the second case is clear: the indictment was dismissed (a) because of a defect in pleading and (b) because it was impossible to prove that the man had actually killed the child.[33] Revisionists conclude the abortion was not a crime in 14th century England. But the cases prove the contrary on their face. The second case was not dismissed on the ground that abortion was not a common law crime, but for other reasons. Transparently, if abortion had not been a common law crime, there would have been no indictment in the first place.[34] The distinction between a thing's not being a crime and its being a crime for which

---

[33] Means, "The Phoenix," pp. 336-341; Byrn, op.cit., pp. 816ff.

[34] Byrn, loc.cit.

hardly anyone is ever convicted is neither fine nor fuzzy; it is straightforward and clear. For the difficulty, the rarity, indeed the virtual non-existence of successful prosecution for what is nevertheless a recognized crime does not create a liberty or a right to do that crime. Else there was, until almost the day before yesterday, a right to child and spouse abuse. Revisionist talk of a common law "right" to abortion is historically untenable and conceptually disingenuous.

More deeply, however, what flaws the celebration of a long-lost right is its ahistoricality, where ideas and beliefs are concerned. Talk of a pre-scientific right to abortion takes a modern term, 'abortion,' which means the intentional termination of pregnancy, indeed, the intentional expulsion of a living fetus, and projects that term back into a time when what was often happening was no more than the de facto termination of pregnancy by some intentional act, a time when women did not even know they were pregnant, when they took potions to "release stopped menses," on the advice of physicians who distinguished sharply between that therapeutic intent and the intent to abort, a time when the unborn child was not even known to be a living entity before the fifth month, so that our distinction between abortion and contraception was very imperfectly understood.

Above all, the revisionist picture leaves out of focus the genuine problem of the law in its relation to scientific progress. We now know what no farmer knew twenty years ago about the effects of DDT. Would we hail a Supreme Court decision striking down all federal and state measures banning the use of DDT? Would we hail it as a restoration of a farmers "historic common law right" to use the pesticide of his choice?

Conclusion: the revisionist history of the rise of anti-abortion legislation in the U.S. fails to refute or displace the standard history, and that history speaks loudly in favor of S. 158.

Senator EAST. Professor Rosenblum?

## STATEMENT OF PROF. VICTOR ROSENBLUM, NORTHWESTERN UNIVERSITY, CHICAGO, ILL.

Mr. ROSENBLUM. Mr. Chairman, I would like at the outset to express my appreciation for the opportunity to appear before this Subcommittee on the Separation of Powers.

Almost 25 years ago, my late mentor and colleague, Peter Odegard and I prepared materials for the Fund for Adult Education of the Separation of Powers in the American System of Government."

One of the statements we made in our concluding essay remained a cornerstone of my own beliefs. We said at the time: "The strength and stability of the American Government depend upon the three powers: President, Congress, and Court, moving in concert to realize the great ends set forth in the preamble to the Constitution."

Certainly, the concert is not without its discordant notes, but the strength of the whole system may be said to depend upon the tensions arising from the potential tug of war among the constitutent parts.

Thrust and counterthrust, check and balance, power versus power, ambition against ambition, and an appropriate sense of restraint on proper occasions—these are not only safeguards of liberty but sources of energy in a system that strives for more perfect union and the blessings of liberty.

The discussion today is in large part a consequence of the failure of the Supreme Court to exercise appropriate restraint in 1973. The Justices donned legislative garb in ruling that States violate the due process clasue of the 14th amendment insofar as they controvert the right to privacy through State laws protecting the life of the child in the womb.

Restraint would have led Justice Blackmun who wrote for the majority to leave the crucial issue of regulation of aboriton to the traditional regulating powers of each State.

Far from providing rational answers to difficult questions, the Supreme Court's legislation through the *Roe* v. *Doe* decisions of 1973 simply abolished protection for what even they had termed potential life. And, as numerous scholars have pointed out, they avoided or misinterpreted the history of protection of the unborn.

What is especially interesting to me as an occasional torts teacher is that tort law has been far more supportive of the personhood of the child in the womb than the Supreme Court's 1973 rulings on abortion.

As the late Dean Prosser pointed out in his classic treatise on torts: "Judicial decisions have changed dramatically regarding recovery by or on behalf of the child when a pregnant woman is injured and the fetus suffers injury as a consequence."

Thus, Prosser's fourth edition, which was published in 1971, summarized and reiterated the devastating criticism heaped by major legal writers on the old rule of judicial denials of recovery to the child.

Said Prosser:

> All writers who have discussed the problem have joined in condemning the old rule as well as in maintaining that the unborn child in the path of the automobile is as much a person in the street as the mother.

And in urging that recovery should be allowed upon proper proof.

In an important recent review of the law of tortious prenatal death, Prof. David Kader of the University of Arizona noted that in *Roe* v. *Wade* the Supreme Court discussed prenatal death recovery under State law as support for its assessment that the fetus does not warrant recognition as a person.

Professor Kader commented in this article of 1980 that:

> The discussion by the Supreme Court was perfunctory and, unfortunately, largely inaccurate and should not be relied upon as the correct view of the law at the time of *Roe* v. *Wade*."

For many centuries, the predominant scientific understanding was similar to that of Aristotle who identified life with the animation of a formed fetus. Partly for this reason, by the middle of the 17th century the beginning of actual individual human life was equated with movement or quickening, when the mother first felt the unborn child move in her womb. Thus, the English common law established criminal penalties for abortion after quickening.

We now know that the child actually moves long before the mother feels quickening, but our ancestors had to judge by the best information available to them at the time.

Only in the second quarter of the 19th century did biological research advance to the extent of understanding the actual mechanism of human reproduction and of what truly comprised the onset of gestational development.

The 19th century saw a gradual but profoundly influential revolution in the scientific understanding of the beginning of individual mammalian life. It was the new reserach finding which persuaded doctors that the old quickening distinction embodied in the common law and some statutory law was unscientific and indefensible.

My distinguished fellow academician, Professor Mohr, has made important scholarly contributions to the history of abortion with his comprehensive study of the activity and influence of 19th century physicians in reforming the abortion laws State-by-State to extend legal protection to the unborn.

Dr. Mohr identifies the period of 1860 to 1880 as the one in which a "physician's campaign against abortion produced the most important burst of antiabortion legislation in the Nation's history."

In that era, Professor Mohr reports, 40 antiabortion statutes of various kinds were enacted by States and territories. Of these, 13 outlawed abortion for the first time, and 21 revised old antiabortion laws by making them more stringent.

Professor Mohr's work is, indeed, of recognized professional distinction. I must nonetheless respectfully dissent from at least two dimensions: one of omission, the other of commission.

Dr. Mohr related the activities and arguments of the physicians and medical societies who fought for the unborn. But he did not acknowledge the background of new biological research and discovery which convinced these doctors that early abortion takes the lives of human beings.

In fact, there was a direct cause-effect relationship between the scientific discoveries and the physicians' and legislators' responses.

Dr. Mohr's omission of this scientific motive leads to a rather strained hypothesis—that the movement was a product of medical

chauvinsim, a vehicle by which the so-called regular physician could drive midwives and other rivals out of business.

It is clear from Professor Mohr's book that the campaign the doctors articulated in striving to persuade State legislatures was geared to the conviction that abortion kills human life before as well as after quickening. Whatever subjective motives may be postulated for the physicians, the life-protective motive of the legislatures is clear.

The climate of opinion and the nature of State laws at this time—that is, at the time of the adoption of the 14th amendment—is significant because it was in 1866 that the 14th amendment was proposed by Congress and in 1868 that it was declared ratified. Therefore, his chapter on 1860 to 1880 is particularly significant.

The contemporaneous attitude of the State legislatures and the public is of relevance to the understanding of the framers and ratifiers of the 14th amendment with regard to whether the unborn were to be included as persons protected by it.

It is important, once again, to remember the intent of the 14th amendment. It was enacted after the Civil War so as forever to enshrine in the Constitution the principle of human equality under law.

Blacks had been excluded from equality under the domestic institution of slavery, specifically justified by the Supreme Court in the infamous *Dred Scott* decision.

The spirit of the amendment requires that members of the human species before birth be acknowledged by the law. It does not postulate the existence of a class of individual human beings who may be disposed of by other human beings at will.

Recognition of a right to cause the death of any member of the species, including the human fetus, runs contrary to the expansive conception of humanity that motivated those who sponsored the 14th amendment.

Since the 14th amendment with its broad protection of the lives of all persons was ratified by State legislatures while these very same legislatures, persuaded by newly discovered scientific and medical evidence, were extending the protection of the criminal law to encompass all the unborn from the time of conception or fertilization, it is a fair assumption that the unborn were not excluded from those persons covered by the amendment.

Some might argue that because the framers did not say explicitly that the unborn were included that therefore the framers and ratifiers of the 14th amendment could not possibly have deemed the unborn to be persons under it.

If such there still may be who make that argument, they might well compete for the Roger B. Taney Award for Documentary Interpretation for theirs is precisely the method of discredited argumentation used by Chief Justice Taney in 1857 to get around the plain language of the Declaration of Independence and conclude that it in no way required or implied citizenship for black people.

Justice Taney had said: "The language of the Declaration of Independence says: 'We hold these truths to be self-evident: that all men are created equal * * *'

"The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument

at this day, would be so understood. But," said Taney, "it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this Declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation."

Justice McLean in his dissent in the case made much more sense, and that is the accredited and accepted interpretation of our time.

Justice McLean said: "I prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings, rather than to look behind that period, into a traffic which is now declared to be piracy, and punished with death by Christian nations.

"While I admit," said McLean, "the Government was not made especially for the colored race, yet many of them were citizens of the New England States and exercised the right to suffrage when the Constitution was adopted, and it was not doubted by any intelligent person that its tendencies would greatly ameliorate their condition."

Justice McLean rightly recognized that the enunciation of great principles in fundamental documents is often designed to represent aspirations rather than previous practices.

It is an affront to the framers as well as to the meaning of their language to reduce the aspirations to the level of previous practice instead of raising future practice to the level of the aspirations.

Chief Justice Taney assumed that the framers of the Nation's fundamental documents could not have hoped thereby to make tomorrow more ethical and moral than the practices of yesterday and today.

Not only did this denigrate the conscience and aspiration of those who, like Thomas Jefferson, saw slavery as evil, but it ruled as a constitutional absolute that even plain language cannot transcend the previous conduct of its author.

I believe we constitutionally can and should interpret language plainly and, as in New Year's resolutions, strive to do what we think right in the future rather than perpetuate the failings of the past.

I mentioned earlier that despite Professor Mohr's impressive scholarship and very important contribution to our understanding of the history of abortion in America I had a bone of commission as well as of omission to pick with him.

The bone of commission is this: Dr. Mohr views the abortion prohibition legislation in the 19th century as an anomaly against a background of leniency toward abortion both before and since. In this I believe he errs.

Abortion was almost universally condemned prior to the 19th century. Professor Mohr, like Professor Means before him, assumed that the criminal law was the only mechanism employed by the State to prohibit abortion.

But an essay by my friends, Dennis Horan, the past chairman of the American Bar Association's Medicine and Law Committee, and Tom Marzen, in the forthcoming book, "New Perspectives on Human Abortion," demonstrates that this was not the case.

Both in Europe and in colonial America, legislatures prohibited abortion at any stage of gestation through their regulation of midwives. For example, New York City from 1716 required all midwives to take an oath not to abort those in their charge.

The significance of these laws is not too difficult to discern. Midwives attended women in pregnancy and childbirth. They performed most abortions as well. Regulations such as the 1716 law would therefore severely limit access to abortion services.

Indeed, since the 1716 law required anyone who assisted women in pregnancy and childbirth to be licensed and then to abide by the provisions forbidding abortion, it in effect proscribed abortion in a manner analogous to the statues enacted in the next century.

For centuries, the English common law of property has recognized the unborn child as an autonomous human being. To the argument that such a child was a nonentity a leading court replied:

> Let us see what this nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the statute of distributions. He may take by devise. He may be entitled under a change for raising portions. He may have an injunction; and he may have a guardian.

In short, Mr. Chairman, the physicians' crusade of the 19th century to extend the protection of the criminal law to cover the unborn from the moment of conception, which Professor Mohr so ably documents, was not, as he said, a period of interruption or deviation from the norm.

Rather, 19th century protection of the unborn was one of many chapters in human history demonstrating an ongoing and nearly universal concern for protection of unborn human life.

Above all, Mr. Chairman, I believe the evidence clearly demonstrates that the 14th amendment was intended to protect all human beings and that many of those who brought the amendment into being through ratification contemporaneously regarded the unborn, from conception, as human beings protectable by law.

Thank you.

Senator EAST. Thank you, Professor Rosenblum.

[The prepared statement, bibliography, and article submitted by Professor Rosenblum follow:]

## Prepared Statement of Professor Victor G. Rosenblum

My name is Victor G. Rosenblum. I have been a professor of law and political science at Northwestern University in Illinois for some 20 years. The affection I have for my school should not hold it accountable in any way for my opinions. I am here today testifying solely as a private individual. For purposes of identification I submit a brief biography. I also have a bibliography on the subject of my testimony, which I would appreciate being entered in the record, together with a 6-page article on "Abortion and Midwifery," by my colleagues in the law Dennis Horan and Tom Marzen, which I would appreciate being placed in the record in its entirety if that is possible.

I'd like at the outset to express my admiration for the concern of this Subcommittee with the nature and requirements of our system of separation of powers. Almost 25 years ago, my late mentor and colleague Peter Odegard and I prepared materials for the Fund for Adult Education which we called The Power to Govern: An Examination of the Separation of Powers in the American System of Government. One of the statements we made in our concluding essay remains a cornerstone of my own beliefs and provides a context for this testimony.

> As the stability of atoms depends upon a nice balance of protons and electrons moving in their appointed orbits, so the strength and stability of the American govenrment depends upon the three powers--President, Congress, and Court--moving in concert to realize the great ends set forth in the Preamble to the Constitution. Certainly the concert is not without its discordant notes. But the strength of the whole system may be said to depend upon the tensions arising from the potential tug of war among the constituent parts. Thrust and counter-thrust, check and balance, power versus power, ambition against ambition, and an appropriate sense of restraint on proper occasions; these are not only safeguards of liberty, but sources of energy in a system that strives for 'more perfect union' and 'the blessings of liberty.'[1]

Note.--Footnotes appear at end of prepared statement.

The discussion today is in large part a consequence of the failure of the Supreme Court to exercise appropriate restraint in 1973. The Justices donned legislative garb in ruling that states violate the due process clause of the Fourteenth Amendment insofar as they controvert the right to privacy through state laws protecting the life of the child in the womb. Restraint would have led Justice Blackmun, who wrote for the majority, to leave the crucial issue of regulation of abortion to the traditional legislative powers of each state. Such restraint was especially warranted in light of the court's own proclamation that "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[2]

If the majority of the Court thought it inappropriate to speculate on the difficult question of when life begins, how could they morally, ethically, or constitutionally authorize what, even from their vantage point, could be the demise of life? If, as a legal matter, the majority believed that life could begin before the third trimester, how could the same justices who had properly placed the most stringent of constitutional restrictions on the death penalty for criminals place a new judicial seal of approval on the destruction of life of innocents for reasons of convenience or caprice? Far from providing rational answers to difficult questions, the Supreme Court's legislation through the Roe and Doe decisions simply abolished protection for what even they had termed "potential life," and, as numerous scholars have pointed out, avoided or misinterpreted the history of protection of the unborn.[3]

What is especially interesting to me as a teacher of torts for the past decade is that tort law has been far more supportive of the personhood of the child in the womb than the Supreme Court's rulings on abortion.

As the late Dean Prosser pointed out in his classic treatise on torts, judicial decisions have changed dramatically regarding recovery by or on behalf of the child when a pregnant woman is injured and the fetus suffers injury as a consequence. The denial of recovery to the child in cases prior to 1946, according to Prosser, was generally based on the proposition that the defendant could not be placed under a duty to a person not yet born at the time of the injury.[4/]

Prosser's fourth edition published in 1971, summarized and reiterated the devastating criticism heaped by major legal writers on judicial denials of recovery to the child. Said Prosser, "All writers who have discussed the problem have joined in condemning the old rule as well as in maintaining that the unborn child in the path of the automobile is as much a person in the street as the mother and in urging that recovery should be allowed upon proper proof."[5/] Invoking Herzog's textbook on Medical Jurisprudence written in 1931,[6/] and Malloy's textbook on Legal Anatomy and Surgery written in 1930,[7/] Prosser maintained that "Medical authority has recognized long since that the child is in existence from the moment of conception and for many purposes its existence is recognized by the law. The criminal law regards it as a separate entity, and the law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent."[8/]

While many jurisdictions held that the child must be born alive for an action for prenatal injury to be maintainable.

Prosser noted that a slight majority of the courts, having become more concerned with compensation for the distressing wrong in the loss of the child, were allowing recovery for prenatal injuries even where the child was stillborn.[9]

I cast my lot with Dr. Seuss' children's story, Horton Hears a Who which made lovingly clear the proposition that "a person is a person, no matter how small."[10] Courts in tort cases increasingly have been enhancing this conclusion by providing recovery by or on behalf of the child injured in the womb regardless of whether he or she is born alive or stillborn.

In an important recent review of the law of tortious prenatal death, Professor David Kader of the University of Arizona noted that in Roe v. Wade the Supreme Court discussed prenatal death recovery under state law as support for its assessment that the fetus does not warrant recognition as a person. Professor Kader commented that "the discussion [by the Supreme Court] was perfunctory, and unfortunately largely inaccurate and should not be relied upon as the correct view of the law at the time of Roe v. Wade".[11]

As of 1971, the publication date of Prosser's treatise, the division of case authority on the issue of whether a fetus was a person in accordance with requirements of wrongful death statutes was 14 - 11 favoring recovery for the wrongful death of a stillborn fetus. Kader added, "Had the Supreme Court done further research, it would have found that between 1971 and 1973, courts in five additional jurisdictions had considered the question, four more allowing recovery...."[12]

As to the Supreme Court's holding in Roe v. Wade that the term "person" as used in the Fourteenth Amendment "does not

include the unborn,"[13] Kader reminded us and the Court that the meaning the Justices have given to person for purposes of applying the Fourteenth Amendment "has embraced entities both within and without the human gene pool."[14]

In the words of John Noonan, condemnation of abortion has been "an almost absolute value in history."[15] That condemnation has resulted in the nearly universal protection of the unborn by the law from the point of their gestation at which the science of the day has indicated a living individual is first present.

For many centuries, the predominant scientific understanding was that of Aristotle, who identified life with the "animation" of a formed fetus.[16] For this reason, by the middle of the 17th century the beginning of actual individual human life was equated with movement or "quickening," when the mother first felt the unborn child move in her womb. Thus, the English common law established criminal penalties for abortion after quickening. This principle, first known to have been stated by the eminent commentator Lord Coke,[17] was recognized by Blackstone in 1769 in his famous Commentaries on the Laws of England: "Life...begins in contemplation of law as soon as an infant is able to stir in the mother's womb."[18]

We know now that the child actually moves long before the mother feels "quickening"--only when the child has grown large enough to crowd the uterus are his or her movements felt, and even then the relative thinness or obesity of the mother can affect when she first feels movement.[19] Quickening is thus quite irrelevant to the objective development or stage of gestation of the child, depending instead primarily on the subjective impressions of the mother. Our ancestors, however, had to judge by the best information available at the time, and so they protected unborn life under the criminal law from quickening

onward-when with their best, but comparatively primitive, scientific understanding they believed individual human life actually began.

Only in the second quarter of the nineteenth century did biological research advance to the extent of understanding the actual mechanism of human reproduction and of what truly comprised the onset of gestational development. The nineteenth century saw a gradual but profoundly influential revolution in the scientific understanding of the beginning of individual mammalian life. Although sperm had been discovered in 1677, the mammalian egg was not identified until 1827. The cell was first recognized as the structural unit of organisms in 1839, and the egg and sperm were recognized as cells in the next two decades.[20] These developments were brought to the attention of the American state legislatures and public by those professionals most familiar with their unfolding import--physicians. It was the new research findings which persuaded doctors that the old "quickening" distinction embodied in the common and some statutory law was unscientific and indefensible.[21]

My distinguished fellow academician, Professor James Mohr, has made important scholarly contributions to the history both of abortion and of the medical profession in America with his comprehensive and well-documented history of the activity and influence of 19th century physicians in reforming the abortion laws, state by state, to extend legal protection of the unborn to the time of conception or fertilization.[22]

Dr. Mohr identifies the period of 1860 to 1880 as the one in which a " physicians' campaign against abortion produced the most important burst of anti-abortion legislation in the nation's history."[23] In that era, reports Mohr, 40 anti-abortion

statutes of various kinds were enacted by states and territories. Of these, 13 outlawed abortion for the first time and 21 revised old anti-abortion laws by making them more stringent, generally by extending the protection of the unborn backwards from quickening to conception.[24]/

States acted throughout the period to restrict abortion: 1860 - Connecticut, Pennsylvania; 1861 - Colorado, Nevada; 1864 - Arizona, Idaho, Montana, Oregon; 1866-67 - Alabama; 1867 - Illinois, Ohio, Vermont, 1868 - Florida, Maryland; 1869 - Massachusetts, Wyoming; 1870 - Louisiana; 1872 - California, New Jersey; 1873 - Virginia, Michigan, Minnesota, Nebraska; 1875 - Arkansas; 1876 - Georgia.[25]/

The "physicians' campaign" chronicled by Mohr began about 1857.[26]/The American Medical Associaton, which was founded in 1847, actively opposed abortion.[27]/ According to Dr. Mohr, much of the impetus for the doctors' anti-abortion activism was grounded in the medical community's antipathy towards the "quickening doctrine," upon which much of the older anti-abortion laws were based. By 1857, the year the Supreme Court rendered the infamous Dred Scott decision,[28]/ it had come to be accepted within medicine that "quickening" is a scientifically and biologically insignificant point in pregnancy. In 1857, a New York State Medical Society resolution stated that "...from the first moment of conception, there is a living creature in process of development to full maturity...and...any... interruption to this living process always results in the destruction of life..."[29]/

Professor Mohr states that this physicians' crusade against both abortion in general and the quickening doctrine in particular was the key factor in persuading the states to pass tougher anti-abortion statutes. In almost every instance, the

new laws passed in the 1860-1880 directly or effectively abolished the "quickening doctrine."[30]

Mohr's study of the doctor-led abortion abolition movement of the nineteenth century effectively discredits the earlier theory, propounded by Cyril Means[31] and accepted by the Supreme Court in legalizing abortion[32] that the statutes prohibiting abortion enacted in the nineteenth century were passed in order to protect the mother from the clinical dangers of surgery rather than from solicitude for the unborn. His work confirms the historical conclusion of Sauer, who, like Dr. Mohr, is not identified with the pro-life cause, that:

> One can infer from an analysis of nineteenth-century laws that the safety of the foetus was a major concern of many State legislatures. A law which has maternal health as its sole or main consideration is not likely to be worded in such a way that the human status of the foetus is recognized, since such recognition would also require that the foetus be given human rights protected by law. In a law where the concern is with the woman's health, a woman is likely to be labelled as 'pregnant' rather than as 'being with child' or some other phrase which gives a human status to the foetus. Although a number of the initial State laws contained a distinction based on quickening which gave lower value to early foetal life, the large majority of State laws never made this distinction, and most of these laws referred to a woman as 'being with child' or some similar phrase which attributed a human status to the foetus. Furthermore, many of the States which initially had this distinction written into their law later dropped it and also referred to a woman at any period of her pregnancy as 'being with child'.[33]

Professor Mohr's work is of recognized professional distinction. I must nonetheless respectfully dissent from at least two dimensions, one of omission, the other of commission.

Dr. Mohr related the activites and arguments, and articulated the beliefs of the physicians and medical societies who fought for the unborn. But at no point in his book did he acknowledge the background of new biological research and discovery which convinced these doctors that early abortion takes the lives of

human beings. In fact, there was a direct cause-effect relationship between the scientific discoveries and the physicians' and legislators' responses.

Dr. Mohr did concede that physician opposition to the "quickening" doctrine was based on their belief in the "inherent difficulties of determining any point at which a steadily developing embryo becomes somehow more alive than it had been the moment before."[34] But he failed to note that the "quickening" doctrine was scientifically superseded only in the years immediately preceding the genesis of the aborton abolition drive.

An 1872 quotation from Dr. Hodge, one of the leaders of the abortion abolition movement, confirms the causal effect of the new scientific information. He wrote:

> If...the profession in former times, from the imperfect state of their physiological knowledge, had, in any degree, undervalued the importance of foetal life, they have fully redeemed their error and they now call upon the legislatures of our land...to stay the progress of this destructive evil of criminal abortion.[35]

Dr. Mohr's failure of omission of this scientific motive leads him to a quandry in trying to explain why, historically, the abortion abolition movement arose when it did. He therefore arrives at the rather strained hypothesis that the movement was a product of medical chauvinism, a vehicle by which the so-called "regular" physicians could drive midwives and other rivals out of business.

But regardless of whatever may have been the possible motivation behind the medical profession's efforts to see that expansively protective legislation was passed in 1860-1880, it is clear from Professor Mohr's book that the campaign the

doctors articulated in striving to persuade state legislatures was geared to the conviction that abortion kills human life before as well as after quickening. I believe it is appropriate, then, to say that the doctors persuaded legislators (1) that the child in the womb is a human being at all points in gestation, (2) that therefore all abortions kill human life, and (3) that therefore the quickening doctrine needed to be abolished in favor of a comprehensive abortion ban. Whatever subjective motives may be postulated for the physicians, the life-protective motive of the legislatures is clear.

In their "physicians' crusade," the abortion abolition activists encountered some apathy and a number of reports emphasizing the frequency of occurence of the evil they sought to combat. But there was no organized opposition--no group banded together to defend a "freedom" to abort. Sauer reports that "not one statement by any nineteenth-century commentator can be found which was in any way sympathetic to women desiring abortions".[36]

The climate of opinion and the nature of state laws at this time is significant because it was in 1866 that the Fourteenth Amendment was proposed by Congress and in 1868 that it was declared ratified.[37] The contemporaneous attitude of the state legislatures and public is of relevance to the understanding of the framers and ratifiers of the Fourteenth Amendment with regard to whether the unborn were to be included as "persons" protected by it.[38] It is a fair assumption that the Members of Congress were aware of the growing anti-abortion sentiment and did nothing to repudiate it.

It is important to remember the intent of the Fourteenth Amendment. It, as well as the Thirteenth and Fifteenth

Amendments, was enacted after the Civil War so as forever to enshrine in the Constitution the principle of human equality under law. Blacks had been excluded from equality under the "domestic institution" of slavery, specifically justified by the Supreme Court in (Dred) Scott v. Sanford.[39] Justices Douglas and Black have noted that in 1873, "Mr. Justice Miller in the Slaughter-House Cases, 16 Wall. 36, 71, adverted to events 'almost too recent to be called history' to show that the purpose of the Amendment was to protect human rights, primarily the rights of a race which had just won its freedom."[40] One class of individuals, biologically members of the human species, had been excluded from full membership in society. Congress and the states wanted to be sure that never happened again.

Thus, Congressman John Bingham, the House sponsor of the Fourteenth Amendment, stated that the Amendment was intended to be "universal" in its protection, and to apply to "any human being."[41] The rights bestowed by the Fourteenth Amendment were intended not only to "pertain to American citizenship but also to common humanity."[42]

The Senate sponsor of the Amendment, Senator Jacob Howard, emphasized that it applied to every member of the human race, giving "to the humblest, the poorest, the most despised of the race" the same legal rights as "the most powerful, the most wealthy, or the most haughty."[43]

The "spirit" of this Amendment demands that members of the human species before birth be acknowledged before the law; it does not postulate the existence of a class of individual human beings that may be disposed of by other human beings at will. Recognition of a right to cause the death of any member

of the species, including the human fetus, runs contrary to the expansive conception of humanity that motivated those who sponsored the Amendment.

Since the Fourteenth Amendment, with its broad protection of the lives of all persons, was ratified by state legislatures while these very same legislatures, persuaded by newly discovered scientific and medical evidence, were extending the protection of the criminal law to encompass all the unborn from the time of conception or fertilization, it is a fair assumption that the unborn were not understood to be excluded from those "persons" covered by the Amendment.

It is true, of course, that when the Fourteenth Amendment was ratified in 1868,[44] the success of the physicians' crusade was as yet not fully complete, and that there were a number of states whose criminal law, statutory or common, protected the unborn only after quickening. The Fourteenth Amendment could not of its own force alter that situation, since it prohibited* only state action, not private action, which deprived persons of their lives.[45]

But some might argue that the contemporaneous existence of such lack of protection, even though the trend was the other way, is evidence that the framers and ratifiers of the Fourteenth Amendment cannot be assumed to have deemed the unborn to be persons under it.

* If such there be, they deserve the Roger B. Taney Award for Documentary Interpretation, for their is precisely the method of argumentation used by the late Chief Justice to get around the plain language of the Declaration of Independence and conclude that it in no way implies the equality of Blacks:

> The language of the Declaration of Independence... proceeds to say: "We hold these truths to be self-evident: that all men are created equal...."
>
> The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day, would be so understood. But it is too clear for dispute, that the enslaved Africanrace were not intended to be included, and formed no part of the people who framed and adopted this Declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.[46]

To this reasoning, Justice McLean cogently replied in dissent:

> I prefer the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings, rather than to look behind that period, into a traffic which is now declared to be piracy, and punished with death by Christian nations. [He refers, of course, to the slave trade, whose existence at the adoption of the Declaration and Constitution Chief Justice Taney had adduced to declare that those documents did not imply Black equality.] I do not like to draw the sources of our domestic relations from so dark a ground. Our independence was a great epoch in the history of freedom; and while I admit the government was not made especially for the colored race, yet many of them were citizens of the New England States, and exercised the rights of sufferage when the Constitution was adopted, and it was not doubted by any intelligent person that its tendencies would greatly ameliorate their condition.
>
> Many of the States, on the adoption of the Constitution, or shortly afterward, took measures to abolish slavery within their respective jurisdictions; and it is a well-known fact that a belief was cherished by the leading men, South as well as North, that the institution of slavery would gradually decline, until it would become extinct.[47]

Justice McLean rightly recognized that the enunciation of great principles in fundamental documents is often designed to represent the aspirations rather than previous practices of the framers, and that it is an affront to the framers, as well as to the meaning of their language, to reduce the aspirations to the level of practice instead of raising future practice to the level of the aspirations. Chief Justice Taney assumed that the drafters of a nation's fundamental documents could not

have hoped thereby to make tommorrow more ethical and moral than the practice of yesterday and today. Taney maintained that the language of the Declaration of Independence, "all men are created equal," could not apply to blacks because many framers were slaveowners. Not only did this denigrate the conscience and aspiration of those who, like Thomas Jefferson, saw slavery as evil even while owning slaves, but it ruled as a constitutional absolute that even plain language cannot transcend the previous conduct of its authors as a key to their intent in writing it.

Surely, instead, we ought, as in New Year's Resolutions, to strive to do what we think right in the future rather than perpetuate the failings and inconsistencies of the past.

When the Fourteenth Amendment was adopted, the virtually undisputed trend of the age was toward the full protection of the unborn as fellow human beings, fellow people, from the time of conception, and the fact that the movement which created and fulfilled that trend did not achieve complete success until some years after its adoption must not blind us to the vision of the Amendment's ratifiers. That vision saw the protection of all humanity, and both logic and history include the unborn within that scope.

In considering whether the term,"person" as used in Sectional of the Fourteenth Amendment, was to include the unborn, you may hear some raise a question about the use of the same term in Section 2 of the Amendment, by which the number of Members of Congress in the House of Representatives for each state is to be "apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." It may be asked whether this requires, or has been regarded as requiring, that the unborn be counted in the census for the purpose of reapportionment. It is true that they have not been so counted. But as Robert Destro points out in an article in the California Law Review

> A thorough examination of the varied usages of the word [person] throughout the text of the Constitu-

> tion leaves little doubt that the meaning of the word is generally derived from the context in which it is used. ...A reading of the Constitution as a whole makes it clear that the only clauses in which context does not supply the meaning of "person" are the due process clauses of the fifth and fourteenth amendments [and the equal protection clause of the fourteenth].... Thus, even if it be assumed that most constitutional usage of "person" in [other] sections does not apply to the unborn, it does not follow that the same must hold true for purposes of due process. 48/

Destro goes on to point out that corporations are not counted in the census, yet they have been held to be "persons" under Section 1 of the Fourteenth Amendment.49/ Indeed, the Supreme Court's ruling in 1886 that a corporation was a 'person' required and received immunity from the plain meaning of language. Such immunity is not necessary to recognize that personhood for purposes of protecting life precedes birth. An entirely plausible construction of Section 1 of the 14th Amendment, contrary to the position of my learned opponents at this hearing, is that it allows for the existence of personhood before birth. As Justice Black pointed out in his dissent in Connecticut General Co.v. Johnson, in which he decried the extension of personhood to corporations, "The history of the Amendment proves that the people were told that its purpose was to protect weak and helpless human beings...."50/ Section 1 of the Fourteenth Amendment begins by declaring that certain persons are citizens. Birth or Naturalization and subjection to the jurisdiction of the U.S. are preconditions to federal and state citizenship. But whereas you must be born, and born in a particular geographic area, to acquire citizenship, the Amendment establishes no preconditions whatsoever to personhood. States are not prevented only from denying due process and equal protection to citizens; a state must not deny equal protection to "any person within its jurisdiction" and must not deny due process to "any person." In short, the Amendment recognizes that personhood is other than and prior to birth.

In the dissent from which I have quoted, Justice Black noted that, of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one percent invoked it in protection of the negro race, and more than fifty percent asked that its benefits be expanded to corporations."51/ If it was ironic that the Court had been more solicitous of the protection of cor-

porations than of the blacks whom it was designed to protect, it is equally ironic - and tragically so - that the modern Court has continued to expand the protection of corporations under the Fourteenth Amendment [52] while withdrawing its protection from prenatal human beings.

I mentioned earlier that, despite Professor Mohr's impressive scholarship and very important contribution to our understanding of the history of abortion in America, I had two bones to pick with him.

The bone of commission is this: Dr. Mohr views the abortion prohibition legislation in the nineteenth century as an anomaly against a background of leniency toward abortion both before and since. In this he errs; abortion was almost universally condemned prior to the nineteenth century. I have noted that following Aristotelian embryology, the theory of late animation was accepted by some philosophers. Under this theory, life come to the embryo at some time midway during its development.[53] English common law reflected this by punishing abortion after "quickening." Nonetheless, during many centuries when the distinction between civil and ecclesiastical law was slight or non-existent, both religion and society condemned abortion at any stage of embryological development. [54]

Professor Mohr, like Professor Means before him, assumed that the criminal law was the only mechanism employed by the state to prohibit abortion. But an essay by my friends Dennis Horan, Past Chairman of the American Bar Association's Medicine and Law Committee, and Thomas Marzen in the forthcoming book, New Perspectives on Human Abortion,[55] demonstrates that this was not the case. Both in Europe and in colonial America, legislatures prohibited abortion at any stage of gestation through their regulation of midwives.

On July 27, 1716, the Common Council of New York City enacted "A Law Regulating Mid Wives within the City of New York," 56/ which required all midwives to take a solemn oath before the mayor, the recorder, or an alderman to abide by its provisions before they might practice their profession. Defaults and failure to be so licensed were heavily fined; enforcement could be secured by the civil authorities or by private prosecution.57/ I quote:

> ITEM You Shall not Give and Counsel or Administer any Herb Medicine or Potion, or any other thing to any Woman being with Child whereby She Should Destroy or Miscarry of that she goeth withall before her time. 58/

This law remained in effect at least until the middle of 1776,59/ when the war between the British and the American colonies intervened. There is evidence that similar laws were enacted elsewhere in the colonies.60/ Such laws were not without precedent. Continental Europe possessed a municipal system of law regulating the practice of midwifery as early as 1452, 61/ and England had enacted similar regulations by 1512.62/ In every case, such regulations forbade the midwife to perform or induce abortion.

The significance of these laws is not too difficult to discern. Midwives attended women in pregnancy and childbirth; they performed most abortions as well. 63/ Regulations such as the 1716 law would therefore severely limit access to abortion services. Indeed, since the 1716 law required anyone who assisted women in pregnancy and childbirth to be licensed and then to abide by the provision forbidding abortion, it in effect proscribed abortion in a manner analogous to the statutes enacted in the next century.

This combination of common law protection of the unborn after quickening and pre-quickening protection through regu-

lation of midwives was consistent with the approach to the unborn in other areas of the law.

I have already talked about the protection of the unborn in tort and wrongful death law.

For centuries the English common law of property has recognized the unborn child as an automonous human being. It has thus reflected a basic psychological evaluation that in law, as in ordinary language, "child" includes the conceived but as yet unborn. In 1795 an English court interpreted the ordinary meaning of "children" in a will to include a child in the womb: "An infant en ventre sa mere, who by the course and order of nature is then living, comes clearly within the description of ' children living at the time of his decease.'64/ Thereafter another court rejected the contention that this was a mere fiction of construction : "Why should not children en ventre sa mere be considered generally as in existence? They are entitled to all the privileges of other persons."65/ To the argument that such a child was a non-entity that court replied:

> Let us see what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the statute of distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian.66/

The evidence cited by Professor Mohr that there was widespread availablity of abortifacient advice in many medical manuals in the early nineteenth century 67/ and of advertising for abortifacients in the 1840's through 1870's 68/ demonstrates only that the laws were flouted, not that they did not exist. Indeed, the resort to abortion, together with the gradual replace-

ment of midwives with physicians as the typical attendants to pregnancy, may be seen as providing another source of the impetus for the campaign to enshrine protection of the unborn from conception in the criminal law itself.

In short, Mr. Chairman, the physicians' crusade of the nineteenth century to extend the protection of the criminal law to cover the unborn from the moment of conception, which Professor Mohr so ably documents, was not, as he says, a "period of interruption, or deviation form the norm,"[69/] brought about to serve "the short-term interests of regular physicans in the face of an unprecedented crisis in the history of medical practice...and the shift in the socio-demographic role of abortion in America."[70/] Rather, nineteenth century protection of the unborn was one of many chapters in human history demonstrating an ongoing and nearly universal protection of unborn human life.

Above all, Mr. Chairman, the historical evidence clearly demonstrates that the Fourteenth Amendment was intended to protect all human beings, and that many of the state legislatures which brought the Amendment into being through ratification contemporaneously regarded the unborn, from conception, as human beings who ought to be protected by law.

Thank you.

FOOTNOTES

1. P. Odegard & V. Rosenblum, The Power to Govern: An Examination of the Separation of Powers in the American System of Government (1956).

2. Roe v. Wade, 410 U.S. 113, 159 (1973).

3. "Potential life:" Id. at 163. For criticism, see, e.g., A. Cox, The Role of the Supreme Court in Government 113 (1976); Strong, Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Process, 55 N. Car. L.

Rev. 1, 96-104 (1976); Epstein, Substantive Due Process By Any Other Name - the Abortion Cases, 1973 S.Ct. Rev. 159; J. Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L. J. 920 (1973).

4. W. Prosser, Handbook of the Law of Torts, 335-38 (4th ed. 1971).

5. Id.

6. Id.

7. Id.

8. Id.

9. Id.

10. Seuss (pseud.), Horton Hears a Who (1954).

11. D. Kader, The Law of Tortious Prenatal Death Since Roe v. Wade, 45 Mo. L. Rev. 639, 652-53 (1980).

12. Id. at 654.

13. Roe v. Wade, 410 U.S. 113, 158 (1973).

14. Kader, op.cit. n. 11, at 656-57.

15. J. Noonan, Jr., An Almost Absolute Value in History, in The Morality of Abortion, Legal and Historical Perspective 1 (J. Noonan ed. 1970).

16. Artistotle, History of Animals, 7.3.583b.

17. Coke, The Third Part of the Institutes of the Law of England, ch. 7 (3d ed. 1660).

18. 1 Blackstone, Commentaries on the Laws of England 124 (1769).

19. D. Horan et al., The Legal Case for the Unborn Child, in Abortion and Social Justice 105,124(Hilgers & Horan ed. 1973).

20. L. Arey, Developmental Anatomy[:] A Textbook and Laboratory Manual of Embryology 45 (6th ed. 1954).

21. R. Sauer, Attitudes to Abortion in America, 1800 - 1973, 28 Population Studies 53, 58-59 (1974).

22. J. Mohr, Abortion in America [:] The Origins and Evolution of National Policy (1978).

23. Id. at 200.

24. Id.

25. Id. at 200-225.

26. Id. at 149.

27. Id. at 157.

28. Scott v. Sandford, 60 U.S. 691 (19 How. 393) (1857).

29. Mohr, op. cit. n. 22 at 216.

30. Id. at 224-25.

31. C. Means, The Law of New York Concerning Abortion and the Status of the Foetus 1644 - 1968: A Case of Cessation of Constitutionality, 14 N.Y. Law Forum 411 (1968).

32. Roe v. Wade, 410 U.S. 113, 151-52 (1973).

33. R. Sauer, op.cit. n.21 at 58.

34. Mohr, op. cit. n. 22 at 165.

35. H. Hodge, Foeticide or Criminal Abortion 5 (1872).

36. R. Sauer, op. cit. n. 21 at 56.

37. Congressional Research Service, Library of Congress, Constitution of the United States of America [:] Analysis and Interpretation 31n.6 (1973).

38. See Roe v. Wade, 410 U.S. 113, 175-77 (1973)(Rehnquist,J., dissenting).

39. Scott v. Sandford, 60 U.S. 691 (19 How. 393)(1857).

40. Wheeling Steel Corp. v. Glander, 337 U.S. 562, 577 (1949) (Douglas, J. dissenting)(joined by Black,J.).

41. Cong. Globe, 39th Cong., 1st Sess. 1089 (1866).

42. Cong. Globe, 40th Cong., 1st Sess. 514 (1868).

43. Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

44. Congressional Research Service, op. cit. n. 37.

45. Civil Rights Cases, 109 U.S. 3 (1883).

46. Scott v. Sandford, 60 U.S. 691, 702-703 (19 How. 393)(1857).

47. Id. at 755-56 (McLean, J., dissenting).

48. R. Destro, Abortion and the Constitution: The Need for a Life-Protective Amendment, 2 Human Life Rev. 30, 51 (1976).

49. Santa Clara County v. Southern Pacific Railroad Co., 118 U.S. 394, 396 (1886).

50. Connecticut General Company v. Johnson, 303 U.S. 37, 87 (1937).

51. Id. at 90.

52. See, e.g., First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)(holding corporations have a constitutionally protected right of free speech).

53. Means, op. cit. n. 31, at 411.

54. Noonan, op. cit. n.15.

55. D. Horan and T. Marzen, Abortion and Midwifery: A Footnote in Legal History, in New Perspectives on Human Abortion 199 (1981).

56. "Minutes of the Common Council of the City of New York" 3 (1712 - 1729).

57. Id. at 123.

58. Id. at 122.

59. See generally "Minutes of the Common Council of the City of New York" 3 (1712 - 1729).

60. D. Wertz & R. Wertz, Lying-In [:] A History of Childbirth in America 7 (1977).

61. J. Donnison, Midwives and Medical Men: A History of Inter-Professional Rivalries and Women's Rights 5 (1977).

62. Id. at 5-6.

63. J. Donegan, Women and Men Midwives : Medicine, Morality and Misogyny in Early America 22 (1978); Donnison, op. cit. n. 61 at 4; S. Arms, Immaculate Deception 17 (1975).

64. Doe v. Clarke, 2 H.Bl. 399, 126 Eng. Rep. 671 (1795).

65. Thelluson v. Woodford, 4 Ves. 227, 31 Eng. Rep. 117 (1798).

66. Id. at 322.

67. Mohr, op. cit. n. 22, at 6.

68. Id. at 47.

69. Id. at 250.

70. Id. at 259.

---

## Bibliography

### Selected Publications

"Administrative Law and the Regulatory Process" in Contemporary Public Administration, pp. 145–173, Thomas Vocino and Jack Rabin, editors [Harcourt, Brace & Jovanovich, 1981];

The Making of a Public Profession (with Frances Kahn Zemans) American Bar Foundation, 1981;

"On Integrating Empirical Realities into Administrative Law and Vice Versa," 32 Ad.L.Rev. 1 (1980) pp. 59–68;

Co-editor (with William R. Hazard) of "Education: Progress and Prospects," special edition of American Behavioral Scientist (Nov.–Dec. 1979);

"Schoolchildren Yes, Policemen No—Some Thoughts About the Supreme Court's Priorities Concerning the Right to a Hearing in Suspension and Removal Cases," 72 Nw.U.L.Rev. 146 (1977);

"The Administrative Law Judge in the Administrative Process: Interrelations of Case Law with Statutory and Pragmatic Factors in Determining ALJ Roles," in Recent Studies Relevant to the Hearings and Appeals Crisis, Subcommittee on Social Security of the Committee on Ways and Means, U.S. House of Rep. 94th Cong., 1st Sess. (Committee Print, Dec. 20, 1975) 171–245;

"Dealing with Federal Regulatory Agencies," Ch. V in Legal Issues for Post-secondary Education, American Ass'n of Community and Junior Colleges (1976);

"Dimensions of Purpose and Priority in Federal Regulation of Utilities," 14 Proceedings of the Iowa State U. Regulatory Conf. 12 (1975);

"Handling Citizen-Initiated Complaints: An Introductory Study of Federal Agency Procedures and Practices," 26 Ad.L.Rev. 1 (1974) 1–47; Reprinted in A Formula for Liberals, pp. 131–150 (Nellen Pub. Co., 1979);

"The Continuing Role of Courts in Allocating Common Property Resources," in The Governance of Common Property Resources," edited by Edwin T. Haefele (Johns Hopkins Univ. Press, 1974) 119–143;

"Of Beneficiaries and Compliance," in The Limits of Law: NOMOS XV (Lieber-Atherton, 1974) 256–267;

Constitutional Law: Political Roles of the Supreme Court, co-edited with A. Didrick Castberg (Dorsey Press, 1973);

"Legal Dimensions of Tenure" (Ch. 4) in Faculty Tenure (Report of the Commission on Academic Tenure in Higher Education) [Jossey-Bass, 1973];

"On Davis on Confining, Structuring, and Checking Administrative Discretion," 37 Law & Contemporary Problems (Winger 1972) 49-62;

"A Place for Social Science Along the Judiciary's Constitutional Law Frontier," 65 Nw.U.L.Rev. 455 (1971);

"Justiciability and Justice: Elements of Restraint and Indifference," 15 Cath.U.L.Rev. 141 (1966);

"Low Visibility Decision-Making by Administrative agencies—The Problem of Spectrum Allocation," 18 Ad.L.Rev. 19 (1965);

"Realities of Regulation," in Krislov and Musolf, The Politics of Regulation, pp. 247-254 (1964); "Regulation in Orbit: Administrative Aspects of the Communication Satellite Act of 1962," 58 Nw.U.L.Rev. 216 (1963);

"The Federal Communications Commission and Miami's Chanell 10" in The Use of Power, pp. 174-228 (A. Westin, ed.) [Harcourt, Brace 1962].

---

BIBLIOGRAPHY ON THE HISTORY OF EMBRYOLOGY

[To accompany testimony of Victor G. Rosenblum before Subcommittee on Separation of Powers, Senate Committee on the Judiciary, June 1, 1981.]

Arey, Developmental Anatomy [:] A Textbook and Laboratory Manual of Embryology 3-6 (1954).
Cole, Early Theories of Sexual Generation (1930).
Meyer, The Rise of Embryology (1939).
Needham, A History of Embryology (1934).
Nordenskiöld, History of Biology (1929).
Russell, The Interpretation of Development and Heredity (1930).

# New Perspectives on Human Abortion

EDITED BY

THOMAS W. HILGERS, M.D.

DENNIS J. HORAN

DAVID MALL

ALETHEIA BOOKS

UNIVERSITY PUBLICATIONS OF AMERICA, INC.

DENNIS J. HORAN and THOMAS J. MARZEN

# 15

# Abortion and Midwifery: A Footnote in Legal History*

Prior to the nineteenth century, reproductive and birth processes were matters between a woman and her midwife, not between a woman and her physician.[1] Yet, from early on, laws which governed midwifery prohibited performance of abortion. This circumstance has been neglected in the controversy which encompasses the history of abortion law, even though it is of some import, as we will attempt to show in this introduction to the subject. A legal system which regarded abortion to be in any sense a matter of right would not reasonably have denied the woman who wished to abort access to the profession which possessed the knowledge and expertise necessary to perform abortion, any more than our present law denies the woman who would procure abortion access to the medical profession.

On July 27, 1716, the Common Council of New York City enacted "A Law Regulating Mid Wives within the City of New York,"[2] which required all midwives to take a solemn oath before the mayor, the recorder, or an alderman to abide by its provisions before they might practice their profession. Defaults and failure to be so licensed were heavily fined; enforcement could be secured by the civil authorities or by private prosecution.[3] The law provided, in relevant part, as follows:

> ITEM You Shall not Give any Counsel or Administer any Herb Medicine or Potion, or any other thing to any Woman being with Child whereby She Should Destroy or Miscarry of that she goeth withall before her time.[4]

* The authors acknowledge the research assistance of Mary Spaulding, senior law student, Pepperdine University School of Law.

This law remained in effect at least until the middle of 1776,[5] when the war between the British and the American colonies intervened. Such laws were not without precedent. Continental Europe possessed a municipal system of law regulating the practice of midwifery as early as 1452,[6] and England had enacted similar regulations by 1512.[7] In every case, such regulations forbade the midwife to perform or induce abortion.

The significance of these laws is not too difficult to discern. Midwives attended women in pregnancy and childbirth; they performed most abortions as well.[8] Regulations such as the 1716 law would therefore severely limit access to abortion services. Indeed, since the 1716 law required anyone who assisted women in pregnancy and childbirth to be licensed and then to abide by the provision forbidding abortion, it in effect proscribed abortion in a manner analogous to the statutes enacted in the next century.

Commentators and, indeed, the Supreme Court have assumed that making abortion a common-law crime was the exclusive legal instrument employed to limit the practice of abortion prior to nineteenth century abortion legislation.[9] Thus, Cyril Means, Jr., stated in his extensive study of New York abortion law that only the common law had applied to abortion prior to January 1, 1830,[10] when the New York state legislature initiated the legislative process which culminated with passage of a statute in 1869 protecting fetal life throughout pregnancy.[11] The existence of the 1716 law demonstrates otherwise. Moreover, the 1716 law makes no reference to quickening, which was an evidentiary fact to be proven in a prosecution for the common-law crime of abortion;[12] on its face, the law was clearly directed toward protection of prenatal life, not preservation of maternal health.

The origin of the association of midwifery with abortion in the New York law predates even the earliest known European municipal regulation of midwives. As Juvenal observes while criticizing the practices of ancient Rome, "But you will never find expectant mothers in gold-embroidered beds. The midwife smothers the hope of life within them. That's her trade. . . ."[13] Physicians did not usually assist the woman in pregnancy until the rise, in the nineteenth century, of medicine based on systematic application of the scientific method,[14] an event which paralleled and generated the American anti-abortion legislation of that time.[15] Prior to this, midwives, who did attend pregnant women and with whom women would thus naturally confer about matters relating to pregnancy, would logically have possessed the expertise and knowledge necessary to induce or perform abortion.

The 1716 New York law was modeled on and is nearly identical to the English licensing regulation.[16] Two differences between them

illuminate the development of the law of abortion. Unlike many of the continental European midwife regulations and the New York law, the English regulation was administered by ecclesiastical authorities and canonical courts.[17] In addition to proscription of abortion, requirements that the midwife minister to women without regard to wealth and that the confidentiality of matters relating to their practice be maintained, and sundry other common requirements, the English regulation required the midwife to assure the baptism of the child and "not in anywise use or exercise any Manner of Witchcraft, Charm, [or] Sorcery invocation. . . ."[18]

The latter provisions of the English regulation which were not found in the New York law obviously reflected the particular concerns of ecclesiastical authorities. Midwives were obviously in the best position to assure baptism of an infant who might not survive. Moreover, there was a real or perceived association between midwifery and the practice of witchcraft.[19] Witchcraft, in turn, was associated with infanticide, child-stealing, and abortion.[20]

When the New York Common Council excluded the requirements to assure baptism and to forswear witchcraft in a law otherwise almost identical to the English regulation, a conscious judgment was evidently made that such restrictions were not appropriately enacted by a purely secular legislature. Nevertheless, the restriction on abortion practices was copied word for word from the English ecclesiastical model and passed into law. A secular interest in the protection of fetal life was thus asserted by the first known legislation regarding abortion to be enacted in what was to become the United States.

That ecclesiastical authorities continued to administer the midwife regulation in England was the source of some controversy. It was suggested at the time that the regulation had not been properly enforced and that civil authorities should assume the responsibility of assuring compliance.[21] But since the colonies lacked a system of canonical courts, there was no choice but to legislate midwife regulations into civil law when the need arose. Indeed, it appears that the New York law is simply the first example of American legislative authority assuming full jurisdiction over abortion, which, like many other areas of law, was a mixed canonical and common-law issue in England.[22] As with the testamentary disposition of personal property and matrimonial regulation—other areas originally within the jurisdiction of English canonical courts—it became necessary for American secular authority to assert power over matters considered vital to civil order and interests, as abortion was evidently perceived to be.

The development of abortion law in England appears to have followed a similar path. When the ecclesiastical courts declined and

their power to enforce weakened, England extended protection under secular law beyond quickening to encompass all of pregnancy.[23] To the extent that ecclesiastical authority could not, or did not, effectively serve the civil interest in the protection of the human being before birth, the state assumed the responsibility.

The existence and intent of the New York City law is simply one more example of the clear tendency of our law to seek the protection of the human being *in utero*. Prior to legislative aberrations of the past decades and the recent sudden discovery by the judiciary of a right of privacy which includes abortion, there has been no occasion in our legal history in which our law has loosened strictures on the destruction of human life before birth. To the contrary, the history of our abortion law amounted to nothing less than an unbroken sequence of attempts to limit the practice of abortion as it was perceived to occur under particular circumstances, and in light of advancing insight into the nature of fetal life.

The midwives of New York City who performed surreptitious abortions in spite of the oath required of them would have been surprised indeed to learn that their conduct would some day righteously be celebrated as an exercise of a fundamental right of privacy. The law enacted by the Common Council signified a singular lack of respect for any supposed right of a woman to practice feticide by means of the person most able to help: the midwife.[24] Further, the 1716 law obviously did not regard abortion as a matter encompassed by the "zone of privacy" it otherwise acknowledged on behalf of the pregnant woman by requiring that the midwife maintain the confidentiality of the relationship formed with the woman.[25]

In sum, the New York law demonstrates utter disregard for interests which the Supreme Court alleges vindicate a presumptive right to abortion. But if there is a small irony to be found here, it cannot compare to the stunning inversion created by use of the Fourteenth Amendment to dignify abortion as a constitutional right.[26] The same state legislatures of the mid-nineteenth century which enacted the Thirteenth and Fourteenth Amendments in order to abolish public and private discrimination based upon race also enacted many of the abortion laws which, a century later, the Supreme Court found inconsistent with the substantive right to abort it discovered hidden in the Fourteenth Amendment.[27] Yet there is no doubt that the *raison d'être* of these abortion laws—to prevent the "unwarrantable destruction of human life,"[28] as the "physicians' crusade"[29] responsible for their enactment characterized their intent—could hardly have been more consistent with the specific purpose of the post-Civil War Amendments: to preserve human beings from systematic oppression based on biological status. If

the members of the New York City Common Council of the eighteenth century would find the logic and premises of *Roe v. Wade* unsupportable, it appears that they would at least share the company of the physicians and legislators of the nineteenth century who were responsible for much of the abortion legislation found unconstitutional as a consequence of *Roe v. Wade.*

## NOTES

1. J. Guillimeau, *Childbirth, or the Happy Deliverie of Women* (London, 1612), pp. 79 ff.; J. Litoff, *American Midwives: 1860 to the Present* (Westport, Conn.: Greenwood Press, 1978), p. 5; R. Wertz and D. Wertz, *Lying-In: A History of Childbirth in America* (New York: Free Press, 1977).

2. "Minutes of the Common Council of the City of New York" 3 (1712-1729): 121. These papers are available through the archives of the New York City Council.

3. Ibid., p. 123. When the fine was not paid, the law provided for forfeiture and sale of chattels and, when the fine still remained unpaid, the offender was committed to the "Common Gaol of the Said City there to Remain without Bail or Mainprize for the Space of Thirty Days." Ibid.

4. Ibid., p. 122.

5. *See generally* "Minutes of the Common Council of the City of New York" (1675-1776).

6. J. Donnison, *Midwives and Medical Men: A History of Inter-Professional Rivalries and Women's Rights* (New York: Schocken Books, 1977), p. 5; T. Forbes, *The Midwife and the Witch* (New Haven: Yale, 1966), pp. 131 ff.

7. Ibid., pp. 5-6.

8. I. Flack, *Eternal Eve: The History of Gynaecology and Obstetrics* (Garden City, New York: Doubleday, 1951), p. 61; J. Donegan, *Women and Men Midwives: Medicine, Morality and Misogyny in Early America* (Westport, Conn.: Greenwood Press, 1978), p. 22; J. Donnison, op. cit., p. 4; S. Arms, *Immaculate Deception* (Boston: Houghton Mifflin Co., 1975), p. 17.

9. Roe v. Wade, 410 U.S. 113, 132-136 (1973).

10. Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality,* 14 NEW YORK LAW FORUM 441, 419 (1968).

11. N.Y. LAWS ch. 631, §§ 1, 2, at 1502 (1869). *See* Quay, *Justifiable Abortion—Medical and Legal Foundations* (pt. 2), 49 GEO. L.J. 395, 498-499 (1961).

12. 1 W. BLACKSTONE, COMMENTARIES * 123-130. *See also* Roe v. Wade, 410 U.S. 113, 135 n. 27 (1973), and the cases there cited.

13. Juvenal *Satire* 6, 2:592-600:

> sed iacet aurato uix ulla puerpera lecto
> tantum artes huius,
> tantum medicamina possunt, quae steriles facit
> atque homines in ventre necandos conducit. . . .

14. *See generally* the sources in note 1 above.

15. *See* J. Mohr, "The Physicians' Crusade Against Abortion, 1757-1880," in *Abortion in America*, ed. J. Mohr (New York: Oxford, 1978), pp. 147-170.

16. *See* J. Donnison, op. cit., pp. 229-231. *Compare* "Minutes of the Common Council of the City of New York," op. cit.

17. J. Donnison, op. cit., pp. 5-7, 229.

18. Ibid., p. 230.

19. T. Forbes, op. cit.

20. Ibid., especially pp. 126-130; H. Kramer and J. Sprenger, *Malleus Maleficarum*, trans. M. Summers, Dover ed. (New York: Dover, 1971), p. 66; H.C. Lea, *Materials Toward a History of Witchcraft* (New York: Yoseloff, 1957), 1:278. S. Arms, op. cit.

21. J. Donnison, op. cit., p. 15; P. Chamberlen, *A Voice in Rhama: or The Crie of Women and Children* (London, 1647).

22. *See* Means, op. cit., pp. 439-440 and the authorities there cited. *See generally* Basset, *Common Law and Canon Law*, 29 HASTINGS L.J. 1383 (1978); Breman, *The Religious Foundations of Western Law*, 29 CATH. U.L. REV. 490 (1975); Donahue, *Roman Canon Law in the Medieval English Church:* Stubbs vs. Maitland *Re-examined after 75 Years in Light of Some Records from Church Courts*, 72 MICH. L. REV. 647 (1974).

23. 43 Geo. 3, c. 58 (1803); 9 Geo. 4, c. 31, § 13 (1828); 7 Will. 4 & 1 Vict., c. 85, § 6 (1837). *See* Quay, op. cit., pp. 431-432.

24. *Compare* Roe v. Wade, 410 U.S. 113, 165-166 (1973).

25. *Compare* "Minutes of the Common Council of the City of New York," op. cit., pp. 121-123, *with* Roe v. Wade, 410 U.S. 113, 152-153 (1973).

26. Roe v. Wade, 410 U.S. 113, 153 (1973).

27. Id. at 175 n.1 (Rehnquist, J., dissenting).

28. Storer et al.: Report on Criminal Abortion. *Transactions of the American Medical Association* 12:75, 1859, *quoted in* J. Mohr, op. cit., p. 157.

29. J. Mohr, op. cit.

Senator EAST. Our time continues to crowd in on us. I will take just a very few minutes to clarify a little bit on this matter of historical perspective and then will turn it over to my good colleagues here so that we can come, I would hope, quite close to adjourning at 1 o'clock because of other commitments.

This adds a valuable dimension to this whole set of hearings, to get some historical perspective. Granted, one is frustrated with the amount of time that we can devote to it, at least in the public arena. But your statements will be part of the record, and so we can study them with greater care.

I would just try to get, in the very brief minutes that I have, Professor Degler, a little perspective on this—and I guess I am really directing my remarks to you and Professor Mohr. I have been familiar with your work, Professor Degler. You are a well-recognized historian.

I find you in somewhat of an awkward position as being a very narrow and legalistic interpreter of the Constitution when normally your historical work would have an infinitely broader, humane cast to it.

I do not wish to make any invidious implication here, but you sound like a very intense, strict constructionist on this 14th amendment problem.

Let me just suggest an idea I would like to consider. First, could we not say, on the basis of what these gentlemen are saying, that we have an evolving standard here because of increased medical understanding of the nature of the preborn?

The 14th amendment says "no person." Now, it could or it could not be that it was meant to apply to the unborn. But the point is that developing medical science would indicate that there is something prior to birth of human characteristic—personhood, if you will. This constitutes a medical determination of when life begins, and hence, because of that new medical understanding, one would include the unborn—the preborn, as has been put here—within the meaning of the due process clause of the 14th amendment.

I am not saying reasonable minds could not differ over that. Do not misunderstand me. But it does not sound to me like a particularly wretched concept that history evolves, knowledge evolves. It is a constitution we are expounding, as has been said so many times.

I do not find—and, again, you might say, as a man of conservative instinct—a great deal of agony constitutionally or otherwise in understanding, because of new knowledge, that we might have a differing conception of how a right might be applied in a particular context.

And I would even add—am I not correct?—that even in *Roe* v. *Wade* the majority is recognizing that on a viability test during the final trimester of pregnancy they could envision a State might determine that the unborn child was something to be protected.

Again, you and Dr. Mohr, it seems to me, invite us into a very rigid, legalistic world. Generally, I am not opposed to legalisms or constitutionalisms or strict construction, but at some point it is like every virtue—carried to an extreme, it might become a vice.

I wonder whether simply to preclude the option of the unborn being protected by the 14th amendment does not put us in a rigid

straitjacket. It strikes me that the Constitution then is not an evolving thing as it is in so many other areas where it might be applied; it is not capable of adapting to new policy, new understanding, new science, new knowledge, and so forth.

Am I communicating my point to you?

Dr. DEGLER. Yes. And I will say, I do not think I am taking a strict constructionist position here. I am taking, I think first, an historical position, which is to say that the 14th amendment, when it was framed, did not equate persons with fetuses or did not see a fetus as a person.

This is the question that I am really concerned with and what I think is quite radical about an attempt to equate a fetus with a person in the meaning of the 14th amendment, in that there are all kinds of complications the results of which we can hardly foretell, as I think some of the constitutional lawyers earlier this morning made clear.

In none of our laws up until now that opposed abortion have we ruled out the possibility of an abortion to save a mother's life, because we have always said in all of our State laws that if a fetus threatens a mother's life the fetus may have to be sacrificed.

As I understand the implications of this bill, that kind of distinction could not be made.

Senator EAST. Excuse me, but I would disagree with you on that. This bill, in returning the matter to the States within certain limitations, would not at all dictate that result.

For example, on the suggestion that it would imply that abortion was murder, no State prior to *Roe* v. *Wade* made abortion murder. The woman was never charged. It was the abortionist who was charged, and not with murder but with some sort of high level misdemeanor or felony.

So to conjure up a chamber of horrors about what State governments might do if allowed to work their way a little bit in this area I do not find warranted or justified.

This bill does not dictate what those States must or must not do in this area of abortion law. So when one says that this law would demand this or this law would demand that, I would not accept that argument. I did not mean to interrupt you, but I would not accept that as a proper understanding of what this bill would do. It does not dictate that.

Dr. DEGLER. It defines a "person" under the 14th amendment, though.

Senator EAST. Yes.

Dr. DEGLER. It means that a fetus is now equivalent to the mother.

Senator EAST. For the purpose of the due process clause right to life, yes. But it would certainly recognize that State law would have great flexibility if the State had an overriding interest in coming down on another side on this issue.

And, frankly, on the matter of protecting the life of the woman, that is not a critical problem because no one is questioning that. All we are saying is that where the mother's life is in danger and surgery would take place it would be incumbent upon the physician to try to save both. We are not forcing any judgment upon him there.

That is, where the life of the mother is in danger, it is not necessary to kill the fetus in some cases. The doctor would try to do both: certainly, save the mother; and, to the extent that he could, save the fetus.

But the fact that the fetus dies in the process of trying to save the life of the mother through surgery—that is not an abortion. It would not be so intended by this bill and was never so understood under State law.

So, again, I would want to interject for purposes of the record that that is certainly not a reasonable implication of where this law would take us.

Dr. DEGLER. Could I respond to that for a moment, sir?

Senator EAST. Yes.

Dr. DEGLER. First of all, as you well know, the intent of Congress does not control the Court in dealing with any piece of legislation or with constitutional interpretation. It is helpful, but it does not control.

So, if the intention is to simply go back to what prevailed before *Roe,* that may be the intention of this bill, but the Court does not have to interpret it in that way just because that was the intention of those who sponsored it.

Second, let me make a hypothetical case. Suppose this law is passed and is declared constitutional and a State passes a law saying you may perform an abortion in order to save the mother's life, this is now a State protection for that, and therefor someone can go to the Court and say: "How can you make a distinction between a fetus and a mother when both are persons under the 14th amendment?" That law would then be declared unconstitutional.

So I do not see how you would be able to make these kinds of distinctions, which is what I am interested in our preserving from not only the present situation but even from what we had prior to *Roe* v. *Wade.*

Senator EAST. I do not foresee any problem there—that the State could provide a law making that kind of determination—and the Court would uphold it.

Where the decision was that clear cut, it was a matter of saving the life of the mother versus the unborn and the State would elect through law to save the life of the mother—I cannot foresee that being struck down by any Court ruling at all.

Within the meaning of the 14th amendment, the State could take action where it has an overriding State interest in so doing. It is a reasonable standard here of elementary fairness and justice.

Certainly, that would be a reasonable statute within the meaning of the due process clause of the 14th amendment. I do not disagree.

One can never, whether it is a Supreme Court decision or an act of Congress, determine precisely every twist and corner that it will take. But I object to the notion that we would create some sort of statutory, constitutional monstrosity here in which reason would be thrown to the winds because of what I would consider a very strained and extravagant interpretation of what we are doing.

I very much respect your opinion and judgment on it. I, as one person, would not want to accept your characterization of where this bill would take us. I do not think the facts warrant it, really,

in terms of our past history on abortion at the State level and in terms of what the framers of this bill intend or what we might reasonably expect the Supreme Court to interpret it as meaning.

Dr. DEGLER. But, sir, we have no experience with the fetus described as a person under the 14th amendment. The fetus was not a person under the 14th amendment prior to *Roe*.

Senator EAST. We have had experience at the State level dealing with it prior to *Roe* v. *Wade*. We have had a great deal of experience: the antiabortion legislation that developed in the 19th century and on into the 20th century. Over a majority of the States prior to *Roe* v. *Wade* had antiabortion legislation in which they did attempt, except when the life of the mother was in danger, to protect the right of the unborn child prior to birth. We have an established record of that.

The constitutional crisis is that *Roe* v. *Wade* totally upended that—totally upended that and presented us with a wholly different complexion on this issue, and that is why we are here trying to unravel this constitutional crisis they precipitated.

Dr. DEGLER. I recognize that, but I still go back to the argument that a person who aborts—a physician who carries out an abortion once the finding of this law becomes a part of the 14th amendment—a person who aborts a fetus because the mother's life is in danger, it seems to me, could then be said to have taken a life without due process of law, under the 14th amendment. Any person could do that—the husband, a relative. No doctor would perform an abortion in fear that he would be charged with violating the law.

Senator EAST. But this bill applies only to State action. State law would have to dictate in the case of private action. That is, the implication that the passage of the act would automatically result in what you are talking about simply is not the case.

Dr. DEGLER. If the law was passed by the States permitting this kind of distinction?

Senator EAST. States had never done otherwise before. And, again, I am willing to trust State government on the issue as much as I am the Supreme Court—in fact, obviously, a bit more.

Dr. DEGLER. But the courts will ultimately decide what this means?

Senator EAST. Ultimately. But then, ultimately, we can come back into the process, too. It is a never-ending dialog.

I appreciate your excellent testimony. I think, in fairness to my good colleagues here—and I have been the one of all claiming that was precious—I am going to cease my questioning and turn it over to Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

The focus of this panel is the sentence in section 1 that states that Congress finds that the 14th amendment to the Constitution of the United States was intended to protect all human beings.

Let me read a sentence in Dr. Degler's testimony and ask Mr. Marshner and Mr. Rosenblum if they agree or disagree with that statement in the sentence. It appears on page 2 of the written testimony in the middle of the page.

It starts out:

Professor Witherspoon then links this discussion of the Amendment's concern—

That is, the 14th amendment—

With the protection of life to the laws then being passed in a number of states to limit abortions. He—

That is, Professor Witherspoon—

Professes to see in these state laws an extension of the concern for the freedom of the former slaves. Yet there is no mention in the discussion in Congress of these laws nor is there any reference to abortion or to the unborn in the course of the debate on the Fourteenth Amendment.

My question is whether you agree with that sentence—that is, that there is no mention in the discussion in Congress of these laws—that is, the States' abortion laws—nor is there any reference to abortion or to the unborn in the course of the debate on the 14th amendment.

Mr. ROSENBLUM. I agree, Senator, that there is no explicit mention, but I do not think that we have to wage the *Dred Scott* fight over and over again when there is a plausible interpretation that can be given on the basis of plain meaning to the language that was used.

For example, Professor Mohr and I reach different constructions, as I think reasonable people under the circumstances are entitled to, with regard to that very first sentence in section 1.

He reads that as definitive proof that the fetus cannot possibly be a person. I read it in precisely the opposite way.

I would say that when section 1 begins by declaring that certain persons are citizens and then specifies that birth or naturalization and subjection to the jurisdiction of the United States are required these are preconditions to what? They are preconditions to Federal and State citizenship.

Whereas you must be born and born in a particular geographic area to acquire citizenship, the amendment establishes no preconditions whatsoever to personhood.

You can very well argue that there is recognition in the amendment that personhood is other than and prior to birth which confers citizenship.

I am not saying that my interpretation is the only interpretation that is possible, but I am saying that it is at least an arguable and acceptable interpretation, just as I would grant the position that is taken by Professor Mohr and Professor Degler that their interpretation is a feasible one, but it is certainly not a necessary one.

Sentor BAUCUS. It seems that there could be a problem with a distinction between citizens and persons and that the unborn would be, under your construction, a person but not a citizen.

I wish we had our constitutional experts here—the prior panel—to explore that point. But at least it raises in my mind the possible problem with the distinction between citizenship and personhood under the law.

Let me ask you another question, and that is, whether or not the two of you think that the constitutional amendment process has served this country well in overturning Supreme Court decisions?

Mr. ROSENBLUM. Senator, you are inviting not only being late for lunch but, I think, avoiding dinner as well. This is the kind of question——

Senator BAUCUS. Just your bottom line opinion.

Mr. ROSENBLUM. Exactly. The bottom line opinion would be yes.

Senator BAUCUS. That it has served our counry well?

Mr. ROSENBLUM. That the amendment process has served our country well. This is not to say that there are no alternatives to the amendment process.

Mr. MARSHNER. I would concur with those remarks. It seems to me that although the process has certainly served the country well there may be cogent reasons to seek less difficult remedies.

Senator BAUCUS. What would those cogent reasons be?

Mr. MARSHNER. One cogent reason, surely, would involve the possibility of speedy relief in case the Court had perpetrated some sourt of injustice. It may take as many as 7 years to ratify an amendment. If there is any way to right the injustice or, for example, to save human lives—some human lives, at any rate—in a period of time less than 7 years, that would seem to me a cogent reason to do something.

Senator BAUCUS. But, of course, the constitutional amendment process was intended to be more cumbersome than the legislative process.

Mr. MARSHNER. To be sure. But any interim measure that you might take would have to, itself, pass Court review in a test of constitutionality.

Senator BAUCUS. Do you agree with Dr. Degler's statement that there is no reference in the debates on the 14th amendments to the rights of the unborn?

Mr. MARSHNER. I certainly agree that, so far as I have been able to peruse those records, I have not found any explicit mention.

Senator BAUCUS. What is the most implicit mention which you found?

Mr. MARSHNER. An implicit mention, it seems to me, is the statement of Bingham himself that the amendment was designed to apply to all human beings.

When you say that it is designed to apply to all human beings, you begin a process of locating the word "person" within a certain semantic and conceptual framework.

If you want to pursue the idea that persons are something other than what we ordinarily mean by "a human being," "a human individual," then you will not want to go along with Bingham's explicit statement. And since he is the sponsor of the measure, his comment is certainly an important part of the record.

If, on the other hand, you think that that is the correct semantics of the person, then you want to endorse Bingham.

Many modern defenders of the abortion right would be strongly opposed to Bingham's statement that an amendment talking about persons applies to all human beings. Many of these opponents—philosophers of medicine, some of them—would try to maintain that "person" is not simply a human being but some sort of privileged case of consciousness—that persons are those who are able to experience certain higher order sorts of sensations or to interact creatively with others, or some such requirement as that. In addition to making us all "unpersons" when we are asleep, there are other difficulties with the theory.

Mr. ROSENBLUM. Senator, on that same point, I would revert to the observations I made at the outset about the separation of powers system—that the separation of powers and its corollary

checks and balances is a constructive and creative force within our system.

It provides opportunities for reexamination when the Court interprets or misinterprets something that Congress has done. It provides Congress with opportunities to agenda items for consideration by the Court. It is through the tensions and reexaminations by principled people of their concerns and their beliefs and the history of their nation that we arrive at the sensible, ultimate decisions, we hope and expect.

Certainly with regard to the interpretation of the 14th amendment, we know that arguably there was a great deal of misconstruction by the courts and at times by Congress in the past.

Certainly, the most obvious misconstruction was the Court's acceptance of the notion that corporations were persons. Justices Black and Douglas argued consistently in the course of dissents in their careers that the Court was way off base when they declared corporations to be persons.

If we go back and look at the decision in which the court did that in 1886, we see that they were so didactic that they said they did not even want to hear argument on the point—that they simply ruled as a categorical fiat on their part that corporations were persons. There was no reasoning whatsoever in the opinion to develop that issue.

A fortiori, if you can go, as Professor Kader has suggested, outside the gene pool to declare a nongene-possessing instrumentality a person, it surely does not require anything like that kind of imagination to conclude that people who recognize that there was personhood in the unborn in other legislation that went on at that time contemplated that the word "person" would include the unborn in the 14th amendment.

Senator BAUCUS. What bothers me is the statement in the bill that Congress finds that the 14th amendment was intended to protect all human beings with the implication that Congress at that time intended to protect the unborn and establish the unborn as persons. I am troubled by that language when there is no reference at all on the subject in the debates.

If that was the intent of Congress you would think somebody would have at least mentioned it. But nobody even mentioned the subject in the debates, as best as we can establish it. With that kind of lack of evidence I find the conclusion contained in the legislation to be forced.

Dr. DEGLER. I would like to say that I think historians, when they are trying to get at intent or trying to find out what was the definition of a word, they do have to get some references to it in the historical record.

Professor Rosenblum has talked about the Roger B. Taney Award, and so on, because of Taney's misreading of the historical record at the time he gave the *Dred Scott* decision.

There was no lack of evidence that there were blacks who were citizens of States in the United States. I mean, he could find it. Mr. Rosenblum even quoted from the differing judges from Taney to the effect that his blanket rule that blacks were not citizens of the United States simply flew in the face of the evidence in some States.

But we have yet to have a piece of evidence to suggest that anyone at the time of the framing of the 14th amendment talked about the unborn being included as persons. The absence of evidence, it seems to me, is very overpowering when you are trying to say what was the intention of the 14th amendment.

Mr. ROSENBLUM. With all due respect to Professor Degler, I think that we have to take what he has just said—he has used two different categories. One is the element of evidence that was cited by Justice McLean of practices that were observed in a number of jurisdictions respecting the citizenship of black people.

But then he goes on to say that there is not, with regard to the 14th amendment, any indication of discussion by the framers of the personhood of the unborn.

Taney's precise point was that there was no discussion by the framers of the Declaration of Independence about citizenship for black people. McLean said—and historians have very properly discredited the Taney reasoning—that it was not the issue of whether individual framers of the declaration had used the language or not that was crucial, but rather what evidence there was for practices respecting the citizenship of black people at that time that was compelling.

My position is that we have numerous illustrations of practices respecting the personhood of the unborn in that period, and prior to that period, and subsequent to that period that make it entirely feasible to say that if the framers did not explicitly exclude the unborn that they very well may have contemplated their inclusion.

Senator BAUCUS. I find it ironic that we are discussing the 14th amendment, which was enacted to overturn the *Dred Scott* decision.

I think we should keep in mind that the 14th amendment was enacted to overturn that Supreme Court decision.

I have no further questions, Mr. Chairman.

Senator EAST. Senator Heflin?

Senator HEFLIN. Professor Rosenblum, I am interested in your analysis of the particular section 1 of the 14th amendment, as to the distinction between personhood and citizenship. I believe, in effect, that Dr. Mohr somewhat agrees with you on that.

Do you agree on that—that there is a distinction in section 1 between a person and a citizen?

Dr. MOHR. Yes. The framers, I think, were originally going to use "citizen" throughout, and then it occurred to them that that would not provide protection for a number of aliens, particularly in the Northern States which would have to ratify this amendment. They wanted to make sure that noncitizens—these are born people, of course—were included.

Senator HEFLIN. Is that generally agreed with by you, Dr. Marshner and Dr. Rosenblum?

Mr. MARSHNER. Yes.

Mr. ROSENBLUM. Yes.

Senator HEFLIN. If that is true, this bill's language is inadequate to approach this problem—is it not?—when it says that: "the Congress further finds that the 14th amendment to the Constitution was intended to protect all human beings." If there are distinctions

of human beings between citizens and persons, then this language is inadequate to approach this problem.

Mr. ROSENBLUM. I am simply not sure about that, Senator. A case can be made in that respect. A case can be made to the contrary.

Senator HEFLIN. If there is a distinction between citizens, who are human beings, and persons, who are human beings, and this was intended to protect all human beings, it will not get to the problem that you have.

I can envision, for example, the question of the right of privacy. Is the right of privacy a privilege or an immunity of citizens? Or where is the root of privacy? This could mean you could have two conflicting constitutional issues involved and that this bill would be inadequate to achieve the intent of what it is designed to achieve.

It could come up that an interpretation be given that States could pass laws making it a crime for abortion for aliens but could not for citizens.

I am just raising these issues.

Do you see any problems involved in this from a historical basis?

Mr. ROSENBLUM. I think, Senator, that the key issue would become how clear the record was made by Congress about exactly what its intent would be.

If, as I understand Senator East's earlier statement about his view of the intent of the measure, it were made crystal clear, I would think that would go a long way toward resolving the problem that you see.

If, on the other hand, as does sometimes happen, there is language in the record of the legislation which indicates a little give here and a little give there and it is ultimately resolved by a deliberate choice of ambiguity in order to get votes, then the difficulty could be compounded and not be resolved at all.

I think that Congress is very much to be commended when Congress bites the bullet and does so clearly, but it certainly does not do a great service when language is fudged for the sake of being able to build a consensus.

Senator HEFLIN. Do I interpret you to mean that the present language is inadequate and it would have to be amplified?

Mr. ROSENBLUM. All I can repeat, Senator, is that I am not sure. It depends on how that would be spelled out through the declarations of intent.

Senator HEFLIN. Thank you.

Senator EAST. Senator Baucus?

Senator BAUCUS. Mr. Chairman, I would like to address a question to Dr. Mohr—to give him a chance to respond to Dr. Marshner.

Dr. Marshner has talked about your books on this subject. I just wonder if you want to respond in any way to some of the criticism that has been made of your analysis?

Dr. MOHR. To do so would take a great deal of time. My analysis is clearly laid out, and the basis of the evidence is indicated in the study. I am prepared to stand on that.

I think the ringer in this issue of how things evolve—what the historical traditions are in these matters—lies in the fact that we are not dealing with a situation that allows us to speculate about

what the 14th amendment does or does not mean. We have, after all, a ruling by the Supreme Court as to what the Supreme Court thinks it meant. And we have historical evidence that supports the Court. That is what is faced in this issue.

As I indicated in my testimony, it seems to me that the constitutional amendment process would be the only appropriate one in this case. Given the checks and balances—the separation of powers, which is the raison d'etre of the subcommittee here—it seems to me that is what it would take to address a High Court finding as to what the intent and meaning of that amendment was, just as the Republicans of the period we are debating here today decided that, in the end, a constitutional amendment was the only way to undo the infamous Dred Scott decision.

Senator BAUCUS. Thank you very much.

Thank you, Mr. Chairman.

Senator EAST. Thank you, Senator Baucus.

Gentlemen, without objection, the full texts of your statements will be included in the record.

We deeply appreciate you coming and being a part of these proceedings. We thank you for that, and we shall stand adjourned.

[Whereupon, at 1:15 p.m., the hearing was adjourned.]

# THE HUMAN LIFE BILL

WEDNESDAY, JUNE 10, 1981

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10 a.m., in room 6226, Dirksen Senate Office Building, Senator John P. East (chairman of the subcommittee) presiding.

Present: Senators Baucus and Heflin.

Staff present: James McClellan, chief counsel; Grover Rees and James Sullivan, counsels; Debbie Freshwater, professional staff member; Nancy Popik, staff member; Ken Kay, minority chief counsel; Debbie Landau, legislative assistant.

## OPENING STATEMENT OF CHAIRMAN JOHN P. EAST

Senator EAST. I would like to convene this hearing.

The Separation of Powers Subcommittee of the Judiciary Committee is continuing its hearing on S. 158. To this date, we have had a series of hearings, the initial hearings being on the medical and scientific implications of this legislation. The following hearings dealt with statutory and constitutional implications.

Today, we are continuing in that same vein. Also, on Friday, we will continue our discussion on the statutory and constitutional questions involved here.

Senator Baucus and I have discussed this matter. We will have a final hearing with the various groups who have strong feelings, or even mild feelings, on this issue. Various groups wish to come and present their points of view.

It is our feeling that if we then finish that road, we will be in a position to make some sort of final disposition on this legislation. At least we would like to feel that we have given it the extensive and exhaustive treatment which we had promised to do at the outset. If at some point it would appear that we have not done that, and Senator Baucus and I agree that additional hearings would be appropriate, we would not hesitate to call them.

We realize the importance of the issue and have no intention of prematurely ending public discussion of it. We do not wish to go on ad nauseum, but, on the other hand, we would rather err on the side of exhausting the issue, at least as much as one can in public hearings. We certainly appreciate that no matter how long we went on with it, we would never fully be able to exhaust an issue of such importance and complexity, and upon which there are such strong differences of opinion.

That is our timetable for the balance of our hearings.

This morning, I would like to welcome my distinguished colleagues, Senator Baucus and Senator Heflin. If they would like to make a statement, we would be happy to take that at this time.

Senator BAUCUS. I have no statement, Mr. Chairman.

Senator EAST. Senator Heflin?

Senator HEFLIN. I have no statement.

Senator EAST. Senator Denton has asked that a written statement of his be placed in the record, which we will happily do. It will be made available to the press.

He deeply regrets that because of other committee assignments he cannot be here, but he did want his statement made available to members of the subcommittee as well as to the press. That statement will be entered into the record and be available to those who would like to see it.

[The prepared statement of Senator Denton follows:]

PREPARED STATEMENT OF SENATOR JEREMIAH DENTON

I WANT TO PUBLICLY APPLAUD SENATOR EAST FOR THE TREMENDOUS JOB HE HAS BEEN DOING IN CONDUCTING THESE HEARINGS ON S.158, MORE COMMONLY KNOWN AS THE HUMAN LIFE BILL. THIS UNDERTAKING IS MOST IMPORTANT TO THOSE OF US WHO ARE COMMITTED TO TAKING WHATEVER STEPS ARE NECESSARY TO STOP THE WIDESPREAD ABORTION TAKING PLACE ON SUCH A LARGE SCALE DAILY IN OUR NATION. SENATOR EAST HAS TENACIOUSLY AND PROFESSIONALLY UNDERTAKEN THIS TASK TO ENSURE THAT ALL SIDES ARE HEARD AND THAT AN ADEQUATE FORUM IS PROVIDED TO FAIRLY AND COMPLETELY EXAMINE ALL POSSIBLE RAMIFICATIONS OF THIS BILL. I HAVE MUCH RESPECT AND ADMIRATION FOR MY COLLEAGUE FROM NORTH CAROLINA AND I TOTALLY SUPPORT HIM IN THIS UNDERTAKING.

OUR NATION IS IN SERIOUS CONDITION WHEN ABORTION IS SANCTIONED BY THE SUPREME COURT AND PAID FOR BY THE FEDERAL AND STATE GOVERNMENTS. IT CONCERNS ME DEEPLY THAT WE HAVE COME TO A POINT IN THIS NATION WHEN THE DISCUSSION CONCERNING ABORTION CENTERS ON: "THE DOCTOR'S RIGHT TO PRACTICE," "PATIENTS' NEEDS," "RISKS TO THE MOTHER," AND "A WOMAN'S RIGHT TO PRIVACY IN THE ABORTION DECISION," YET ALMOST TOTALLY UNDISCUSSED AND FORGOTTEN IS ANY CONCERN FOR THE UNBORN CHILD AND HIS OR HER RIGHTS.

THESE UNBORN CHILDREN ARE TOTALLY AND COMPLETELY DEPENDENT UPON THE WHIMS OF THOSE RESPONSIBLE FOR THEM. HISTORICALLY, THE COURTS AND THE GOVERNMENT IN THIS COUNTRY HAVE BEEN THE PROTECTORS

OF WIDOWS AND ORPHANS FOR THIS SAME REASON OF HELPLESSNESS. CERTAINLY, THIS RATIONALE SHOULD APPLY EVEN MORE IN THE CASE OF THE UNBORN, WHOSE HELPLESSNESS AND DEPENDENCE IS GREATER.

IT APPEARS THAT WE HAVE COME TO THE POINT WHERE WE TOTALLY CENTER ON WHAT MAKES THE INDIVIDUAL FEEL GOOD WITHOUT ANY REGARD FOR THE INDIVIDUAL'S RESPONSIBILITY TO OTHERS SUCH AS FAMILY, FRIENDS, NATION AND OTHER INDIVIDUALS IN THIS GREAT NATION OF OURS. WE DID NOT REACH THE POINT OF GREATNESS IN OUR COUNTRY BY INDIVIDUALS FUNCTIONING IN ISOLATION WITHOUT REGARD TO OTHERS. IT TOOK A CORPORATE EFFORT REQUIRING CONCERN AND RESPECT FOR OTHERS AND THE SUBORDINATION OF INDIVIDUAL RIGHTS AND WELL-BEING, AT TIMES, TO THE LARGER GOOD AND WELFARE OF OUR COMMUNITIES AND NATION.

THE ABORTION ISSUE IS A PRIME EXAMPLE OF THIS TOTAL LACK OF REGARD FOR OTHERS AND FOR HUMAN LIFE. A BASIC RESPECT FOR LIFE, EVEN POTENTIAL HUMAN LIFE, WAS SO ENGRAINED AND FUNDAMENTAL IN THIS NATION THAT IT WAS ABOVE DISCUSSION BY THE VAST MAJORITY OF OUR CITIZENS UNTIL ONLY RECENTLY IN OUR NATION'S HISTORY. HAVE WE GOTTEN SO CALLOUSED, NUMBED OR CASUAL THAT WE DO NOT RECOGNIZE THE REALITY OF WHAT IS OCCURRING?

IT IS TIME THAT WE AS A NATION REASSESS OUR POSITION AND FACE THE REALITY OF ABORTION, WHICH HAS TAKEN THE LIVES OF MILLIONS OF OUR UNBORN CHILDREN.

WE HAVE GONE TOO FAR IN ALLOWING THE PRIVATE RIGHTS OR

PREFERENCES OF ASSERTIVE INDIVIDUALS TO OUTWEIGH AND TOTALLY OVERSHADOW OUR FUNDAMENTAL UNDERSTANDING OF AND RESPECT FOR HUMAN LIFE IN ALL ITS FORMS, ESPECIALLY THAT LIFE WHICH CANNOT SPEAK OUT FOR ITSELF. AS STATED IN OUR OWN DECLARATION OF INDEPENDENCE, "WE HOLD THESE TRUTHS TO BE SELF-EVIDENT . . . THAT THEY (ALL MEN) ARE ENDOWED BY THEIR CREATOR WITH CERTAIN INALIENABLE RIGHTS, AMONG THESE ARE LIFE . . . ." THIS FUNDAMENTAL TRUTH UNDERLIES THE VERY FOUNDATION OF OUR COUNTRY. IF THERE IS ANY DOUBT WHATSOEVER AS TO THE POINT IN TIME A HUMAN BEING BECOMES SUCH, THEN THAT DOUBT MUST BE RESOLVED IN FAVOR OF THAT POTENTIAL OR LIKELY HUMAN LIFE UNTIL WE KNOW FOR A CERTAINTY OTHERWISE.

THE 1973 DECISION IN ROE V. WADE WAS A SERIOUS MISTAKE WHICH MUST BE CORRECTED AS SOON AS POSSIBLE. IN THAT DECISION, THE SUPREME COURT REFUSED TO DECIDE WHEN HUMAN LIFE BEGINS AND WHETHER UNBORN CHILDREN ARE HUMAN LIFE. THIS DECISION AS TO WHEN HUMAN LIFE BEGINS INVOLVES THE VERY SORT OF CONSIDERATIONS THAT ARE APPROPRIATE FOR CONGRESS BUT NOT FOR THE COURTS AS WAS RECOGNIZED IN THE DECISION. IT IS TIME FOR CONGRESS TO SPEAK BY DECLARING A NATIONAL POLICY AS TO WHEN HUMAN LIFE BEGINS. IN PAST DECISIONS, THE SUPREME COURT HAS RECOGNIZED THAT CONGRESS HAS A LEGITIMATE INTEREST IN PROTECTING POTENTIAL LIFE.

I FEEL THAT THE BEST WAY TO RESOLVE THE UNCERTAINTY AS TO WHEN HUMAN LIFE BEGINS, WHICH UNDERLIES THE ENTIRE ABORTION QUESTION,

IS TO PASS AN AMENDMENT TO THE CONSTITUTION WHICH DECLARES THAT THE UNBORN ARE "PERSONS" WHO SHALL NOT BE DEPRIVED OF "LIFE." BUT I ALSO FEEL THAT S.158, THE HUMAN LIFE BILL, OFFERS A CRUCIAL OPPORTUNITY TO TAKE THE FIRST STEP IN PROHIBITING ABORTIONS BY PASSING A CONGRESSIONAL DECLARATION THAT "PERSON" AND "LIFE" AS USED IN THE FOURTEENTH AMENDMENT DO INCLUDE THE UNBORN FROM TIME OF CONCEPTION. THIS IS AN IMPORTANT INTERIM STEP WHICH I FEEL HAS A GOOD CHANCE OF PASSAGE IN THIS CONGRESS.

AGAIN, I FULLY SUPPORT SENATOR EAST IN CHAIRING THESE HEARINGS AND I LOOK FORWARD TO HAVING THE BENEFIT OF THE TESTIMONY PRESENTED TODAY AND IN SUBSEQUENT HEARINGS. I REGRET THAT MY OTHER DUTIES HAVE NOT ALLOWED ME TO PERSONALLY ATTEND MORE OF THE HEARINGS, BUT I AM FOLLOWING CLOSELY ALL TESTIMONY CONCERNING THIS BILL.

THANK YOU, SENATOR EAST.

Senator EAST. This morning, we have two panels. We anticipate ending this hearing at 1 o'clock at the latest. We have been working on a 3-hour basis and that seems to have worked reasonably well. Beyond that hour, other commitments arise, and I suppose the power to concentrate ebbs rather quickly after that point.

I would like to encourage the panelists as well as ourselves to be mindful of our time limitation. We would appreciate it if the panelists would please simply not read their statements but extemporize about them and to give us in their own words the essence of the argument. Your written statement will be a part of the record. We do have it available to us so it is not necessary to read it in toto.

If you are going to read, I would deeply appreciate if you would read selectively. It not only will help expedite so that we can get into the question-and-answer period, but it also economizes in terms of the cost to the Judiciary Committee and the subcommittee because it will be a part of the record.

The more time we have for discussion, in my judgment, the more fruitful the hearing is because we can all read the statements. We have had an opportunity to read them and we can read them subsequently in terms of drawing final conclusions.

The members of the first panel this morning are Prof. Norman Dorsen, Prof. Theodore Eisenberg, and Prof. Charles Rice. I would

like to briefly read some biographical data on these three distinguished gentlemen.

First, I would like to welcome you this morning. We appreciate your taking the time from your very demanding schedules to be with us.

Professor Dorsen is a professor of law at New York University. He received his B.A. degree from Columbia and his J.D. from Harvard and did postgraduate work at the London School of Economics. He has written numerous works on the subject of civil rights in the United States and is the president of the American Civil Liberties Union.

Prof. Theodore Eisenberg is a professor of law at the University of California at Los Angeles. He received his A.B. degree from Swarthmore and his J.D. from the University of Pennsylvania. He was a law clerk for Chief Justice Earl Warren on the U.S. Supreme Court.

Prof. Charles Rice is a professor of law at Notre Dame University. He received his A.B. degree from the College of the Holy Cross, his J.D. degree from Boston University, and his LL.M. and J.S.D. degrees from New York University.

You can see from my reading of the biographical information, we have three very distinguished and accomplished panelists this morning. We appreciate their sharing their thoughts on S. 158 with us.

Professor Dorsen, if we might begin with you, we will have each panelist make his remarks. Then we will go back and begin our interrogation.

## STATEMENT OF NORMAN DORSEN, PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, N.Y.

Mr. DORSEN. Thank you, Senator East.

If I may, I would like to supplement very briefly the kind introduction you made of me. I would just add two points.

One, I want to say that I also was a law clerk in the Supreme Court for a great conservative justice, John Marshall Harlan, which I am very proud of as part of my background.

Second, while it is true that I am, and have been since 1976, the president of the American Civil Liberties Union, I am not testifying today on behalf of the ACLU, even though my personal views and the views of the organization are similar.

In this connection, I would like to introduce into the record a memorandum on the power of Congress to curtail the authority of the Federal courts, dated June 9, 1981 which was prepared for the ACLU by the distinguished law firm of Wilmer, Cutler & Pickering of Washington, D.C. I have been asked to do that and I hope it will be acceptable to you and your colleagues.

Senator EAST. Fine, thank you.

Mr. DORSEN. I shall try to comply scrupulously with your very reasonable request to be as brief as possible, although I did not realize I was going to have to be extemporaneous. I am going to have to do a little selective reading.

The essential point which I shall try to make is that section 2 of S. 158, which would withdraw the jurisdiction of the Federal courts to issue injunctions or declaratory judgments relating to State laws

that circumscribe the right of women to exercise their constitutional right of privacy established in *Roe* v. *Wade*, is in my judgment, beyond the power of Congress to enact since it would impermissibly curtail the power of the Federal courts to exercise its article three authority on constitutional issues, and, second, because the purpose of S. 158, from the objective record—without psychoanalyzing any individual Member of Congress—is constitutionally improper.

S. 158, ONE OF MANY LIMITING BILLS

Members of the Senate, including the Members of the Senate here, recognize that S. 158 must be viewed in the context of many other bills that have been introduced to restrict the jurisdiction of the Federal courts, including the Supreme Court. These bills vary significantly in approach, but it is clear to me that the enactment of any one of them would do severe damage to the judiciary and weaken the separation of powers that is the very foundation of our Constitution.

Some of these bills do not address jurisdiction directly, but rather they seek to limit the remedies available to Federal courts when they find violations of constitutional rights.

For example, some of the bills would not interfere with Federal jurisdiction over school desegregation cases but would deal with certain remedies. On its face, S. 158 also appears to address remedy rather than jurisdiction, but, in my judgment, this is a distinction that does not entail a real difference because it is obvious in the abortion context that the denial of a remedy is equivalent to denial of subject matter jurisdiction.

For that reason, I think the bill, and section 2 in particular, have to be viewed as if it involved a denial of jurisdiction.

Turning to one of the two main points in my testimony, while it is true and well understood by scholars and judges that Congress has broad authority over the Federal courts, it is also true, as the Supreme Court has said on many occasions, that Congress cannot limit this jurisdiction or make exceptions to the Supreme Court's appellate jurisdiction in ways that violate other constitutional provisions.

To take an obvious example, Congress plainly could not define the jurisdiction of the Federal courts to provide that no Roman Catholic or no Jew or no Methodist could sue in Federal court. That would obviously be a violation of equal protection. Similarly, Congress cannot restrict jurisdiction in a way that infringes on a constitutional right.

One case that is widely cited, the *Battaglia* case which was written by Judge Learned Hand, made this point very clear more than a generation ago.

S. 158 would, I think, have this precise infirmity. It would eliminate the Federal courts as the principal forum for vindicating certain constitutional rights, specifically the right of women to choose to have an abortion.

To be sure, the State courts would often be available for those with claims of constitutional wrongs, although it is not clear to me that they would always be available. I have not adequately studied—I am not sure anyone has adequately studied—the precise jurisdictional situation in every State of the United States.

In any case, it is obvious that relegating a constitutional claim to State remedies, even with potential for Supreme Court review, would not grant redress to every woman who claimed a violation of constitutional right. Many cases never reach the Supreme Court at all. Its workload prevents it from hearing any but a small fraction of the cases brought before it.

Chief Justice Burger, among many other people, has argued very strenuously that the Supreme Court does not have the time or the resources to deal with all the important cases that the Court is asked to review.

If that is true, and I think it is true, then it is obvious that abortion cases coming from State courts would be among those that would not be heard by the Supreme Court.

In some constitutional cases, furthermore, State remedies are constitutionally inadequate. In the well-known *Dombrowski* case, the Supreme Court refused to make a plaintiff resort to State court proceedings for protection of first amendment rights.

Similarly, in the later case of *Younger* v. *Harris* and the earlier one of *Fenner* v. *Boykin*, the Court explicitly assumed that individuals' constitutional rights in some cases could not be adequately protected except by recourse to the lower Federal courts.

Statutes enacted by Congress, such as the Norris-La Guardia Act and the Tax Injunction Act of 1937, which deprive the lower Federal courts of the power to enter certain injunctions, limit the judicial power only insofar as there are other means by which individuals can have their constitutional rights fully protected.

S. 158 is an example of a statute which goes too far. In at least some cases, denying litigants access to the lower Federal courts for redress of their constitutional grievances is tantamount to denying the litigants their constitutional rights, for State court alternatives simply are not always available and not always adequate.

This is not intended to be a criticism of the State courts, which have bulging dockets even greater than the dockets of the Federal courts. The point is that the device of curtailing the remedies of injunction and declaratory judgment amount to the very same thing as a restriction on jurisdiction because these are the typical Federal court remedies for defeating unconstitutional measures. If they are unavailable, particularly in the area of abortion where the gestation period is limited to 9 months, it is the equivalent of erasing Federal court jurisdiction altogether.

Finally on this point, S. 158 singles out claims relating to a specific subject, abortion, and separates those claims from other constitutional claims. This singling out, which of course is discrimination, runs contrary to the theory of equal treatment embodied in the 14th amendment, a basic idea of constitutional structure.

My second point is a different one. That is: While S. 158 is in form a limitation on Federal court remedies, the purpose and effect of section 2 is substantive, that is, to make it more difficult than previously for individuals to secure constitutional rights. That is the plain purpose of the bill. It is obvious that S. 158 would never have been drafted if the Supreme Court had not interpreted the Constitution to protect women's constitutional rights to abortions. I do not think anyone can deny it. That purpose, with great respect, is not constitutionally proper.

It is true that the Supreme Court has frequently applied the rule that the constitutionality of a statute must be determined on its face and without inquiry into motives and purposes. I cite a number of cases in my prepared statement.

Just as those cases are well known, so are the well-known exceptions to this principle. Perhaps the most important one involves the equal protection clause.

For many years, the Supreme Court has declared that the unequal impact of a statute is not enough to establish a violation of equal protection. There must be a governmental purpose to discriminate. In all the cases I cite, the Supreme Court, doing the very best it can in the admittedly difficult purpose analysis in those situations, has examined congressional purposes as part of the Supreme Court's duty and responsibility. The Court has held that a statute which does not on its face articulate an unlawful purpose may, because of its language and the context in which it is enacted, disclose an unlawful purpose and an inevitable unlawful effect.

Plainly, S. 158 is intended to prevent, if possible, or at least to obstruct, fulfillment of the rights recognized in *Roe* v. *Wade.* Indeed, the sponsors of this and similar bills have been frank in acknowledging that purpose.

However, it is unnecessary to rely exclusively on such statements by the bills' sponsors. My conclusion that section 2 is unconstitutional is based on the text of the bill itself. It is impossible to conceive of any jurisdictional considerations to which the bill is relevant.

To be sure, there are cases involving the performance of abortions in the Federal courts, but they constitute only an infinitesimal part of the total volume of Federal court litigation. Thus, the bill cannot be reasonably regarded as intended to reduce the burdens on the Federal courts.

Cases involving constitutionality of State law are numerous in both State and Federal courts. It could be argued that since State laws are involved, their validity should be first passed upon in the State courts. That would throw in the Supreme Court of the United States the entire burden of insuring uniformity among the States of the standards of constitutional validity. I do not think such a course would be wise as a matter of legislative policy, and it cannot reasonably be contended, I suggest, that so singular a change—involving only abortion rights—is reasonably related to a general jurisdictional purpose.

The conclusion is clear on the face of the bill that its only purpose and its inevitable effect is to obstruct the judicial protection of the constitutional rights recognized in *Roe* v. *Wade.* Such purpose and effect, in the absence of a compelling State interest, are unconstitutional.

Quoting from several Supreme Court cases:

> It is well settled that, quite apart from the guarantee of equal protection, if a law "impinges upon a fundamental right secured by the Constitution, [it] is presumptively unconstitutional."

Abortion is such a right. The Supreme Court so held in 1973 with, I believe, only one member of the Supreme Court dissenting

from that judgment. Congress should leave decisions of these cases to the Federal courts where they belong.

Thank you very much, Mr. Chairman.

Senator EAST. Thank you, Professor Dorsen. We appreciate that.

[The prepared statement and memorandum submitted by Professor Dorsen follow:]

## Prepared Statement of Professor Norman Dorsen

My name is Norman Dorsen. I am a lawyer, admitted to practice in New York State, the District of Columbia, and other federal courts including the Supreme Court of the United States. Before entering the private practice of law, I served as law clerk to Chief Judge Calvert Magruder of the U.S. Court of Appeals for the First Circuit and for Justice John Marshall Harlan of the U.S. Supreme Court. Beginning in 1962 I have appeared as counsel in numerous constitutional cases in the Supreme Court and other federal and state courts. Since 1961 I have been a member of the faculty of New York University Law School, where I am now Stokes Professor of Law. I have been a visiting professor and have lectured at many other law schools, including Harvard, Texas, Michigan, and the University of California at Berkeley. I was President of the Society of American Law Teachers from 1973-75.

Finally, I am and have been since 1976 the President of the American Civil Liberties Union. While I am not testifying on behalf of the ACLU today, my views and its are similar on the issues before this Subcommittee. In this connection, I would like to introduce into the record a Memorandum on the Power of Congress to Curtail the Authority of the Federal Courts, dated June 9, 1981, which was prepared for the ACLU by Wilmer, Cutler & Pickering of Washington, D.C.

Section 2 of S. 158 would withdraw the jurisdiction of the federal courts to issue injunctions or declaratory judgments relating to state laws that purported to circumscribe the right of women to exercise the constitutional right of privacy established by the Supreme Court in the case of Roe v. Wade, 410 U.S. 179 (1973), and reaffirmed in numerous decisions over the past decade. In my judgment, for the reasons to follow, this provision is beyond the power of Congress to enact since it impermissibly would curtail the power of the federal courts to exercise its Article III authority on constitutional issues and, secondly,

because the purpose of S. 158 is constitutionally impermissible.

Section 2 must be viewed in the context of the many other bills that have been introduced to restrict the jurisdiction of the federal courts, including the Supreme Court. These bills vary significantly in approach, but it is clear that the enactment of any one of them would do severe damage to the judiciary and weaken the separation of powers that is the very foundation of our Constitution. This is so because all of the bills would significantly limit the power of the lower federal courts to hear or grant relief in cases where constitutional rights are at stake -- whether involving prayer in public schools or other public buildings, abortion, school desegregation, and sex discrimination in the armed forces. Most of the bills also would curtail the appellate jurisdiction of the United States Supreme Court over particular issues. One bill even attempts to withdraw state court jurisdiction over pupil assignment to schools.

Some bills do not address jurisdiction directly, but rather seek to limit the remedies available to federal courts when they find violations of constitutional rights. For example, a number of bills do not on their face interfere with federal jurisdiction over school desegregation cases, but would prohibit federal courts from requiring the assignment of students to particular schools. S. 158 also appears on its face to address remedy rather than jurisdiction -- it would prohibit lower federal courts from issuing injunctions or temporary restraining orders against the enforcement of statutes and regulations governing abortion. But this is a distinction that does not entail a real difference because it is obvious that in the abortion context a denial of a remedy is equivalent to the denial of subject matter jurisdiction. Regardless of the form that Section 2 takes, the bill is designed to and would in fact frustrate the exercise of constitutional rights, and for that reason is unconstitutional.

Constitutional scholars and judges have long debated the scope of congressional power over lower federal courts under Article III. Most commentators have concluded that the "ordain and establish" language of Article III indicates that lower federal courts are creatures of Congress and not, as in the case of the Supreme Court, of the Constitution itself. Article III, therefore, has been construed to grant Congress broad discretion to establish, alter, or eliminate the jurisdiction of lower federal courts. See, e.g., Lockerty v. Phillips, 319 U.S. 182, 187 (1943) quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845).

But Congress' power over the federal courts under Article III is not absolute. As always, the Constitution itself restricts Congress' enumerated powers:

> "[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."

William v. Rhodes, 393 U.S. 23, 29 (1968). Having created the lower federal courts and conferred on them jurisdiction over cases arising under the Constitution, Congress can neither limit this jurisdiction nor make exceptions to the Supreme Court's appellate jurisdiction in ways that violate other constitutional provisions. To take an obvious example, Congress plainly could not define the jurisdiction of the federal courts to provide that no Roman Catholic could sue in federal court; such a provision would violate Equal Protection. Similarly, in Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), cert. denied, 335 U.S. 887 (1948), it was suggested that a congressional enactment that purported to remove certain constitutional cases from the lower federal courts would be invalid as a violation of the Due Process Clause.

S. 158 would have the same infirmity. It would eliminate the federal courts as the principal forum for vindicating certain constitutional rights. That in turn would have in some cases the effect of denying certain women the right to choose to have an abortion, a right to which they are constitutionally entitled. To the extent that an Act of Congress in effect renders nugatory established constitutional rights, the Constitution will not permit it to stand. See Eisentrager v. Forrestal, 174 F.2d 961, 964 (D.C. Cir. 1949), reversed on other grounds sub nom, Johnson v. Eisentrager, 339 U.S. 763 (1950)("no Government action which is void under the Constitution is exempt from judicial power.").

To be sure, the state courts often are available for those with claims of constitutional wrongs. But in some cases, relegating a constitutional claimant to state remedies, even with the potential for Supreme Court review, is the equivalent of denying any redress whatever. Many cases, in fact, never reach the Supreme Court at all -- its workload prevents it from hearing any but a small fraction of the cases brought before it. Thus, even if Supreme Court review theoretically would remain available, elimination of access to lower federal courts would mean in fact that most people never would have an opportunity for any federal forum to consider their federal constitutional claims.

In some constitutional cases, furthermore, it is plain that state remedies are constitutionally inadequate. In Dombrowski v. Pfister, 380 U.S. 479 (1965), the Supreme Court refused to make a plaintiff resort to state court proceedings for protection of his First Amendment rights, finding that threats of state court criminal action could deprive the litigant of his constitutional rights and that state court proceedings would not "assure adequate vindication of constitutional rights." Similarly, in Fenner v. Boykin, 271 U.S. 240 (1926), and in Younger v. Harris, 401 U.S. 37 (1971), the Court explicitly assumed that individuals' constitutional rights in

some cases could not be adequately protected except by recourse to the lower federal courts. Even statutes such as the Norris-La Guardia Act and the Tax Injunction Act of 1937, which deprive the lower federal courts of the power to enter injuctions in certain cases, limit the judicial power only insofar as there are other means by which individuals can have their constitutional rights fully protected. Such statutes confirm the unconstitutionality of S. 158 for they reinforce what the Supreme Court already has ruled: In at least some cases, denying litigants access to the lower federal courts for redress of their constitutional grievances is tantamount to denying the litigants their constitutional rights, for state court alternatives simply are not always available and adequate. The device of curtailing the remedies of injunction and declaratory judgment amount to the same thing because these are the typical federal court remedies for defeating unconstitutuional measures. If they are unavailable, it is the equivalent of erasing federal court jurisdiction altogether.

Moreover, S. 158 singles out claims relating to a specific subject and separates those claims from other constitutional claims. That singling out -- or discrimination -- runs contrary to the political theory underlying our entire constitutional structure. There can be little doubt that S. 158 never would have been drafted if the Court had not interpreted the Constitution to protect women's rights to abortions. The bill is simply an attempt by Congress to review, and reverse, a specific Supreme Court decision that Congress finds objectionable, as well as an attempt to amend the Constitution without going through the procedures required by Article V.

Section 2 of S. 158 is in form a limitation on federal court remedies. But the purpose and effect of Section 2 of S. 158 is substantive -- i.e., to make it more difficult than theretofore for individuals to secure their constitutional rights recognized in Roe v. Wade. This purpose is not constitutionally permissible.

The Supreme Court has applied the rule that the constitutionality of a statute must be determined on its face, and without inquiry into motives or purposes that underlie the enactment. See, e.g., McCray v. United States, 195 U.S. 27, 56 (1904); United States v. Darby, 312 U.S. 100, 113-14 (1941); Flemming v. Nestor, 363 U.S. 603, 617 (1960); United States v. O'Brien, 391 U.S. 362, 382-86 (1968). But there are well-recognized exceptions to that principle. United States v. O'Brien, supra at 383 note 30; Ely, Legislative and Administrative Motivation in Constitutional Law, 70 Yale L.J. 1205 (1970). Perhaps the most important one involves the equal protection clause of the Fourteenth Amendment. For many years the Supreme Court has declared that the unequal impact of a statute is not enough to establish a violation of the equal protection clause; there must be a governmental purpose to discriminate. Snowden v. Hughes, 321 U.S. 1 (1944); Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977); Mobile v. Bolden, 446 U.S. 55 (1980). And it is equally well settled that, in equal protection cases, the courts are not limited to an examination of the statute on its face. Loving v. Virginia, 388 U.S. 1 (1967); Green v. County School Board, 398 U.S. 430 (1968); Columbus Board of Education v. Penick, 443 U.S. 229 (1979). Most important for present purposes, the Court has held that a statute which does not on its face articulate an unlawful purpose, may, because of its language and the context in which it is enacted, disclose on its face an unlawful purpose and an inevitable unlawful effect. Grosjean v. American Press Co., 297 U.S. 233 (1936); Gomillion v. Lightfoot, 364 U.S. 339 ( 1960).

Plainly S. 158, including Section 2, is intended to prevent, if possible, at least to obstruct, fulfillment of the rights recognized in Roe v. Wade. Indeed, the sponsors of this and similar bills have been frank in acknowledging that purpose. But it is unnecessary to rely on such statements by the bill's sponsors, and my conclusion that Section 2 is unconstitutional

is based on the text of the bill itself. For it is impossible to conceive of any jurisdictional considerations to which the bill is relevant. There are, to be sure, a number of litigations involving the performance of abortions pending in the federal courts, but they constitute only an infinitesimal part of the total volume of federal court litigation. Thus the bill cannot reasonably be regarded as intended to reduce the burdens on the federal courts.

Cases involving the federal constitutionality of state laws are, of course, numerous in both state and federal courts. It could be argued that since state laws are involved, their validity should be first passed upon in the state courts. That would throw on the Supreme Court the entire burden of ensuring uniformity among the states of the standards of constitutional validity, and I do not think such a course would be wise as a matter of legislative policy. But recognizing that such a decision is within the power of Congress, S. 158 accomplishes this only with respect to injunction and declaratory judgment actions involving the particular rights recognized in Roe v. Wade. It cannot reasonably be contended that so singular a change is reasonably related to a general jurisdictional purpose.

The conclusion is clear, on the face of the bill, that its only purpose and its inevitable effect are to obstruct the judicial protection of the constitutional rights recognized in Roe v. Wade. Such purpose and effect, in the absence of a compelling state interest, are unconstitutional: "It is well settled that, quite apart from the guarantee of equal protection, if a law 'impinges upon a fundamental right secured by the Constitution [it] is presumptively unconstitutional.'" Harris v. McRae, -- U.S. -- , 65 L.ed. 2d 784, 801 (1980); San Antonio School District v. Rodriguez, 411 U.S. 1, 17, 31 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

# Memorandum on the Power of Congress To Curtail the Authority of the Federal Courts

By: Craig J. Blakely
Fern B. Kaplan
James Robertson
Kevin Eugene Smith
Kathy B. Weinman
David L. Westin
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

## I. The Current Bills Seeking To Limit Federal Court Authority Go Much Further Than Past Limitations Enacted Into Law

### A. Current Proposals To Limit Federal Court Authority

Numerous bills have been introduced in this session of Congress to limit the jurisdiction of federal courts or to restrict the power of federal courts to grant certain types of relief. The bills are focused on substantive issues that are controversial at this moment in our nation's history: prayer in public schools and other public buildings, methods of achieving school desegregation, abortion, and sex discrimination in the armed forces.

All of the bills would place restrictions on the lower federal courts, and most would affect the appellate jurisdiction of the Supreme Court. Some of the bills seek completely to remove federal court jurisdiction of particular subjects, while others only purport to limit the remedies available once violations are found. Of the bills that on their face deal only with remedy, some are so broad that they would effectively preclude all federal court review of the substantive areas involved.

The bills that attempt to limit federal court rulings on questions of prayer in public schools and buildings are all virtually alike.[1/] They all provide that neither the Supreme Court nor the District Courts would have jurisdiction to hear any case arising out of a state law or regulation, or arising out of any Act interpreting, applying, or enforcing a state law or regulation, relating to voluntary prayer in public schools or buildings. Each bill contains the proviso that it would not apply to any case pending at the time of enactment.[2/] Together, they are the broadest of all the bills under discussion, since they would completely withdraw jurisdiction of a particular subject matter, and would do so with respect to the Supreme Court as well as the lower federal courts.

The narrowest group of bills, in terms of their approach to limiting the power of the federal courts, are those that pertain to assignment of students to schools. They purport only to limit the remedies available to federal courts, rather than totally remove school desegregation cases from the courts. Some of these bills would simply prohibit any federal court from requiring attendance of students at particular schools.[3/] Others, however, would sweep more widely by precluding any federal court judgment or order that has the "effect of" or "relates to" requiring the attendance of any public school student at a particular school,[4/] and such broad

---

1/ H.R. 72 (Ashbrook), H.R. 326 (Holt), H.R. 408 (Quillen), H.R. 865 (Crane), H.R. 989 (McDonald), H.R. 1335 (Nichols), S. 481 (Helms).

2/ Senator Helms' bill contains the recitation that it is designed "to promote the separation of powers." S. 481. That bill also defines "voluntary prayer" so as not to include any prayer composed by an official or employee of a state or local government.

3/ H.R. 1079 (Hinson), H.R. 1180 (Ashbrook), H.R. 3332 (Gaydos), S. 1005 (Helms), S. 1147 (Gorton).

4/ H.R. 340 (Holt), H.R. 761 (McDonald), H.R. 869 (Crane).

prohibitions are more akin to denials of jurisdiction than to prohibitions on remedy. One bill in each House would permit pupil assignment only if such assignment does not run afoul of very specific guidelines as to travel time, travel distance, and school location.5/

Some of the bills relating to school desegregation contain other important provisions. Several invoke the authority of Congress to ensure equal protection under the Fourteenth Amendment.6/ Two of the bills, in addition to placing restrictions on federal courts, would prohibit federal agencies from withdrawing or threatening to withdraw federal funds from school systems as a means of pressuring school districts to change student assignments.7/ And four of the bills would explicitly authorize suits in federal court to enforce their provisions.8/

Most of the bills that relate to abortion are somewhat analogous to the broader school assignment bills. They purport to limit remedies rather than jurisdiction, but do so in a way that arguably would preclude review of the subject by the affected courts. One bill expressly does withdraw jurisdiction from both the Supreme Court and the District Courts over any case arising out of a state law, or arising out of any Act interpreting, applying, or enforcing a state law, relating to abortion.9/ But all of the other bills only apply

5/ H.R. 2047 (Moore), S. 528 (Johnston).

6/ H.R. 761 (McDonald), H.R. 2047 (Moore), S. 528 (Johnston), S. 1147 (Gorton).

7/ H.R. 340 (Holt), S. 1005 (Helms).

8/ S. 1005 (Helms) (authorizing suits by students, parents, school boards and faculty); H.R. 2047 (Moore) and S. 528 (Johnston) (authorizing suits by the Attorney General on behalf of students or parents unable effectively to institute suits themselves); S. 1147 (Gorton) (authorizing suits by aggrieved persons or by the Attorney General to enforce provisions).

9/ H.R. 867 (Crane). The language is like Mr. Crane's H.R. 865 on school prayer and H.R. 869 on assignment of pupils.

to lower federal courts and are phrased in terms of remedy, prohibiting those courts from issuing injunctions, restraining orders, or declaratory judgments with respect to laws regulating abortions or regulating expenditure of funds for abortions.10/ Because much if not all modern constitutional litigation in the federal courts involves declaratory or injunctive relief, or both, and because such relief would offer the only meaningful opportunity for a woman to challenge the constitutionality of state bans on abortions, these bills in practical effect would leave little room for a court to review the constitutionality of an abortion statute at all. Hence, the restrictions in these abortion bills more closely resemble the absolute jurisdictional limitations contained in the school prayer bills than the limitations on remedy contained in the narrower school assignment bills.

Some of the abortion bills have other noteworthy provisions. One bill in each House would curtail review of federal abortion laws as well as state laws.11/ And three bills -- those that would declare that human life exists from conception -- invoke the power given Congress by the Fourteenth Amendment to prevent deprivation of life without due process of law.12/

The bills that concern claims of sex discrimination in the draft and in the armed forces would limit the jurisdiction of the federal courts over purely federal matters.13/ They would bar the Supreme Court and the District Courts from exercising jurisdiction to rule on the

10/ H.R. 73 (Ashbrook), H.R. 900 (Hyde), H.R. 3225 (Mazzoli), S. 158 (Helms), S. 583 (Hatch).

11/ H.R. 73 (Ashbrook), S. 583 (Hatch).

12/ H.R. 900 (Hyde), H.R. 3225 (Mazzoli), S. 158 (Helms).

13/ H.R. 2365 (Evans), H.R. 2791 (Evans).

constitutionality of statutes or regulations that authorize different treatment in the armed forces on the basis of sex with respect to induction, composition of units and assignments. One of these bills states that it is designed to exercise Congress' power under Article I, Section 8 of the Constitution "to raise and support armies . . . to provide and maintain a navy . . . to make rules for the government and regulation of the land and naval forces."14/

Finally, one bill would withdraw jurisdiction from all lower federal courts "to modify, directly or indirectly, any order of a court of a State if such order is, will be, or was, subject to review by the highest court of such State."15/ It is difficult to determine precisely what types of cases would be removed from lower federal courts by this bill.

B. Previous Laws Curtailing Federal Court Authority

Limitations on federal court authority have been enacted in the past, but not one has even come close to doing what the present group of bills seeks to accomplish. No legislative enactment upheld by the courts has ever completely removed the authority either of the lower federal courts or of the Supreme Court to hear and decide matters of constitutional dimension or to grant necessary relief in cases of constitutional violation.

The statute perhaps cited most often in support of the argument that Congress does have power to withdraw particular subjects from the federal courts is the Norris-LaGuardia Act of 1932. 29 U.S.C. §§ 101 et seq. Section 7 of

---

14/ H.R. 2791 (Evans).

15/ H.R. 114 (Bennett).

that Act, which has been upheld by the Supreme Court,[16] bars any federal court from issuing an injunction in any case involving a labor dispute unless a hearing is held and certain findings are made. 29 U.S.C. § 107. Neither that limitation nor the limitations contained in other sections of the Act[17] attempt to withdraw the authority of federal courts to enforce existing constitutional rights.

The Tax Injunction Act, 26 U.S.C. § 7421(a),[18] which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," is also cited as authority by some of the proponents of these bills. But that Act, which has been sustained by the courts,[19] does not deprive any court of its authority to enforce constitutional rights. The federal courts retain full jurisdiction to hear any constitutional challenge in a suit to recover the amount of tax after collection.[20]

The statute upheld by the Supreme Court in the case of Ex parte McCardle,[21] relied on by some to support the notion of plenary congressional power to curtail federal court authority, bears little resemblance to the proposed bills; it did not attempt completely to remove federal court consideration of a constitutional issue. 15 Stat. 44 (1868). The statute merely removed Supreme Court jurisdiction over a

---

16/ Lauf v. E. G. Shinner & Co., 303 U.S. 323, 329-30 (1938).

17/ See particularly 29 U.S.C. §§ 103-105.

18/ This statute was first enacted as part of the Internal Revenue Act of March 2, 1867, 14 Stat. 475 (1867).

19/ E.g., Snyder v. Marks, 109 U.S. 189 (1883).

20/ The difference between requiring a taxpayer to pay a tax before suing to challenge it and requiring a pregnant woman to deliver her child before challenging the abortion laws seems obvious. See discussion at pp. 63-68 infra.

21/ 74 U.S. (7 Wall.) 506 (1869).

narrow class of habeas corpus cases, which jurisdiction had been conferred by Congress scarcely a year earlier.[22/]

Congress has enacted other limitations on federal court authority, but none has precluded federal courts from hearing, deciding or providing effective relief in constitutional cases. Thus, the Emergency Price Control Act, 56 Stat. 23 (1942), gave exclusive jurisdiction to the Emergency Court of Appeals to enjoin enforcement of price orders, subject to review by the Supreme Court. Congress thus maintained in an inferior federal court the power to grant injunctive relief,[23/] and claims of constitutional right were left reviewable by federal courts.[24/] The same is true of the Voting Rights Act of 1965, 46 U.S.C. § 1973b, which provides that suits by states seeking to be relieved of coverage under the Act must be brought in the District Court for the District of Columbia. This once again leaves jurisdiction in a lower federal court, with review by the Supreme Court available.[25/] The statutory anti-injunction provision of 28 U.S.C. § 2283, that federal courts not issue injunctions to stay state court proceedings, has been held inapplicable where a "uniquely federal right or remedy" is involved.[26/] And Section 2 of the Portal-to-Portal Act, 29 U.S.C. § 252, which precludes federal courts from enforcing certain claims for retroactive wages

---

22/ See Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869).

23/ See Lockerty v. Phillips, 319 U.S. 182, 187 (1943).

24/ See Yakus v. United States, 321 U.S. 414, 434 (1944).

25/ See South Carolina v. Katzenbach, 383 U.S. 301, 331-32 (1966). Indeed, Congress has acted many times to specify that a certain kind of case must be brought only in a specified court. E.g., 28 U.S.C. §§ 1491, 1346(a) (giving Court of Claims exclusive original jurisdiction over certain claims against the United States); 47 U.S.C. § 402(b) (providing that appeals from certain decisions of the Federal Communications Commission are to be brought in the U.S. Court of Appeals for the District of Columbia Circuit). Such limitations are obviously much narrower than the kind proposed by the current bills.

26/ Mitchum v. Foster, 407 U.S. 225, 237 (1972).

under the Fair Labor Standards Act, was sustained only because no constitutional right was ultimately held to be at issue.[27/] Finally, it is noteworthy that in the single instance in which Congress did attempt to exercise its control over federal court jurisdiction as a means of circumventing a substantive judicial interpretation of the Constitution, the Supreme Court held that Congress had exceeded its authority.[28/]

C. Failed Attempts To Enact Similar Types of Limitations

The previous subsection dealt with bills that were actually enacted. Many other bills similar to the proposals now being considered have been introduced from time to time because of dissatisfaction with one court decision or another. Those attempts to "overrule" decisions of the Supreme Court and other courts have routinely failed. This subsection will review several of them and the burials they received.

In 1958, Senator Jenner introduced a bill designed to counteract the Supreme Court's decisions in Konigsberg v. State Bar of California, 353 U.S. 252 (1957), and Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957). Those cases held that California and New Mexico had unconstitutionally denied applications for admission to their state bars, in that former Communist Party membership, use of aliases and refusal to answer questions did not amount to a rational basis for a finding of bad moral character.

The Jenner bill, as reported by the Senate Judiciary Committee, sought to withdraw Supreme Court appellate jurisdiction of any question pertaining to state bar

---

27/ Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948).

28/ United States v. Klein, 80 U.S. (13 Wall.) 128, 147-48 (1871).

admissions.[29] In debate on the floor of the Senate, Senator Jenner expressed confidence that this limitation "provides a complete remedy for the evil results flowing from the Supreme Court's decisions in the Schware and Konigsberg cases."[30] So that there could be no mistake about the bill's purpose, Senator Jenner explained:

> The evil we are seeking to correct here is assumption by the Supreme Court of control over State bar admissions and the use of this assumed control to force individual States to accept Communists as officers of their Courts. By removing such cases from the appellate jurisdiction of the Supreme Court, this assumption of power is negatived, and its exercise for the future is prevented.[31]

The bill was reported favorably by a divided Judiciary Committee despite written opposition from the American Bar Association[32] and President Eisenhower's Justice Department.[33] The statement of the Committee members who

---

29/ S. Rep. 1586, 85th Cong., 2d Sess. 4-5, 9-10 (1958). The reported bill contained other substantive provisions not affecting court jurisdiction. As originally introduced in Committee, the bill would have eliminated the appellate jurisdiction of the Supreme Court in five areas: (1) any practice, jurisdiction or contempt proceeding of any congressional committee; (2) administration by the executive branch of its employee-security program; (3) any state statute or regulation to control subversive activities; (4) rules of educational governing bodies concerning subversive activities among teachers; and (5) admission to practice law in state courts. See 104 Cong. Rec. 18635-37 (remarks of Sen. Jenner), 18648-49 (remarks of Sen. Butler) (1958). Following amendments in Committee by Senator Butler, only the last of these remained in the bill.

30/ 104 Cong. Rec. 16643 (1958).

31/ Id.

32/ S. Rep. 1586, supra note 29, at 37-38. Additionally, the American Bar Association's Special Committee on Individual Rights as Affected by National Security protested: "It is difficult to conceive of an independent judiciary if it must decide cases with constant apprehension that if a decision is unpopular with a temporary majority in Congress, the Court's judicial review may be withdrawn." Id. at 38.

33/ In a letter to Senator Wiley, who was the senior minority member of the Committee, Deputy Attorney General Walsh

[Footnote continued next page]

opposed reporting the bill noted that it would be "dangerous precedent" for Congress "to whittle away at the Federal judiciary whenever the majority disagreed with a decision of the Supreme Court," and concluded that such a practice would probably result in "the complete destruction of the Federal judiciary."[34/] Senator Wiley, the ranking Republican on the Committee, added: "If we begin taking jurisdiction from the Court whenever its decisions are unpopular, our property and civil rights would soon be in jeopardy."[35/] Another Republican, Senator Langer, took the position that the jurisdictional limitation in the bill "will encourage other legislation which will weaken the jurisdiction of the Supreme Court to which the people look as the guardian of our constitutional guaranties."[36/]

Later, during debate in the Senate,[37/] Senator Wiley said that the proposed restriction on Supreme Court jurisdiction "may very well be historically the most ruinous legislation to come out of the Senate -- and the Congress -- in half a century."[38/] After discussing in detail the vital role of the Supreme Court in our tripartite system of government, Senator Wiley summed up:

> This legislation violently tampers with the basic law of the land as established by the

---

[Footnote continued from preceding page]

wrote: "Aside from possible questions of constitutionality which may be raised by a provision withdrawing jurisdiction over a narrowly limited class of cases, this Department doubts the wisdom of dealing, at this time, with specific Supreme Court rulings by amendments to the Court's jurisdictional statute." Id. at 37.

34/ Id. at 16.

35/ Id. at 24.

36/ Id. at 26.

37/ 104 Cong. Rec. 18681-83 (remarks of Sen. Wiley) (1958).

38/ Id. at 18683.

> Founding Fathers. It goes to the heart of our most cherished liberties. Its consequences will undoubtedly be frighteningly unwise and can be fatal to the inherent structure of American Government.[39]

The bill was tabled by a vote of 49-41.[40]

Another attempt to overturn a Supreme Court decision by withdrawal of jurisdiction came in 1964 in response to the ruling in Reynolds v. Sims, 377 U.S. 533 (1964), which required apportionment of each house of state legislatures solely on the basis of population. Senator Dirksen and Senator Mansfield, respectively the minority and majority leaders of the Senate at that time, offered a nongermane amendment to the then-pending foreign aid bill to require that any court order directing state legislative reapportionment be stayed, absent unusual circumstances, until such time as state legislatures were re-elected under previously established apportionment rules and were able to offer their own reapportionment proposals.[41] Following a lengthy filibuster, a much milder substitute was eventually passed.[42]

As a substitute to the Dirksen-Mansfield amendment, Senator Thurmond introduced the so-called Tuck amendment, named for Representative Tuck who had successfully offered it in the House. That amendment sought to remove jurisdiction from the Supreme Court and the District Courts over reapportionment of any state legislature.[43] That extreme proposal was defeated

---

39/ Id. Senator Hennings, the leader of the opposition to the Jenner bill, warned that passage of the bill "could be the first swing of the ax in chipping away the whole foundation of our independent federal judiciary." Id. at 18686.

40/ Id. at 18687.

41/ 110 Cong. Rec. 19449 (1964).

42/ Id. at 22564, 22758.

43/ Id. at 22095.

by a vote of 56-21.[44/] In opposing the Tuck amendment, Senator Hart argued that the only provision for changing the Constitution is by way of a constitutional amendment, and that Congress had no more business telling the courts that they could not rule in constitutional areas than the courts would have in telling Congress that it could not legislate in those areas.[45/] He concluded:

> [W]e are not the reviewing authority of the Supreme Court, and we are not supposed to put the Supreme Court out of business. The day we do that, history will mark as the day when this Republic began to disintegrate.[46/]

And Senator Morse labeled both the Tuck amendment and the Dirksen-Mansfield amendment "attempts on the part of Congress to supersede the U.S. Supreme Court and to change our Government from one of three coordinate, coequal branches of government into a government of legislative supremacy."[47/]

Even though it did not purport to withdraw jurisdiction over reapportionment completely, the Dirksen-Mansfield amendment came under attack for the same reasons as the Tuck amendment did. Senator Kuchel complained that any restrictions on the Supreme Court's authority to construe the Constitution would mean that the

> Constitution would be interpreted by 50 State supreme courts into a political jungle of conflicting rights and responsibilities, with the Federal Government not knowing where to turn or what route to follow, and with individual citizens in a perpetual quandary.[48/]

---

44/ Id. at 22104.

45/ Id. at 22102.

46/ Id.

47/ Id. at 22101.

48/ Id. at 21792.

Senator Church stated his support for a constitutional amendment that would leave apportionment of state legislatures in the hands of the states, but opposed the Dirksen-Mansfield amendment as a grave threat to "the independence of our judiciary to give force and effect to the Constitution."[49/] Senator Javits stated his belief that Congress could only direct the Court to stay out of state legislative apportionment by constitutional amendment,[50/] and he pleaded that it is "the function of governance to avoid dreadful confrontations."[51/]

A series of votes on sections of the Omnibus Crime Control and Safe Streets Act of 1968, which ultimately became law,[52/] demonstrates the way in which Congress has always separated its substantive views on Supreme Court decisions from its views on jurisdictional limitations. Title II of the bill reported by the Senate Judiciary Committee[53/] was designed to circumvent the Supreme Court's decisions in Miranda v. Arizona, 384 U.S. 436 (1966), United States v. Wade, 388 U.S. 218 (1967), and Mallory v. United States, 354 U.S. 449 (1957). Miranda, of course, established guidelines for determining whether confessions are voluntary under the Fifth Amendment. Wade invalidated eyewitness identifications of suspects who were not given the opportunity to have counsel present during identification procedures. And Mallory held inadmissible statements made by a suspect who had not been promptly arraigned.

---

49/ Id. at 21886.

50/ Id. at 22093.

51/ Id. at 22092.

52/ P.L. 90-351, 82 Stat. 197 (1968). See especially the portions of the Act now codified at 18 U.S.C. §§ 3501 and 3502.

53/ S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in [1968] U.S. Code Cong. and Admin. News, 2112, 2123-53, 2176.

Title II dealt with both jurisdiction and substance. One substantive provision, that a confession in a federal case would be admissible if a trial judge determined by weighing a variety of factors that it was voluntarily given, passed 55-29.[54/] Another substantive part of the bill, providing that a confession in a federal case would not be inadmissible solely because of delay in arraignment, was adopted 58-26.[55/] A third substantive provision required the admissibility in federal court of eyewitness testimony identifying a suspect as having committed a crime; that also was adopted, by a vote of 63-21.[56/]

Other provisions would have removed federal court jurisdiction over the admissibility of confessions and eyewitness identifications, however, and those were not adopted. By a vote of 52-32, the Senate struck from the bill the prohibition on all federal courts to review a state court ruling admitting a confession as voluntarily made if that ruling was upheld by the highest state court.[57/] Similarly, the Senate removed by a vote of 51-30 the portion of the bill that would have withdrawn all federal appellate court jurisdiction over any decision by either a federal or state trial court to admit an eyewitness identification of the accused.[58/] In the debate, Senator Griffin, who approved of the substantive provision making eyewitness identifications

---

54/ 114 Cong. Rec. 14172 (1968).

55/ Id. at 14174-75.

56/ Id. at 14180.

57/ Id. at 14177.

58/ Id. at 14181. The Senate also struck 54-27 a section of the bill which essentially would have removed all federal habeas corpus review of state court judgments and would have left Supreme Court review of state court decisions by appeal or certiorari as the only available means of federal court review. Id. at 14183-84.

admissible, opposed the limitation on jurisdiction over that area and cautioned against upsetting "the delicate balance which exists between the legislature [sic] and judicial branches of the Federal Government."[59/]

More recently, a 1972 proposed amendment to the Higher Education Act would have removed all federal court authority to make any decision that would have the effect of requiring transportation of pupils to or from school. This amendment was similar to some of the bills now pending.[60/] Then-Senator Mondale opposed the amendment, stating:

> If statutory efforts to alter constitutional rights and remedies could be made successful merely by reciting the word "jurisdiction" the Congress could overrule any court decision, and the Constitution would be just a piece of paper.[61/]

Senator Cooper later expressed the same doubt "that we can by statute limit the constitutional authority of the courts."[62/] And Senator Javits pointed out the difference, in terms of

---

59/ Id. at 14181. The views expressed by the Judiciary Committee minority in opposition to Title II of the Committee report made the following additional arguments: (1) that Congress cannot act by statute, but only by constitutional amendment, if it wishes to change the Constitution or Supreme Court decisions interpreting the Constitution; (2) that the exercise by Congress of its power under Article III, Section 2 of the Constitution to make "exceptions" to the Supreme Court's appellate jurisdiction "must be consistent with the fundamental role of the Supreme Court in our Federal system," and that interpreting that power otherwise would "nullify[ ] the supremacy clause"; (3) that the limitations "would cause the sort of basic confrontation between court and legislature that should be avoided at all costs if possible"; and (4) that the Constitution would be reduced "to a hodgepodge of inconsistent decisions." S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in [1968] U.S. Code Cong. and Admin. News, supra note 53, at 2209, 2218-20. Senator Fong, who concurred in the statement of minority views, added in a separate statement: "I had thought it settled within our federal system that what is mandated by the Constitution may not be dismissed by legislative fiat." Id. at 2240-41.

60/ See note 4 supra.

61/ 118 Cong. Rec. 5681 (1972).

62/ Id. at 5981.

congressional authority, between statutes such as the Norris-LaGuardia Act, which do not involve constitutional rights, and proposals such as the 1972 amendment, which do.[63] The amendment was defeated 50-47.[64]

President Franklin Roosevelt's "Court-packing" plan of 1937, of course, was also unsuccessful as an attempt to tamper with the federal courts because of controversial decisions.[65] Following decisions by the Supreme Court holding unconstitutional certain key aspects of his New Deal reform package, President Roosevelt had a bill introduced that would have authorized the appointment of as many as six additional Justices to the Supreme Court -- one for every Justice who reached age 70 after having been a federal judge for 10 years and who did not resign or retire within six months thereafter. At the time of that proposal, six of the nine Supreme Court Justices had attained age 70. The plan, of course, was never enacted.

The Senate Judiciary Committee reported the bill adversely by a unanimous vote,[66] addressing the proposal with scathing language. A list of six primary reasons for rejecting the plan included the following two reasons applicable to the current proposals:

> It applies force to the judiciary and in its initial and ultimate effect would undermine the independence of the courts.

---

63/ Id. at 5962.

64/ Id. at 5979.

65/ Several of the past attempts to limit federal court authority have been likened to the Court-packing plan. With respect to the Jenner Bill, see 104 Cong. Rec. 18682 (1958) (remarks of Sen. Wiley). With respect to the Omnibus Crime Control Bill of 1968, see S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in [1968] U.S. Code Cong. and Admin. News, supra note 53, at 2219-20 (minority views); 114 Cong. Rec. 14181 (1968) (remarks of Sen. Griffin).

66/ S. Rep. No. 711, 75th Cong., 1st Sess. (1937).

> The theory of the bill is in direct violation of the spirit of the American Constitution and its employment would permit alteration of the Constitution without the people's consent or approval; it undermines the protection our constitutional system gives to minorities and is subversive of the rights of individuals.[67]

The Committee noted that the framers of the Constitution "created a judicial branch of government consisting of courts not conditionally but absolutely independent," and that the effect of the Court-packing proposal was "to take from the Justices affected a free exercise of their independent judgment."[68] The Committee warned:

> If we yield to temptation now to lay the lash upon the Court, we are only teaching others how to apply it to ourselves and to the people when the occasion seems to warrant. Manifestly, if we may force the hand of the Court to secure our interpretation of the Constitution, then some succeeding Congress may repeat the process to secure another and a different interpretation and one which may not sound so pleasant in our ears as that for which we now contend.[69]

The Committee thus concluded:

> It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America.[70]

## II. Congress' Article III Power To Curtail Supreme Court Jurisdiction Is Limited

### A. Supreme Court's Essential Role

The source of congressional power over the federal judiciary is Article III of the Constitution. Congress'

---

67/ Id. at 3.

68/ Id. at 9.

69/ Id. at 10.

70/ Id. at 23.

Article III powers are broad, but they are not plenary; they are limited, in the first instance, by Article III itself. Article III created the Supreme Court as the head of a separate and co-equal branch of the Federal Government. Section 1 of Article III provides that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (Emphasis added.) Section 2 of Article III defines "the Judicial Power" to include in part "all Cases, in Law and Equity, arising under this Constitution." Thus, the Constitution itself establishes the Supreme Court,[71] and establishes its powers, while the decision whether to establish lower federal courts and what jurisdiction to give them was left to the Congress.[72]

Article III establishes both original and appellate jurisdiction in the Supreme Court. The Court's original jurisdiction extends to "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[73] The Court's appellate jurisdiction, on the other hand, extends to both "Law and Fact, with such Exceptions, and

---

71/ In contrast to the lower federal courts about which there was disagreement, there was virtually unanimous agreement on the need for a federal supreme court. See 1 M. Farrand, Records of the Federal Convention of 1787 at 21, 95, 104-05, 244, 292 (1974) [hereinafter cited as "Farrand"]; 2 Farrand at 37; 3 Farrand at 600. See Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 161 (1960).

72/ The decision to give Congress the option of creating lower federal courts was formulated by James Madison and James Wilson. This "Madisonian Compromise" represented a middle ground between those states that wished to mandate the establishment of lower federal courts and those that opposed any such courts. 1 Farrand at 124-25. Redish & Woods, Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and A New Synthesis, 124 U. Pa. L. Rev. 45, 52-54 (1975).

73/ Congress may grant to other federal courts concurrent jurisdiction over classes of cases that lie within the Supreme Court's original jurisdiction. Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898); Börs v. Preston, 111 U.S. 252 (1884). However, Congress cannot restrict the constitutional grant of original jurisdiction. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174-75 (1803).

under such Regulations as the Congress shall make." The "exceptions and regulations" clause is the source of whatever power Congress has to limit the Supreme Court's appellate jurisdiction.

The language of Article III itself limits that power and provides a basis for its proper exercise.[74/] The use of the words "exceptions" and "regulations" in defining congressional power is significant. The common meaning of these words, both now and at the time of the Constitutional Convention, suggests that Congress' Article III power to fashion "exceptions" and make "regulations" with respect to the appellate jurisdiction of the Supreme Court is not plenary.[75/] As Professor Hart asked rhetorically in his famous article on federal jurisdiction: "You would treat the Constitution, then, as authorizing exceptions which engulf the rule, even to the

---

74/ The history of the Constitutional Convention, however, suggests that the framers may have intended to limit congressional power to regulate the Supreme Court's appellate jurisdiction even more than suggested by the literal language of Article III itself. Prof. Merry of Purdue, for instance, has argued that the "exceptions" clause was directed at matters of fact and not of law. Merry, Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis, 47 Minn. L. Rev. 53 (1962). Prof. Berger has also suggested this interpretation. As Prof. Berger describes it, the "difficulty, in a nutshell, was the greatly varied practice in the States respecting review of facts, not alone in jury trials but in admiralty and equity as well." R. Berger, Congress v. The Supreme Court Ch. 9, 287 (1969). The members of the Constitutional Convention could not agree on a uniform method for review of such factual findings by lower courts. In a spirit of compromise, they decided to leave the issue to the federal legislature. The exceptions clause of Article III simply was intended to make clear that the Congress had that power.

75/ The Webster's New Collegiate Dictionary defines "exception" as "one that is excepted; [especially]: a case to which a rule does not apply." The meaning has not changed since the time of the Constitutional Convention. Ash's Dictionary of the English Language (1775) defined "exception" as "an exclusion from a general rule or law." Dyche's New General English Dictionary (1781) defined the term as "something taken out of a number of other things, and differing in some particular . . . ." The word "regulation" similarly implies a somewhat limited authority. The modern definition of the word is "an authoritative rule dealing with details or procedure" while "regulate" is defined as "to make regulations for or concerning" or "to bring order, method, or uniformity to." This meaning has changed little since the time of the Constitutional Convention. Perry's English Dictionary (1805) defined the word as "[t]o adjust by rule or method, to methodise, to dispose in order, to direct."

point of eliminating the appellate jurisdiction altogether? How preposterous!"[76/] The Judiciary Act of 1789 did not vest jurisdiction in the Supreme Court but only created exceptions to the jurisdiction that had already been established by the Constitution. Chief Justice Marshall stated:

> Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it posssessed of creating a supreme court, as ordained by the constitution; and in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished. The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.[77/]

The limitations on Congress' power found by the language of Article III are corroborated by consideration of the Supreme Court's central role in the constitutional scheme. The Court provides an ultimate and independent forum for the interpretaton of constitutional law and the resolution of conflicts between federal and state laws. As Justice Marshall wrote in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803): "It is emphatically the province and duty of the judicial department to say what the law is."[78/] Those bills that would eliminate the Court's appellate jurisdiction over particular constitutional rights would remove the Court from part of its province and prevent the Court from performing its duty.

---

76/ Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1364 (1953).

77/ Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313-14 (1810).

78/ The Court expressly reaffirmed this principle of Marbury v. Madison in rejecting President Nixon's assertion of executive privilege to prevent the release of the Watergate tapes to the Congress. United States v. Nixon, 418 U.S. 683, 705 (1974).

Early in the Constitutional Convention, it was recognized that some part of the national government necessarily must possess the power to strike down or veto state laws in conflict with national policies. Initially, however, the delegates were not in agreement as to the appropriate repository of that power. Some proposed that Congress be given the power to veto state legislation.[79/] The Madisonian position, however, that "[t]he jurisdiction of the supreme Court must be the source of redress," carried the day.[80/]

Significantly, the determination of the Supreme Court's appellate jurisdiction was considered concurrently with the Supremacy Clause. Draft language for a supremacy clause was offered as a substitute for the defeated proposal for congressional review of state legislation.[81/] As Professor Ratner has observed, "taken together, these resolutions evidence the Convention's purpose to make the Supreme Court the principal instrumentality for implementing the supremacy clause."[82/]

---

79/ The dispute, however, centered not on whether the Supreme Court would have jurisdiction to review state laws but on whether such review, if limited to the Supreme Court, would be sufficient. Wilson of Pennsylvania suggested that judicial review was insufficient, arguing that "[t]he firmness of Judges is not of itself sufficient. Something further is requisite -- It will be better to prevent the passage of an improper law, than to declare it void when passed." 2 Farrand at 391.

80/ 2 Farrand at 589.

81/ 2 Farrand at 22, 2839. See Ratner, supra note 71, at 165. The draft of the Supremacy Clause states: "The Acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States shall be the supreme law of the several States, and of their citizens and inhabitants. . . ." 2 Farrand at 183.

82/ Ratner, supra note 71 at 165 (footnote omitted). Persuasive support for this proposition was voiced by Alexander Hamilton in The Federalist, No. 22, at 197:

> A circumstance which crowns the defects of the Confederation remains yet to be mentioned, -- the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the

[Footnote continued next page]

The role of the Supreme Court as ultimate interpreter of federal law and in ensuring uniform application of that law has been recognized from the time of the earliest Supreme Court decisions. In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347-48 (1816), Justice Story wrote:

> A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might reduce the grant

---

[Footnote continued from preceding page]

> United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL. And this tribunal ought to be instituted under the same authority which forms the treaties themselves. These ingredients are both indispensable. If there is in each State a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless diversities in the opinions of men. We often see not only different courts but the judges of the same court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice.

A recognition of the Court's role in providing a uniform interpretation and application of federal law is evidenced throughout The Federalist. In The Federalist, No. 81 at 505, Hamilton wrote: "That there ought to be one court of supreme and final jurisdiction, is a proposition not likely to be contested." He further stated, in No. 80 at 500: "If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed." Madison wrote in No. 39 at 285, that it "is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. . . . Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact . . . ."

> of appellate power over their decisions. That motive is the importance and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

Chief Justice John Marshall articulated the same principle in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 416-18 (1821):

> [T]he necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved. . . .
>
> . . . [The framers of the Constitution] declare, that in such cases, the Supreme Court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a State Court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction.83/

---

83/ Id. at 416-18. Justice Taney, writing in Ableman v. Booth, 62 U.S. (21 How.) 506, 517-18 (1858) stated:

> But the supremacy thus conferred on this Government [by the Supremacy Clause] could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take

[Footnote continued next page]

The circumstances of contemporary society have, if anything, only increased the Supreme Court's role in ensuring uniform application of consitutional principles. In Cooper v.

---

[Footnote continued from preceding page]

> place . . . [a]nd the Constitution and laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different States, and the Government of the United States would soon become one thing in one State and another thing in another. It was essential, therefore, to its very existence as a Government, that . . . a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a State court or a court of the United States, should be finally and conclusively decided. . . . And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; [and] to make the Constitution and laws of the United States uniform, and the same in every State. . . .

Equally strong language can be found in other Supreme Court decisions. For instance, in Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1856) the Court stated:

> [O]ur national union would be incomplete and altogether insufficient for the great ends contemplated, unless a constitutional arbiter was provided to give certainty and uniformity, in all of the States, to the interpretation of the constitution and the legislation of congress. . . . [T]he framers of the constitution, and the conventions which ratified it, were fully aware of the necessity for . . . a department . . . to which was to be confided the final decision judicially of the powers of that instrument, the conformity of laws with it, which either congress or the legislatures of the States may enact, and to review the judgments of the state courts, in which a right is decided against, which has been claimed in virtue of the constitution or the laws of congress. . . . Without the supreme court, as it has been constitutionally and legislatively constituted, neither the constitution nor the laws of congress passed in pursuance of it, nor treaties, would be in practice or in fact the supreme law of the land. . . .

Id. at 350-51, 355.

Aaron, 358 U.S. 1 (1958), the Court considered a claim that state officials had no duty to comply with the Court's earlier holding in Brown v. Board of Education, 347 U.S. 483 (1954). In an opinion signed by each of the justices, the Court reaffirmed its central role in interpreting the Constitution. The Court's statement merits repeating here:

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." . . . [Marbury v. Madison] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."84/

Enactment of those bills which seek to eliminate the Supreme Court's appellate jurisdiction over particular constitutional claims would disable the Court from performing its central role of ensuring uniform national application of constitutional principles. Unlike the minimal congressional regulation of federal court jurisdiction upheld in Ex parte McCardle and Yakus,85/ some of the present bills would appear to extinguish the federal judicial power altogether, insofar as it extends to cases arising under certain constitutional provisions. Without the ability to review the decisions of state and lower federal courts, there would be varying interpretations of the same Constitution, with no opportunity for resolution. Constitutional rights would vary from state to state and the Supremacy Clause would be reduced to a nullity.

---

84/ Cooper v. Aaron, 358 U.S. 1, 18 (1958).

85/ See pp. 8-9 supra.

B. Separation of Powers

For the Supreme Court to be "supreme," of course, it must be independent. The Article III provisions providing life tenure for judges and prohibiting diminution in their compensation while they are on the bench are designed to ensure that the federal judiciary remains an independent and co-equal branch of the Federal Government, immune from the day-to-day influence of the political branches. Alexander Hamilton wrote:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.86/

The independence of the Supreme Court (as well as the lower federal courts) would be fatally compromised if Congress could grant or remove jurisdiction depending on whether it approved of a decision, or review decisions within the Court's jurisdiction before permitting those decisions to become effective, or require the Court to decide such cases in

---

86/ The Federalist, No. 78 at 491. In No. 78, Hamilton also wrote:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

Id. at 494.

congressionally specified ways. In the late Eighteenth Century, Congress enacted a statute empowering federal and state courts to determine the pensions to be awarded disabled veterans from the Revolutionary War, subject to review by the Secretary of War. The Circuit Court for the District of Pennsylvania refused to entertain a suit brought under the statute, and the Attorney General sought review in the Supreme Court. Before the Supreme Court could decide the case, Congress amended the legislation. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792). In dismissing the case as moot, however, the Court incorporated in the margin of its opinion several authoritative views concerning the separation between the legislative and judicial branches of government. Thus, the Circuit Court for the District of New York, consisting of Chief Justice Jay, Justice Cushing and a district judge, had unanimously held:

> [B]y the Constitution, neither the Secretary of War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.87/

Similarly, the Circuit Court for the District of Pennsylvania (consisting of two Supreme Court Justices and a district judge) had jointly written the President in 1792 protesting the Pension Act:

> It is a principle important to freedom, that in government, the judicial should be distinct from, and independent of, the legislative department. To this important principle the people of the United States, in forming their Constitution, have manifested the highest regard.
>
> They have placed their judicial power, not in Congress, but in "courts." They have ordained that the "Judges of those courts shall hold their offices during good behavior" and that "during their

---

87/ 2 U.S. (2 Dall.) at 410 n.(a).

> continuance in office, their salaries shall not be diminished."
>
> * * *
>
> . . . Such revision and control [of judicial decision by a Legislature] we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and, consequently, with that important principle which is so strictly observed by the Constitution of the United States.88/

A year after Hayburn's Case, in 1793, the separation of powers doctrine was further clarified in an exchange of correspondence familiar to every law student. Thomas Jefferson, then Secretary of State, asked the Supreme Court for a legal opinion on the effect of certain treaties. The court refused, explaining to President Washington in a letter dated August 1793, that the Supreme Court may not constitutionally give advisory opinions.89/

The importance of the Supreme Court's independence was affirmed in United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). There, the Court refused to follow congressional legislation designed in effect to direct the outcome of a particular case. The legislation provided that possession of a pardon should be treated as conclusive proof of disloyalty and that the case seeking return of property should be dismissed for lack of jurisdiction. The Court, however, rejected the limitation. The Court stated:

> Congress has already provided that the Supreme Court shall have jurisdiction of the judgment of the Court of Claims on appeal. Can it prescribe a rule in

---

88/ Id. at 411-12 n.(a) (emphasis in original). The decisions reported in the margin of Hayburn's Case have been approved and relied on as a correct interpretation of the Constitution in subsequent cases, including, e.g., Muskrat v. United States, 219 U.S. 346, 352-53 (1911), and United States v. Ferreira, 54 U.S. (13 How.) 40 (1852) (Taney, J.).

89/ See 3 Johnston, Correspondence and Public Papers of John Jay, 486-89 (1891). Accord, Gordon v. United States, 117 U.S. 697 (1864).

> conformity with which this Court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.90/

By impermissibly encroaching upon the independence of the Supreme Court, these bills would upset the constitutional scheme of checks and balances and cripple the federal judiciary in its role, as the third branch of the national government. As Justice Jackson wrote in his concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952):

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

It is thus not exaggeration to say that passage of the proposed bills restricting Supreme Court jurisdiction would supplant the Court as the ultimate arbiter of the Constitution.

---

90/ Id. at 147. As the Court stated in Gordon v. United States, 117 U.S. 697, 699-701 (1864):

> The Supreme Court does not owe its existence or its powers to the Legislative Department of the government. . . .
>
> The existence of this Court is . . . as essential to the organization of the government established by the Constitution as the election of a president or members of Congress. . . . [T]here was . . . an absolute necessity, in order to preserve internal tranquility, that there should be some tribunal to decide between the Government of the United States and the government of a State whenever any controversy should arise as to the relative and respective powers in the common territory. The Supreme Court was created for that purpose, and to insure its impartiality it was absolutely necessary to make it independent of the legislative power, and the influence direct or indirect of Congress and the Executive. Hence, the care with which its jurisdiction, powers, and duties are defined in the Constitution, and its independence of the legislative branch of the government secured.

Claimants receiving an unfavorable decision in the judicial branch would, in effect, appeal to Congress seeking passage of a bill removing jurisdiction over the particular issue. Constitutional rights thereby would be subject to the whims of ever-changing political majorities, precisely the opposite of what the framers intended. As Justice Marshall wrote in Marbury v. Madison,

> [T]here is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.
>
> If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.[91]

These bills would violate separation of power principles not only by encroaching upon the constitutional prerogatives of the judiciary but also by intruding into the constitutional role of the states as co-participants in the amendatory process. Insofar as these bills would have the effect of altering the interpretation and application of the underlying constitutional right, they would effectively bypass the formal amendment process, to the exclusion of the states. Under the provisions of Article V of the Constitution, Congress may propose constitutional amendments by two-thirds vote of both Houses. Amendments are ratified by the vote of the legislatures of three-fourths of the states.[92]

The bills which seek to restrict Supreme Court jurisdiction not only would impermissibly exclude the states from the amendment process but would expand Congress' role in

---

91/ Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

92/ Constitutional amendments may be proposed and ratified by state conventions as well. U.S. Const. Art. V.

that process beyond that set forth in the Constitution. Although Congress was ultimately given a role in the amendatory process, early drafters of what came to be Article V excluded Congress from the amending process: "that provision ought to be made for amending the system now to be established, without requiring the assent of the National Legislature."[93/] Further constraints on Congressional power in the amendatory process are provided by the need to obtain state consent and by the provision authorizing state conventions to propose amendments.[94/]

## III. Congressional Power To Curtail Federal Court Jurisdiction Is Limited by Other Provisions of the Constitution

All of the bills, whether they purport to affect the jurisdiction of the entire federal judiciary or only that of the lower federal courts, would in some manner impair the exercise of rights guaranteed to individuals by constitutional provisions outside of Article III. To the extent that they do so, the bills would be unconstitutional.

### A. Relationship Between Article III and Other Constitutional Provisons

Section 1 of Article III provides that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Congress proceeded to "ordain and establish" a system of lower federal courts as one of its first acts after ratification of the Constitution in 1789.[95/] By successive legislative enactments, the federal court system evolved to its present form and has remained

---

93/ 1 Farrand at 121 (emphasis omitted).

94/ Kauper, The Alternative Amendment Process: Some Observations, 66 Mich. L. Rev. 903 (1968).

95/ See An Act to establish the Judicial Courts of the United States, 1 Stat. 73 (1789).

essentially unchanged since 1911.[96/] Congress conferred on the District Courts original jurisdiction of cases arising under the Constitution, laws, or treaties of the United States in 1875 (now codified in 28 U.S.C. § 1331), and original jurisdiction over civil rights in 1871 (now codified in 28 U.S.C. § 1343(3)).

Constitutional scholars and judges have long debated the scope of congressional power over lower federal courts under Article III.[97/] Most commentators have concluded that the "ordain and establish" language of Article III indicates that lower federal courts are creatures of Congress and not, as in the case of the Supreme Court, of the Constitution itself.[98/] Article III, therefore, has been construed to grant Congress broad discretion to establish, alter, or eliminate the

---

96/ See generally P. Bator, P. Mishkin, D. Shapiro, H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 32-49 (2d ed. 1973).

97/ Justice Story believed that the Constitution mandated the creation of lower federal courts so that federal rights and claims could be vindicated. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 330-33 (1816). Justice Story erroneously assumed that state courts could not exercise jurisdiction over federal causes of action. Id. at 334, 337-38. One commentator has posited that, whatever its historical antecedents, Article III now prohibits Congress from abolishing lower federal courts. He argues that because of changed circumstances, including the inability of the Supreme Court to review all cases arising under federal law, lower federal courts have become an integral part of the constitutional structure of government. Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L. J. 498 (1971).

98/ See, e.g., R. Bork, Constitutionality of the President's Busing Proposals (American Enterprise Institute 1972); Harzenski, Jurisdictional Limitations and Suspicious Motives: Why Congress Cannot Forbid Court-Ordered Busing, 50 Temple L. Q. 14, 25-26 (1976); Hart, The Power of Congress to Limit the Jurisdiction of Lower Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953); Reddish & Woods, Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. Pa. L. Rev. 45 (1975); Comment, Congressional Power Over State and Federal Court Jurisdiction: The Hill-Burton and Trans-Alaska Pipeline Examples, 49 N.Y.U. L. Rev. 131 (1974).

jurisdiction of lower federal courts.[99/]

Just as Congress does not have plenary power to change the jurisdiction of the Supreme Court,[100/] however, so, too, its power over the lower federal courts under Article III is not absolute. As always, the Constitution itself restricts Congress' enumerated powers:

> [T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.

Williams v. Rhodes, 393 U.S. 23, 29 (1968). Having created federal courts and conferred upon them jurisdiction over cases arising under the Constitution, Congress may not curtail this jurisdiction in violation of other parts of the Constitution.[101/]

The line of federal court of appeals cases following the enactment of the Portal-to-Portal Act[102/] by Congress in 1947 illustrates this limitation on Congress' power. The

---

99/ See, e.g., Lockerty v. Phillips, 319 U.S. 182, 187 (1943), quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845):

> The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'

See also Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922).

100/ See pp. 24-43 supra.

101/ See also Glidden Co. v. Zdanok, 370 U.S. 530, 568 (1962); Van Alstyne, A Critical Guide to Ex Parte McCardle, 15 Ariz. L. Rev. 229, 263-69 (1973); Rotunda, Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing, 64 Geo. L. J. 839, 851-54 (1976).

102/ Portal-to-Portal Act, 61 Stat. 84 (1947), as amended, 29 U.S.C. §§ 216, 251-62. See p. 10 supra.

Supreme Court had previously construed the Fair Labor Standards Act of 1938 to require that employers compensate their employees for necessary time spent on the work premises before and after performing the primary functions of their jobs.[103] For example, the Court's decisions mandated payment for time spent changing into and out of work clothes and obtaining and returning tools and equipment. These unanticipated rulings created immense liability for both private and governmental employers. In response, Congress passed the Portal-to-Portal Act, which provided that wage claims under federal law would be governed solely by express contractual terms or by custom and practice. In addition, the statute eliminated the jurisdiction of courts over pending and future federal wage actions where the alleged liability of the employer was not based on a claim compensable under the substantive provisions of the Act. The Act was clearly intended to preclude claims based on the earlier Supreme Court rulings.[104]

When the Portal-to-Portal Act was enacted, employees had already filed several suits in various federal courts to recover wages on the basis of the Supreme Court precedent. Significantly, most courts ignored the Act's jurisdictional prohibition and reached the merits of the cases, ultimately holding that Congress could retroactively alter the statutory definition of compensable work within the bounds of the Constitution.[105] One court of appeals merely concluded that it need not consider the validity of the jurisdictional

---

103/ See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946); Jewell Ridge Coal Corp. v. UMW Local 6167, 325 U.S. 161 (1945); Tennessee Coal, Iron & Railroad Co. v. Muscoda Local 123, 321 U.S. 590 (1944).

104/ See Battaglia v. General Motors Corp., 169 F.2d 254, 259-60 (2d Cir.), cert. denied, 335 U.S. 887 (1948).

105/ See Thomas v. Carnegie-Illinois Steel Corp., 174 F.2d 711 (3d Cir. 1949); McDaniel v. Brown & Root, Inc., 172 F.2d 466 (10th Cir. 1949); Lee v. Hercules Powder Co., 171 F.2d 950 (7th Cir. 1949); Potter v. Kaiser Co., 171 F.2d 705 (9th Cir. 1949).

limitation because the substantive provisions of the Act were constitutional.[106] Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948), however, directly addressed the constitutionality of the jurisdictional preclusion, and the court observed:

> [W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.[107]

The Portal-to-Portal cases culminating in Battaglia v. General Motors Corp. stand for the proposition that Congress cannot, through regulation of federal court jurisdiction, effect what it could not otherwise achieve through substantive legislation directly altering constitutional rights. Even where legislation purports to address only jurisdiction, its validity will rest on the constitutionality of its substantive result, and the two "will stand or fall together."[108] If Congress withdraws judicial power to hear and decide claims of unconstitutional infringement of rights, it has withdrawn the right itself, and its act must be tested against that result. And, of course, the courts retain jurisdiction to determine whether such withdrawal was permissible.[109] As one court

---

106/ Seese v. Bethlehem Steel Co., 168 F.2d 58, 65 (4th Cir. 1948).

107/ 169 F.2d at 257. (footnote omitted).

108/ Id. The First Circuit described Battaglia v. General Motors Corp. as holding that "the constitutional infirmity, if any such existed, could not be circumvented by the . . . jurisdictional provision. . . ." Manosky v. Bethlehem-Hingham Shipyard, 177 F.2d 529, 532 (1st Cir. 1949).

109/ See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 348 (2d ed. 1973): "If the court finds that what is being done [by the government] is invalid, its duty is simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction." Thus, so long as federal courts have federal question jurisdiction, they always have the power to decide the constitutionality of any congressional jurisdictional limitation.

observed:

> A basic and inherent function of the judicial branch of a government built upon a constitution is to set aside void action by government officials. . . . In our jurisprudence, no Government action which is void under the Constitution is exempt from judicial power.[110/]

Professor Berger has asserted that, whatever the scope of Congress' powers over federal and state courts, "these powers cannot be so employed as to defeat one 'of the most important and avowed purposes of the proposed government' -- judicial protection of constitutional rights."[111/]

Congress could not constitutionally enact legislation that directly outlaws abortions[112/] or requires prayer in public schools.[113/] It is equally clear that for Congress to assist the states to enforce or administer similar laws would be unconstitutional.[114/] It follows that, to the extent the bills now before Congress would eliminate the federal judiciary as the only available or effective forum for the vindication of certain constitutional rights, the jurisdictional bills would operate in violation of substantive provisions of the Constitution and would themselves accordingly be

---

110/ Eisentrager v. Forrestal, 174 F.2d 961, 964 (D.C. Cir. 1949) (citations omitted), rev'd on other grounds sub nom. Johnson v. Eisentrager, 339 U.S. 763 (1950).

111/ R. Berger, Congress v. Supreme Court, 282 (1969), quoting The Federalist No. 82 at 517 (A. Hamilton).

112/ See Roe v. Wade, 410 U.S. 113 (1973).

113/ See School District v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

114/ For example, Congress could not require a state to prohibit abortions as a condition of receiving federal funds, nor could Congress provide funding to states for the purpose of compensating clergymen to lead prayer in public schools. Cf. Hunter v. Erickson, 393 U.S. 385 (1969) (city charter amendment which provided that fair housing laws had to be approved by referendum invalidated); Reitman v. Mulkey, 387 U.S. 369 (1967) (state constitutional provision prohibiting the state or any political subdivision or agency thereof from interfering with decisions to sell or lease or not sell or lease real property invalidated).

unconstitutional.[115] Insofar as the bills would have the effect of denying certain women the right to choose to have an abortion, of forcing children to attend public prayer in violation of their constitutional rights, or of depriving minority school children of the racially integrated school environment that the Constitution mandates, they would, in essence, render some constitutional rights unenforceable and nugatory -- which the Constitution will not permit.[116]

Commonly cited judicial precedents upholding congressional curtailment of judicial power are not to the contrary. The Norris-La Guardia Act[117] limits federal court jurisdiction to issue injunctions or restraining orders in labor disputes, but it affects only remedies for private controversies. It does not in any way alter judicial power over unconstitutional government action. In reviewing that statute, the Supreme Court therefore had no basis for considering whether the jurisdictional bar deprived parties

---

115/ See Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498, 511 (1974).

116/ Justice Harlan, in his concurring opinion in Oestereich v. Selective Service Board, 393 U.S. 233 (1968), observed that an interpretation of a congressional statute to preclude challenges to federal action "would raise serious constitutional problems." 393 U.S. at 243 (Harlan, J., concurring). Justice Harlan's statement is especially significant because the case involved an area where courts have traditionally deferred to Congress -- the military draft. See also Johnson v. Robison, 415 U.S. 361, 366-67 (1974), where Justice Brennan noted that a construction of a military benefits statute as "bar[ring] federal courts from deciding the constitutionality of veterans' benefit legislation . . . would, of course, raise serious questions concerning the constitutionality of [the statute]."

Some commentators have asserted that preclusion or substantial curtailment of judicial review of unconstitutional governmental action violates the Due Process Clause. See, e.g., Comment, Congressional Power Over State and Federal Court Jurisdiction: The Hill-Burton and Trans-Alaska Pipeline Examples, 49 N.Y.U.L. Rev. 131, 141-42 (1974); Redish & Woods, Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. of Pa. L. Rev. 45, 76-81 (1975). The substance of the deprivation, whether classified as a violation of due process or of a substantive constitutional right is the same: the inability to vindicate constiutional rights.

117/ 29 U.S.C. §§ 101-15. See p. 7 supra.

seeking an injunction of their constitutional rights. Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938).[118]

Indeed, the cases upholding restrictions on court challenges to government action have assumed that the federal courts would always be available for the vindication of constitutional rights. For example, while the Supreme Court upheld as a valid exercise of Congress' jurisdictional and war powers[119] the Emergency Price Control Act of 1942,[120] which permitted judicial review only by an Emergency Court of Appeals and the Supreme Court, by writ of certiorari to that special court, it assumed that the statutory procedures for constitutional challenges would adequately safeguard claimants' rights.[121] The Court made clear that the Constitution requires a judicial remedy for constitutional wrongs: "A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored."[122] And there is some reason to believe that even this minimal structuring of federal court jurisdiction was upheld only because Congress confronted a national economic emergency during a time of war.[123]

---

118/ Indeed, the Norris-La Guardia Act has been cited as promoting constitutional rights -- the First Amendment right to peaceful picketing. See Rotunda, Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problems of School Busing, 64 Geo. L.J. 839, 852 n.72 (1976), citing Thornhill v. Alabama, 310 U.S. 88 (1940).

119/ Yakus v. United States, 321 U.S. 414 (1944); Lockerty v. Phillips, 319 U.S. 182 (1943).

120/ 56 Stat. 23 (1942). See p. 9 supra.

121/ Yakus v. United States, 321 U.S. at 437:

> No reason is advanced why petitioners could not, throughout the statutory proceeding, raise and preserve any due process objection to the statute, the regulations, or the procedure, and secure its full judicial review by the Emergency Court of Appeals and this Court.

122/ Lockerty v. Phillips, 319 U.S. at 188. See also Yakus v. United States, 321 U.S. at 444.

123/ See Adamo Wrecking Co. v. United States, 434 U.S. 275, 290 (1978) (Powell, J., concurring).

Similarly, the cases upholding the anti-injunction provision of the Internal Revenue Code, 26 U.S.C. § 7421(a),[124] recognize that federal courts retain the power to review the constitutionality of a tax. Section 7421(a) affects only the timing of the relief and applies in cases only where remedies other than injunctions are adequate.[125] In one such case, Justice Brandeis reasoned that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination . . . is adequate." Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931). Even so, the Supreme Court has held that the anti-injunction provision "is inapplicable in exceptional cases where there is no plain, adequate, and complete remedy at law,"[126] i.e., where the tax is demonstrably unconstitutional or otherwise unlawful. See, e.g., Miller v. Standard Nut Margarine Co., 284 U.S. 498 (1932); Hill v. Wallace, 259 U.S. 44 (1922).[127]

B. Inadequacy of State Court Alternatives

To be sure, the state courts often are available for those with claims of constitutional right. But in some cases, relegating a constitutional claimant to state remedies, even with the potential for Supreme Court review, is the equivalent of denying any redress whatever. This is most clearly the case in those suits that involve claims against federal officers, because a state court may be constitutionally prohibited from granting an effective remedy. See Tarble's Case, 80 U.S. (13

124/ See p. 8 supra.

125/ See, e.g., Bob Jones University v. Simon, 416 U.S. 725 (1978); Phillips v. Commissioner, 283 U.S. 589 (1931).

126/ Allen v. Regents, 304 U.S. 439, 449 (1938).

127/ See Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962) where the Court reversed an order enjoining the collection of a tax because there was no showing that the United States could not ultimately prevail on the merits of the case.

Wall.) 397 (1871) (state court may not issue a writ of habeas corpus to release petitioner from federal custody); McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821) (state court may not issue a writ of mandamus to compel performance of a duty by a federal officer); Pennsylvania Turnpike Commission v. McGinnes, 179 F. Supp. 578 (E.D. Pa.), aff'd per curiam, 278 F.2d 330 (3d Cir.), cert. denied, 361 U.S. 829 (1959) (state court may not enjoin a federal officer). In other kinds of cases, although there is always a theoretical possibility of Supreme Court review of state court judgments, many cases, in fact, never reach the Supreme Court at all -- its workload prevents it from hearing any but a small fraction of the cases brought before it. Thus, even if Supreme Court review theoretically would remain available under some of these bills, elimination of access to lower federal courts effectively would mean that most people never would have an opportunity for any federal forum to consider their federal constitutional claims.

In some cases, furthermore, state remedies may simply be inadequate in constitutional cases. In Dombrowski v. Pfister, 380 U.S. 479 (1965), the Supreme Court refused to make a plaintiff resort to state court proceedings for protection of his First Amendment rights, finding that threats of state court criminal action could deprive the litigant of his constitutional rights and that state court proceedings would not "assure adequate vindication of constitutional rights." Similarly, in Fenner v. Boykin, 271 U.S. 240 (1926), and in Younger v. Harris, 401 U.S. 37 (1971), the Court explicitly assumed that individuals' constitutional rights in some cases could not be adequately protected except by recourse to the lower federal courts. The bills now under consideration totally eliminate access to lower federal courts for litigants with certain constitutional claims. In those cases when state court alternatives are not available or adequate, these bills

are tantamount to denying litigants their constitutional rights and thus are unconstitutional.

C. Equal Protection

The bills also require the most careful constitutional scrutiny because they accord some constitutional claimants preferred status over other constitutional claimants, allowing some the choice of a federal or state forum, while relegating others to state courts alone. Such discrimination could violate the constitutional guarantee of equal protection which is inherent in the Due Process Clause of the Fifth Amendment,[128] if it amounts to treating people differently on the basis of which constitutional rights they choose to exercise.[129]

In Lindsey v. Normet, 405 U.S. 56 (1972), the Supreme Court struck down a state statute which differentiated among persons on the basis of their legal claims. The statute required most civil claimants to post a single bond to appeal adverse trial court judgments but required that claimants appealing judgments under a forcible entry and wrongful detainer statute post (and risk forfeiting) a double bond with two sureties. Finding no reasonable justification for burdening the appeals of one class of claimants but not another, the Court invalidated the double bond requirement. It reasoned that "[w]hen an appeal is afforded, . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." Id. at 77.

A variant of the Supreme Court's rationale in Lindsey v. Normet has been applied to cases involving criminal

---

128/ See Bolling v. Sharpe, 347 U.S. 497 (1954).

129/ See, e.g., Police Dep't v. Mosley, 408 U.S. 92 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942).

appellate proceedings. In Griffin v. Illinois, 351 U.S. 12 (1956) and Douglas v. California, 372 U.S. 353 (1963), the Court ruled that where states provide appellate review as an integral component of their criminal justice systems, they may not, without offending the Equal Protection Clause, deprive some defendants of access.[130] Relying on these and other cases, Professor Tribe has suggested that there may be a "fundamental right to equal litigation opportunity" protected by the Equal Protection Clause.[131] According to Tribe, like the right to an equal vote,[132] the right to litigate carries within it "a core structural idea that the right at stake is really one to equal participation in governmental and societal decision-making."[133] That right may have special significance where constitutional rights (such as the right to privacy and the guarantee of the First Amendment) are in jeopardy.[134] In that context more than in purely private controversies[135] citizens have an active role to play in affecting their government by making it conform to the dictates of the law.

The concept of equal litigation opportunity is thus

---

130/ Both Griffin v. Illinois and Douglas v. California involved wealth classifications. The Supreme Court held unconstitutional the refusal of states to provide for free trial transcripts and free counsel for indigent defendants on first appeal.

131/ L. Tribe, American Constitutional Law 1008-10 (1978). Professor Tribe also cited Boddie v. Connecticut, 401 U.S. 371 (1971) and NAACP v. Button, 371 U.S. 415 (1963) as cases "support[ing] a theory of equal protection based on an ideal that binding decision mechanisms not be structured so as to exclude any identifiable group, no matter what claims the group seeks to advance." Id. at 1009-10.

132/ See, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

133/ L. Tribe, American Constitutional Law 1006-07 (1978).

134/ See Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Police Dept. v. Mosley, 408 U.S. 92 (1972).

135/ Professor Michelman, however, asserts that there is a due process right of access to courts in all civil actions. See Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights - Part 2, 1974 Duke L.J. 527 (1974).

comparable to the principles articulated in cases involving the interface of the First Amendment and the Equal Protection Clause, where political participation is also at issue. Police Department v. Mosley, 408 U.S. 92 (1972), for example, reviewed an ordinance prohibiting all picketing near a school, with the exception of labor picketing directed at the school. In holding that such discrimination violated the Equal Protection Clause, the Supreme Court stated:

> under the Equal Protection Clause, . . . government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.136/

So, too, Congress may not constitutionally deny access to established lower federal courts by claimants seeking to vindicate rights that are politically disapproved at the moment.

D. Separation of Powers

The discrimination inherent in these bills runs contrary to the political theory and spirit of our entire constitutional structure. As Chief Justice Stone observed in the famous footnote four of his opinion in United States v. Carolene Products Co., 304 U.S. 144 (1938), the political process can be trusted to weed out "undesirable legislation" that affects a broad cross-section of the populace. The same is not true, however, of legislation aimed at what Chief Justice Stone called "discrete and insular minorities." This is why the Bill of Rights removes from majoritarian politics decisions directly and explicitly affecting such minorities. In the place of the normal majority rule, Article V establishes a constitutional amendment process that requires a two-thirds vote of both Houses of Congress and the concurrence of

---

136/ 408 U.S. at 96.

three-fourths of the states. The proponents of the bills pending before Congress would seek to circumvent this constitutional process by legislating explicitly against those "discrete and insular minorities" and against those rights which the Supreme Court has held protected by the Constitution.

Congress' singling out for insulation from federal court review of several specific areas where Congress disagrees with the judiciary's interpretation would be especially pernicious. Whatever the courts' reluctance to delve into questions of legislative intent to violate constitutional norms, the Supreme Court has not hesitated to strike down legislation whose only purpose and effect plainly is to curtail or discourage the exercise of constitutional rights.[137/] There can be little doubt that the present bills would never have been introduced if the Supreme Court had not construed the Constitution to protect women's rights to choose abortions (in some circumstances), and children's rights to be free from prayer or segregation in public schools. Thus, even if Congress may regulate federal court jurisdiction in a neutral manner,[138/] these bills raise significant constitutional problems because they are aimed at curtailing constitutional rights identified and protected by the federal judiciary.[139/]

The Supreme Court in the past has found that post hoc congressional attempts to interfere with its decision-making violate Article III. In United States v. Klein, 80 U.S. (13

---

137/ See Shapiro v. Thompson, 394 U.S. 618, 631 (1968); United States v. Jackson, 390 U.S. 570, 581 (1968).

138/ See Eisenberg, Congressional Authority to Restrict Lower Court Jurisdiction, 83 Yale L.J. 498, 514-30 (1974).

139/ An invidious legislative motive has been held to have constitutional significance. See Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). An impermissible objective may be demonstrated where, as here, there is a clear legislative pattern that cannot be explained by any other rationale. See Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. at 266; Gomillion v. Lightfoot, 364 U.S. 339 (1960); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Wall.) 128 (1871), the Court invalidated a jurisdictional regulation, in part, because the statute

> shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny pardons granted by the President the [constitutional] effect which the court has adjudged them to have.140/

The pending bills are similar attempts by their proponents to review and reverse specific Supreme Court decisions that have been deemed objectionable, and they might very well be struck down on that ground alone.

## IV. The Proposed Limitations on Equitable Relief Would Violate the Separation of Powers and Individuals' Constitutional Rights Under the Fourteenth Amendment

Several of the bills now pending in Congress would directly prohibit federal courts from entering busing orders in school desegregation cases or from granting equitable relief in cases challenging abortion statutes. Busing, of course, is a remedy the federal courts have employed in order to correct past unconstitutional discrimination in schooling; it is not a constitutional right in itself. The busing jurisdiction bills, therefore, differ from the other bills curtailing federal court jurisdiction in that they purport to limit only the relief that federal courts could give for certain constitutional violations -- not the court's ability to decide whether there was such a violation. Certain of the abortion jurisdiction bills on their face also would appear to restrict only the relief given and not the underlying constitutional right to choose an abortion. Nevertheless, the jurisdictional bills with respect to equitable relief raise substantial constitutional problems with respect to both the separation of powers and equal protection under the law.

---

140/ 80 U.S. (13 Wall.) at 145.

In a school desegregation case over which a federal district court has jurisdiction and in which the court has found deprivation of a constitutional right, the court may in the exercise of its equity power enter an order requiring some busing in order to fashion an effective remedy. Similarly, federal courts having jurisdiction over challenges to abortion statutes have the power to enter injunctions and temporary restraining orders in order to give effective relief to constitutional claimants. Because the federal jurisdictional bills now pending in Congress would render such orders nugatory, they would interfere with the constitutional separation of powers. See the discussion at pp. 35-39 supra. See also Schneiderman v. United States, 320 U.S. 118, 168-69 (1943), where Justice Rutledge stated, concurring, that Congress may not make:

> . . . an adjudication under Article III merely an advisory opinion or prima facie evidence of the fact or all the facts determined. Congress has, with limited exceptions, plenary power over the jurisdiction of the federal courts. But to confer the jurisdiction and at the same time nullify entirely the effects of its exercise are not matters heretofore thought, when squarely faced, within its authority.

[Footnotes omitted; emphasis added.] Cf. Sterling v. Constantin, 287 U.S. 378, 403 (1932) (Hughes, C.J.).

On equal protection grounds, the bills now pending in Congress that would prevent federal courts from giving certain forms of equitable relief are subject to the same attack outlined under section III of this memorandum, supra, namely, that the result of such regulation of remedy would be to interfere with individuals' constitutional rights with respect to school desegregation and abortion. Courts order school desegregation where they have found that the segregated conditions are due, at least in part, to intentional official

conduct in violation of the Fourteenth Amendment.[141/] Once a court has found a constitutional violation, however, the Fourteenth Amendment requires the discriminating agency to "effectuate a transition to a racially nondiscriminatory school system," Brown v. Board of Education, 349 U.S. 294, 301 (1955) (hereinafter cited as "Brown II") and to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Green v. County School Board, 391 U.S. 430, 437-38 (1968). The authority of the federal courts to issue orders requiring such affirmative action is inherent in their equity power. Brown II, supra. The validity of court orders is not affected by the fact that they may be difficult or burdensome:

> All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 (1971).

As Chief Justice Burger observed in Swann, supra, at 30, busing is one "remedial technique[ ] . . . within [the] court's power to provide equitable relief . . ." in a case of constitutional injury to school children.

---

141/ Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971); Deal v. Cincinnati Bd. of Educ., 369 F.2d 55, 62 (6th Cir. 1966); Bell v. School City of Gary, Indiana, 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964); U.S. v. School District 151, 286 F. Supp. 786, 797 (N.D. Ill. 1968), aff'd, 404 F.2d 1125 (1968); Taylor v. Bd. of Educ., 191 F. Supp. 181, 182-83 (S.D.N.Y.), aff'd, 294 F.2d 36 (2d Cir.), cert. denied, 368 U.S. 940 (1961).

> [W]e find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.

Id. Other techniques include teacher transfers, majority-minority "free" student transfers, rezoning (gerrymandered or "satellite" or both), pairing, and new school construction. Courts order busing in combination with other techniques.

> The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision. No rigid guidelines as to student transportation can be given for application to the infinite variety of problems presented in thousands of situations.

Id. at 29 (emphasis added). The Supreme Court has ruled that, as a practical matter, busing is the only remedy that will correct certain violations of the Fourteenth Amendment. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 (1971). Thus, frustration or denial of court-ordered remedies for school desegregation cannot be distinguished from frustration or denial of the underlying Fourteenth Amendment right. See Griffin v. School Board, 377 U.S. 218, 232 (1964); Cooper v. Aaron, 358 U.S. 1, 17 (1958).

Indeed, in North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971), the Supreme Court struck down a state statute imposing an absolute prohibition on involuntary busing of any student on grounds of race or to bring about racial balance. The court said that this ban would inescapably operate to obstruct the remedies granted in the Charlotte-Mecklenburg case, and noted that because

> [B]us transportation has long been an integral part of all public educational systems . . . it is unlikely that a truly effective remedy could be devised without continued reliance upon it.

402 U.S. at 46.

If a state anti-busing statute violates the Fourteenth Amendment "when it operates to hinder vindication of federal constitutional guarantees," it is difficult to conclude that a congressional statute achieving the same result could possibly be constitutional.

The need for equitable relief in cases challenging abortion statutes is even more plain. The very nature of the constitutional right being asserted requires that effective relief be given quickly. If a woman's constitutional right to choose what to do with her own body is to mean anything of substance, therefore, courts must have the power to restrain officials from irreversibly changing the status quo under statutes that are unconstitutional. To deny such power is to deny the right itself.

## Conclusion

The bills to curtail federal court jurisdiction now pending in Congress are without precedent in the history of our Republic. Their effect would be to modify basic political relationships as set forth in the Constitution -- relationships between the Congress and the federal judiciary, between federal and state governments, and between individual citizens and their governments. As a result, the bills are inconsistent with various constitutional provisions and guarantees. Those bills curtailing the jurisdiction of the Supreme Court are at odds with the Article III guarantee of an independent Supreme Court as ultimate arbiter of the Constitution. The bills eliminating lower federal court power to hear and decide cases involving specific constitutional rights would deprive various individuals of those rights and would discriminate against certain litigants in ways that would violate the Equal Protection guarantee of the Constitution. And even the bills that appear on the surface to deal only with remedies, in practical effect would directly curtail the underlying right, for the remedies they would eliminate are in many cases the only effective redress for violation of constitutional rights.

Senator EAST. Professor Eisenberg?

## STATEMENT OF THEODORE EISENBERG, PROFESSOR, UCLA SCHOOL OF LAW, LOS ANGELES, CALIF.

Mr. EISENBERG. Thank you, Senator.

In addition to the statement I will make today, I would like to add to the record a memorandum on the constitutionality of section 2 of S. 158. It is attached to the statement delivered to the panel.

### CONGRESS POWER TO CONTROL JURISDICTION

I should start out by saying that I think Congress has very substantial control over the jurisdiction of lower Federal courts. Indeed, in most cases, in any case not involving constitutional rights, there is just not a problem. There is absolutely no question that Congress could completely remove the case from the courts. For example, if Congress decided antitrust cases should be removed from Federal court, I would have no difficulty with it just eliminating all jurisdiction to hear antitrust cases.

Even in cases involving constitutional rights, I think Congress has some power to control lower court jurisdiction. One class of cases would involve remedies that are not constitutionally required. We really have not developed a very detailed jurisprudence of exactly what remedies are and are not constitutionally required. Even if a case involves constitutional rights, say rights to an abortion, I would have no difficulty in a statute withdrawing power from the lower courts to prevent the courts from issuing a particular remedy if that remedy is not constitutionally required. We probably will not know which remedies are constitutionally required until you get a Supreme Court decision on the matter.

Even beyond that, I think Congress could remove certain constitutional cases from the lower Federal courts for what might be described as neutral reasons. For instance, the old $10,000 jurisdictional limitation kept many constitutional cases out of Federal court, but it did so in what I think was generally perceived as a neutral manner. It did not focus on particular issues. It did not try to keep particular litigants from having their issues heard in lower court and therefore was not a widespread source of dissatisfaction.

Finally, I think even in the abortion controversy, a withdrawal of jurisdiction from the lower Federal courts would be constitutional if Congress has the power to overturn *Roe* v. *Wade.* In other words, if Congress by passing a statute could overturn *Roe* v. *Wade,* then I would have no major difficulty with the statute saying the lower Federal courts cannot hear these cases. It would not be depriving anyone of a right they could vindicate in court anyway.

### LIMITS ON CONGRESS POWER

However, then we come to the hard case, I think. That is the one where there is a constitutional right that Congress lacks power to overturn—of which abortion rights may be one, although that is not the subject, I guess, of this panel—and for which a constitutionally necessary remedy is at issue. It seems to me that it is in this narrow class of hardcore cases where the crunch really comes and

where I have great difficulty with Congress being able to withdraw the cases from lower Federal courts.

The difficulty with allowing Congress complete power in these cases results from a historical problem which is worth mentioning even though it is developed more fully in the accompanying memorandum.

I think it must be agreed that the framers agreed initially that Congress would have the power to create or not to create lower Federal courts. Indeed, this agreement is what generates much of the view that Congress has the power to completely control lower Federal court jurisdiction.

When the framers entered into that agreement, things were much different than they are today. I think an unwritten understanding at the time was that there need not be lower Federal courts. However, one role of the national judiciary was to be its availability to hear all Federal constitutional cases. At the time of the Constitutional Convention, it was very easy to fulfill that role without lower Federal courts. You simply sought review in the Supreme Court. The Supreme Court at that time had no discretion not to hear a case. The Supreme Court at that time had no cases. I think it was something like 5 years before it had any docket at all. For any litigant who wished Supreme Court review, it was realistically available in every case involving constitutional rights. With knowledge of that, I think the framers could comfortably decide to leave it to the discretion of Congress whether or not to have lower Federal courts.

Times have changed. I try to develop the historical material supporting this position in my memorandum. If one accepts that one of the roles of the national judiciary is to provide a forum for all constitutional rights to be available to a litigant who wants it, then there is great difficulty in reconciling Congress original power to create or not to create the lower Federal courts with the current status of the caseload of the Supreme Court.

Anyone who believes the national judiciary should be available to hear every constitutional case or that any litigant who wants to be heard in a constitutional case should have access to the Federal judiciary cannot seriously contend that the Supreme Court is the forum that satisfies that function. The numbers of cases are overwhelming. I do not have the exact percent, but it is well under 10 percent of the cases that litigants request the Supreme Court to hear that are actually heard on their merits by the Court. Many fewer than that are resolved by full opinion after full hearing.

If the national judiciary is to be a forum for cases involving constitutional rights, it cannot consist of a Supreme Court alone. I prefer not to have to say whether it is constitutional or unconstitutional for Congress to withdraw jurisdiction in these cases. It seems to me that maybe the more important principle is fidelity to the structure of our Government.

There are many situations in which Congress probably has power to disrupt that structure, but in good faith and in good conscience does not and never will. I think this is at least one of those situations where one can brush aside the formal constitutional issue and, getting back to the original plan of the Government,

realize that the framers' original plan simply cannot be fulfilled today without lower Federal courts.

THE EFFECTS OF SECTION 2 OF S. 158

The other major point I would like to make in my opening remarks about S. 158 is that if one analyzes its effects, it seems to me it only matters in a relatively small class of cases. That is because it does not withdraw Supreme Court jurisdiction but only lower court jurisdiction.

I think that a decisionmaker being asked to pass on section 2 of S. 158 asks: Is the inevitable confrontation between branches of Government worth the benefits that section 2 confers even upon those who strongly favor it? Its benefits, it seems to me, are marginal. Its costs are a potential constitutional crisis. It just does not seem to me, as a citizen, to be worth it.

In thinking through section 2's effects, I think two paths of development are worth considering. First, assume that the Supreme Court finds that section 1 of S. 158 eliminates all constitutional rights to an abortion and that *Roe* v. *Wade* no longer survives. In this situation, with one exception, section 2 accomplishes nothing. It merely prevents lower Federal courts from being the forums in which litigants are told that they have no right to an abortion. Section 2's full effect on the abortion controversy is already embodied in the nonjurisdictional provision of section 1 of S. 158. Section 2's jurisdictional limitation in this case does no real harm, but it does no real good either. It is a sort of added paperweight.

Again, we are assuming that abortion rights are terminated by section 1 of S. 158. The one exceptional case arises when section 2 prevents a lower Federal court that is more sympathetic to abortion rights than the Supreme Court from delaying implementation of State abortion laws, laws probably passed on the heels of this bill, pending a Supreme Court decision sustaining S. 158's validity.

In this case, section 2 does have the effect of preventing a delay in the effectiveness of the statute. I think that is an undeniable effect. However, it seems to me this concern can be more directly dealt with by providing for expedited appeals directly to the Supreme Court. If one believes the Supreme Court will ultimately sustain section 1 and interpret it to overrule *Roe* v. *Wade,* one can get that result quickly and efficiently by asking the Supreme Court to expedite its review of the matter.

This timing concern need not generate the interbranch confrontation inherent in section 2 and, perhaps more importantly, this concern disappears if the Supreme Court finds, as it might, that rights to abortions survive enactment of section 1 of S. 158.

Let us consider that case. In the second case, we now assume that there is a right to an abortion despite enactment of S. 158. In this situation, what is the effect of section 2?

Here its effects are a little more unpredictable. Here its effects, I think, depend on the attitudes of State courts toward abortion rights and upon the Supreme Court's ability to stay on top of the situation. If State courts are totally faithful to the Supreme Court's pronouncements, or if the Supreme Court does what no law requires it to do and hears every abortion case, then section two

again has no real effects. It will not preclude any woman from vindicating her constitutional right to an abortion because either State courts are doing it for her or the Supreme Court, on review, is doing it.

However, now assume we are in the real world where the system may work less smoothly. There are at least two situations when some discontinuity may occur between rights declared by the Supreme Court and a litigant's ability to vindicate those rights.

First, State courts may prove less receptive to abortion rights than the Supreme Court says they should be, or, under State law, they may be unable to vindicate abortion rights for want of an adequate remedy. In addition, the Supreme Court may fail to hear one or more of these cases where State courts have not vindicated their rights.

Second, the simple delay in achieving Supreme Court review, even if available, may irreparably harm the abortion rights of some litigants faced with unsympathetic State courts.

In these cases of discontinuity, section 2 clearly matters, but its effect is not a very appealing one. Its sole effect is to hinder litigants in vindicating a constitutional right, a right assumed in this analysis to have survived enactment of section 1 of S. 158. Thus, section 2's only real substantive long-lasting effects occur when abortion rights survive enactment of S. 158 and section 2 hinders litigants asserting such rights.

As a matter of legislative policy, I can see no justification for such a statute. Even more puzzling is a decision to enact such a measure when substantial costs attend the measure. In S. 158, Congress is pushing to the limit its control of the judiciary. It seems to me all such interbranch confrontations are fraught with risk. We never know the ultimate effects of them. They ought to yield more definite and substantial benefits than section 2's effects.

Thank you.

Senator EAST. Thank you, Professor Eisenberg.

[The prepared statement, memorandum, and letter to Senator Baucus, submissions of Professor Eisenberg, follow:]

PREPARED STATEMENT OF PROFESSOR THEODORE EISENBERG

I am honored to have been asked to testify about section 2 of S. 158. My remarks today summarize and refine the views contained in the attached Memorandum on the Constitutionality of Section 2 of S. 158.

Congress has, must have, substantial control of lower federal court jurisdiction. In the case of rights not guaranteed by the Constitution, Congress may do virtually what it pleases. For example, if Congress decides that antitrust cases should not clog the courts, or that courts are reaching incorrect results in antitrust cases, Congress may withdraw or modify federal court jurisdiction to hear such cases. Since Congress may repeal or modify antitrust statutes, there is no constitutional harm if Congress seeks to change antitrust law through jurisdictional provisions. Similarly, if no abortion rights survive enactment of section 1 of S. 158, then section 2's jurisdictional withdrawal is not of serious concern.

But if, as is likely, abortion rights survive enactment of section 1, or if section 2 is enacted without section 1, in which case abortion rights clearly would survive, then there are serious doubts about section 2's wisdom and constitutionality. For Congress' unfettered control of lower federal court jurisdiction ends where constitutional rights begin. Unlike antitrust laws, Congress has no general authority to modify or repeal constitutional rights. As more fully discussed in the attached Memorandum, a withdrawal of lower court jurisdiction to hear cases involving constitutional rights deprives litigants of their right of access to federal court and may violate rights of privacy and equal protection. It is not a realistic response to these claims to assert

that Supreme Court review of state court decisions furnishes a federal forum to protect constitutional rights. No litigant is assured of a hearing by the Supreme Court.

Because I have seen some statements to the contrary, I wish to emphasize that no Supreme Court holding establishes that Congress has unfettered control of lower court jurisdiction. In no case has the Court approved a withdrawal of jurisdiction to hear cases of constitutional dimension. In dicta, the Court has stated that Congress has plenary control over lower federal court jurisdiction. But the statements always are rendered in some context other than one in which Congress withdraws jurisdiction to hear cases concerning existing constitutional rights. In fact, if taken seriously, the Court's dicta prove way too much. May Congress withdraw jurisdiction to hear cases brought by blacks? May a Democratic Congress enact a law prohibiting Republicans from bringing federal court actions? All must concede the existence of some limits on Congress' control. I would welcome enlightenment from proponents of section 2 as to their understanding of those limits.

As concerned as I am about section 2's constitutionality, I do not believe its enactment or defeat should depend solely on that issue. That a statute is constitutional does not make it wise. And section 2 is unwise in at least two respects.

Congress has the naked power to take many actions affecting Courts that are difficult for courts to review. The constitutionality of these actions is, therefore, never formally resolved. But some of the actions plainly are at odds with the structure of our system. Congress should not fall into the trap of equating the absence of a declaration of unconstitutionality with fidelity to our governmental system. Early

efforts to impeach federalist judges because of disagreements with their decisions and President Roosevelt's court-packing plan were as inconsistent with the essential structure of our government as any law any court has found unconstitutional. Yet there is no obvious judicial remedy in either of these situations.

Because of the remedial problems that may attend a judicial decision invalidating a grant or withdrawal of jurisdiction, and because of the interbranch confrontation inherent in such a situation, there is an understandable reluctance to believe that courts actually would invalidate a congressional jurisdictional provision. Even if courts would be reluctant to deem section 2 unconstitutional, the provision is at odds with the structure of our government. The availability of federal courts to vindicate constitutional rights, staffed by life-tenured independent judges, has become a cornerstone of our system. In some eras judges have been more conservative than the popular will, in other eras they have been more liberal. But we cannot have both fully independent judges and judges whose decisions change to accommodate currently popular political trends. The country fought this battle when Jeffersonians attempted to impeach federalist judges who failed to shift with the prevailing political winds. We ought not have to fight it again.

Second, even one wishing to further the legal battle against abortions is hard pressed to justify section 2. Of course, I understand the superficial reason for section 2, to supplement a bill attempting to overturn Roe v. Wade. But the institutional costs that accompany section 2 far outweigh any substantive effects it may have upon the abortion controversy. Indeed, if one thinks through the possible

effects of section 2, they seem undesirable from any point of view.

In thinking through section 2's effects, two paths of development are worth considering. First, assume the Supreme Court finds that S. 158 eliminates all constitutional rights to an abortion and that Roe v. Wade does not survive. In this situation, with one exception, section 2 does not accomplish anything. It merely prevents federal courts from being the forums in which litigants are told they have no right to an abortion. Section 2's full effects on the abortion issue are already embodied in the nonjurisdictional portion of S. 158. Section 2's jurisdictional limitation does no harm but it does no good either.

The exceptional case arises when section 2 prevents a lower federal court that is more sympathetic to abortion rights than the Supreme Court from delaying implementation of state abortion laws pending a Supreme Court decision sustaining S. 158's validity. In this situation, section 2 does have the effect of preventing a delay in the effectiveness of a valid statute. But this concern may be more directly dealt with by providing for expedited direct appeals to the Supreme Court. The concern need not generate the interbranch confrontation inherent in section 2. And, of course, the concern disappears if the Supreme Court finds abortion rights survive S. 158.

In the second case, the Supreme Court, giving due deference to Congress' declaratory statement in section 1 of S. 158, nevertheless concludes that the rights of a pregnant woman outweigh those of an unborn fetus.* This outcome

---

* Analysis of the second case would be the same if section 2 were enacted without section 1 being enacted. In either case, abortion rights survive enactment of the bill.

seems sufficiently likely that one considering S. 158 ought to take it into account. In this situation, what is the effect of section 2?

Here its effect depends upon the attitudes of state courts towards abortion rights and upon the Supreme Court's ability to stay on top of the situation. If state courts are totally faithful to the Supreme Court's pronouncements or if the Supreme Court does what it is not required to do, and hears every abortion case, then section 2 again has no real effects. It will not preclude any woman from vindicating her constitutional right to an abortion.

But now assume we are in the real world where the system may work less smoothly. There are at least two situations when some discontinuity may occur between rights declared by the Supreme Court and litigants' ability to vindicate those rights. First, state courts may prove less receptive to abortion rights than the Supreme Court says they should be, and the Supreme Court may fail to hear one or more abortion cases. Second, the simple delay in achieving Supreme Court review, even if available, may irreparably harm the abortion rights of some litigants faced with unsympathetic state courts. In these cases of discontinuity, section 2 clearly matters. But it functions in a rather horrifying manner. Its effect is to hinder litigants in vindicating a constitutional right, a right assumed to have survived enactment of S. 158.

Thus, section 2's only real effects occur when abortion rights survive enactment of S. 158 and section 2 hinders litigants asserting such rights. As a matter of legislative policy, there is no justification for a measure with such effects. Even more puzzling is a decision to support such a

measure when substantial costs attend the measure. In the case of S. 158, Congress is pushing to the limit its control of the judiciary. All such interbranch confrontations are frought with risk. They ought to yield more definite and substantial benefits than section 2's tawdry effects.

---

## Memorandum on the Constitutionality of Section 2 of S. 158

Theodore Eisenberg
Professor of Law, UCLA

Analysis of Section 2 of S. 158 depends in part on one's assessment of Section 1. If constitutional limitations on antiabortion statutes do not survive enactment of Section 1, then Section 2 is constitutional. If federal constitutional limitations on state restrictions on abortion survive enactment of Section 1, then Section 2 may exceed Congress' power to control the federal judiciary.

There are at least two sets of circumstances under which federal constitutional limitations on antiabortion laws would survive enactment of Section 1.[1] First, Section 1 may be interpreted, as suggested in my letter to Senator Baucus of April 28, 1981, in a manner that does not undermine Roe v. Wade. In that event, at least some residual right to obtain an abortion would continue to be guaranteed under the federal Constitution. Second, if Section 1 is interpreted as (a) attempting to overrule Roe v. Wade but (b) being beyond Congress' power, existing abortion rights would survive. Except where otherwise indicated, I assume for purposes of this Memorandum that abortion rights would survive enactment of Section 1.

---

1. Hereafter, I frequently refer to those federal constitutional limits on antiabortion laws that survive Section 1 as "abortion rights."

## I. A Framework Within Which to Analyze Section 2

One of Section 2's principal difficulties is that it undermines an essential role of the federal judiciary. Perhaps above all else the framers intended the national judiciary to be able to hear and to do justice in all cases involving federal constitutional rights. At the time of the Constitutional Convention and the Judiciary Act of 1789, this function could be performed solely by the Supreme Court. But this function no longer can be performed solely by the Court. Therefore, to maintain an essential function of the national judiciary, litigants need access to lower federal courts. What follows in Part I of this Memorandum is an effort to support each of the steps of the preceding argument.[2] The principles developed in Part I are applied to S. 158 in Part II. Although Part II also considers other possible constitutional infirmities of Section 2, I assume others will develop these arguments in greater detail.

### A. An Essential Role of the Federal Judiciary

The framers intended the national judiciary to be able to hear and to do justice in at least all cases involving federal constitutional rights. In the 1780's, not unlike today, "[c]ourts were thought of in part . . . as instruments for the protection of individuals." Two of the most influential delegates to the Constitutional Convention stressed the federal judiciary's role as a protector of citizens. At the Convention itself Gouverneur Morris stated that everyone had witnessed "excesses against personal liberty, private prop-

---

2. Substantial portions of this Memorandum are taken from or based on Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498 (1974). Documentation for many of the statements and quotations contained herein may be found in that article at pp. 506-13, 521-23, 527-28, 515-16.

erty and personal safety." In one of the Federalist Papers Hamilton emphasized that the courts must protect individuals from legislative tyranny:

> Limitations on legislative authority can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing.

The state ratification debates also reflect the common assumption that the federal judiciary would be available to vindicate all federal rights. There was no suggestion that the national judiciary or Congress had the power to choose which constitutional rights would be vindicated. At the Virginia deliberations on the proposed constitution, Supreme Court jurisdiction was said to be intended "to prevent injustice by correcting the erroneous decisions of local subordinate tribunals . . . . " This can only mean being able to do justice in each individual case within the federal jurisdiction, even if by appellate review.

This emphasis on the national judiciary's role as vindicator of individual rights strongly suggests that the framers intended national tribunals to be able to hear each case within the federal judicial power. Hamilton is again instructive:

> The evident aim of the plan of the convention is, that all the causes of the specified classes shall, for weighty public reasons receive their original or final determination in the courts of the Union.

The early Supreme Court did in fact supply a final determination of those cases appealed to it, no matter how trivial the matter might appear from a national perspective.

In addition, the judiciary would be unable to check legislative abuses if its jurisdiction were limitable at the unfettered discretion of Congress. To assume that the

framers desired both to control the legislature by means of the federal courts and to give the legislature a method for nullifying such control by a simple majority vote approving a jurisdictional statute is "to charge them with chasing their tails around a stump."

A compelling indication that the framers intended the federal judiciary to afford a forum at some level for all cases within its jurisdiction comes from an omission from Article III. Neither the final arrangement nor any of the five judiciary plans submitted to the Convention authorized federal courts to decline to hear a case. Discretionary review by the Supreme Court did not originate until 1925. The framers' failure to confer, or even consider conferring, discretionary review powers upon courts suggests that federal tribunals, including the Supreme Court, were thought capable of providing a forum in all cases within their jurisdiction.

Many Supreme Court cases and a large body of legal commentary implicitly support the view that each litigant ought to be able to have his day in federal court. When the Court denies access to a lower federal court forum, as in Younger v. Harris, 401 U.S. 37 (1971), Stone v. Powell, 428 U.S. 465 (1976) or Allen v. McCurry, 101 S.Ct. 411 (1980), the Court or commentators often remark that the litigants' federal constitutional rights are protected by their access to Supreme Court review. Unless one believes the availability of a federal forum to be relevant, there is no reason for these repeated (even if misleading) assurances. Indeed, one of the most disquieting features of these cases is that the promise of Supreme Court review upon which they rest is, for the vast majority of litigants, an illusion.

B. The Original Plan for Implementing That Essential Role

Accepting the national judiciary's role as a protector of

federal rights, how was the new judiciary to fulfill that role? The right to appellate review by the Supreme Court would provide litigants with an opportunity to have their cases heard by a national tribunal. This faith in the availability of Supreme Court review was in evidence at the Constitutional Convention. Rutledge employed it as a rationale for not including any lower federal courts in the constitutional scheme. Luther Martin explained to his fellow Marylanders that he did not think that lower federal courts were necessary because, "by giving an appeal to the Supreme Court of the United States, the general government would have sufficient check over [state] decisions and security for the enforcing of their laws . . . . " Undoubtedly the same confidence was a major factor in the acquiescence of some to the deletion of mandatory inferior tribunals at the Convention.

The expectation that there would be few federal cases supports the view that Supreme Court review was believed adequate to implement the role of the national judiciary. If there were to be few cases, the Supreme Court, by appellate review, would be capable of vindicating each litigant's federal rights. Roger Sherman, a delegate to the Convention from Connecticut, later wrote that "it is not probable that more than one citizen to a thousand will even have a cause that can come before a federal court." Alexander Hanson, a Maryland federalist, also felt that there would be few federal actions. Soon after the Convention, James Madison wrote to George Washington, "The great mass of suits in every State lie between Citizen & Citizen, and relate to matters not of federal cognizance." With but few exceptions the framers felt that the federal judicary, due to the consitutional limits on the subject matter of its jurisdic-

tion, would peacefully coexist with state courts, handling only those few cases of federal concern.

Thus commentary contemporary with ratification of the Constitution suggests that the federal judiciary in some form was expected to be able to hear any litigant whose case was within the federal constitutional jurisdiction, either at trial or on appeal. The absence of any provision in the Constitution giving the federal courts discretionary jurisdiction reinforces this view. The mandatory federal forum may have been limited to appellate review but it was to be available in all cases.

Willingness to implement the federal judiciary's role through Supreme Court review was perfectly understandable at the time. Without question, the Supreme Court was then capable of providing a forum for all federal cases. Between 1789 and 1801 the Supreme Court disposed of fewer than 90 cases. During the first four terms of the Court, not a single case was argued. Since the Court's jurisdiction was not discretionary, any litigant whose case fell within the federal judicial power and who desired to have a federal forum hear his case could obtain such a forum.

C. The Current Inadequacy of the Original Plan and the Resulting Shift in Federal Courts' Roles

However content one might have been in 1789 to have the Supreme Court by itself fulfill the national judiciary's role, such an approach clearly will not work in today's world. Contrast the above figures for the Supreme Court's early terms with the status of a modern Court term. During the 1979 Term, the Supreme Court was asked to hear 4,781 cases, but disposed of only 278 on the merits, including 149 by full opinion. This increase in case load has had significant consequences for both the Supreme Court and the lower federal

courts. The Supreme Court is no longer capable of providing a federal forum to hear the merits of every case involving a federal constitutional question.

As the federal caseload has grown the role of lower federal courts has undergone change. Today the lower federal courts are more than mere federal trial forums for cases falling within the Article III jurisdictional grant. First, in those instances where the Supreme Court makes a pronouncement of nation-wide impact regarding federal rights or interests, access to the lower courts is needed to enforce and apply it. Moreover, as Supreme Court review becomes more selective, the lower courts have become the primary vindicators of federal rights.

Cases which dramatically affect the legal system are by now commonplace. Cases such as Miranda v. Arizona and Gideon v. Wainwright affected and continue to affect an enormous number of cases. Outside the area of criminal procedure, the reapportionment and desegregation decisions have generated hundreds of lower court cases. If the burden of enforcing such important decisions and resolving all the subsidiary questions were left to Supreme Court review of state court decisions unsympathetic to the federal right, it is doubtful that the task could be performed. Judge Carl McGowan has noted the increased latitude available to the Supreme Court in desegregation cases simply because litigants have access to the lower federal courts.

> The promulgation of those principles [announced in Brown v. Board of Education] would have provided an infinitely more daunting prospect in the absence of the machinery provided by the inferior federal courts. Their performance in the discharge of this difficult task has been less than even, but is it conceivable that the job could have been entrusted entirely to the state courts, bearing in mind the differences in loyalties and the vulnerability to local pressures inherent in an elective system of judges? The

> federal judges themselves have, even with the security provided them by the Constitution, found the going hard. It is not fanciful to think that it would have been too much for unsheltered state judges . . . . Certainly it would have been hard to have asked them to risk such an exposure with so few shields.

Similarly, the success of innovative Supreme Court action in other areas, such as reapportionment and criminal procedure, has rested in substantial part upon the support of the lower federal courts. Access to the lower federal courts is even more important where the Supreme Court chooses to remain silent. To a significant extent the contemporary guarantors of federal rights are not the nine Supreme Court Justices but the judges of the district courts and courts of appeals. The lower judges are not authorized to decline to hear a federal matter within their jurisdiction. Hundreds of important issues are determined with practical finality by lower federal judges. During the 1949 Term it was said that the Court failed to consider on the merits a number of cases "which raised the most vital constitutional problems that could be presented to any court in a democratic country." No doubt the same could be said of more recent terms.

Caseload increases have a related effect on the Supreme Court's theoretical role. The heavy use of the Justices' discretion to determine what few cases the Court will hear on the merits makes it impossible to maintain the fiction that every litigant may resort to the Court for vindication of his federal claim. The Court can no longer resolve all federal cases. The Court's role today, by necessity, is to service issues rather than to do justice for all litigants. Justice Frankfurter, before he served on the Court, wrote that the essential functions of the Supreme Court are "[to] resolve conflicts among coordinate appellate tribunals and to determine matters of national concern." Indeed, the

Court's own rule governing grants of certiorari reveals a bias toward issues rather than litigants and their particular rights.

This shift in the Supreme Court's function has meant that it must decline to hear most cases. The modern Court has no qualms about refusing to decide a case or controversy even when it has jurisdiction to do so. It may prefer to hear a case in which a particular issue is presented in a "clean-cut" manner, on a more complete record, or simply under "more appropriate circumstances." Whatever one's opinion of such techniques, they illustrate the modern Court's understanding of its function.

## II. Analysis of Section 2

What conclusions follow from these assertions about an essential role of the national judiciary? In particular, if the structure of our government depends in part upon access to lower federal courts in constitutional cases, is a measure like Section 2, which limits their jurisdiction in such cases, unconstitutional? Although I address this question below, I would first like to suggest why Section 2's technical constitutionality should not become the focal point of the debate.

### A. The Metaconstitutional Argument Against S. 158

Congress probably has power to enact a broad range of measures adversely affecting the judiciary's ability to fulfill its role. Some such measures could not easily be found unconstitutional. Yet they would be so at odds with our governmental structure that, whether or not constitutional, they should never be enacted.

One important such measure was President Roosevelt's court-packing proposal. Congress always has had power to

specify the number of Supreme Court Justices. In 1937, frustrated by Supreme Court decisions blocking the New Deal, President Roosevelt proposed a plan to expand the Court, thereby providing him with a substantial number of new appointments to the Court. In a stinging rebuke, the Senate Judiciary Committee rejected the plan.

> We recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of the constitutional principle. [Under] the form of the Constitution it seeks to do that which is unconstitutional. [I]ts practical operation would be to make the Constitution what the executive or legislative branches of the Government choose to say it is--an interpretation to be changed with each change of administration. It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America. (quoted in G. Gunther, Constitutional Law 152 (10th ed. 1980))

Whether or not the court-packing plan was constitutional, it was so at odds with the fundamental structure of our system as to be irresponsible. Similarly, a Senate upset with a president might simply refuse to give its approval to any presidential appointments, regardless of the nominee's qualifications. Even if the Constitution vests the Senate with the naked power to so refuse, no Senator sensitive to how our system is meant to work could adhere to such a course.

If Part I accurately describes an essential role of the federal judiciary, then Section 2 of S. 158 is as grave a threat to the intended structure of our government as either of the foregoing situations. Assuming some abortion rights survive enactment of Section 1 of S. 158, Section 2 deprives litigants of effective access to a federal forum for vindication of a constitutional right merely because Congress disapproves of that right. Short of open hostilities between the courts and Congress, there can be no greater assault by Congress upon the intended functions of the national judi-

ciary. And in light of the critical role of the lower courts in enforcing and implementing Supreme Court decisions, Section 2 is little less than a direct challenge to the principle of judicial review.

Furthermore, even if Part I misreads the federal judiciary's role, Section 2 would be a dangerous precedent. The nation has come to view the federal courts as the final arbiters of constitutional rights. The Supreme Court's unacceptable results have been and may continue to be corrected by constitutional amendments. The few legislative exceptions to this pattern of finality have been in the name of undoing massive prior discrimination. Section 2 seems to overturn all of this through what to the lay public must seem like little more than a legal trick. Such a technique cannot build confidence in our institutions.

The Constitution does not and cannot specify in detail every desirable limit on congressional action. Relations between Congress and the other branches of government are to a large degree left to the good-faith discretion of Congress. But that broad discretion does not mean that a conscientious member of Congress may ignore inherent, even if nonconstitutional, limitations on relations with the other branches of government.

B. The Constitutionality of Section 2[3]

In passing on the validity of any federal statute one must determine its natural or probable effect and measure

---

3. In discussing the constitutionality of Section 2, and in what follows, I refrain from a detailed analysis of case law in this area. There are two reasons for this. First, the sparse precedents do not provide sure guidance. Second, my analysis of the existing precedents is available at 83 Yale L.J. at 523-30. To the extent that precedent is viewed as relevant to this matter, my previous analysis supports the conclusions in this Memorandum.

that effect against constitutional requirements. A statute that fails to conform to those requirements must fall. The foregoing principle apples to jurisdictional statutes. For example, a jurisdictional statute prohibiting black plaintiffs from bringing actions in the lower federal courts would fall as a violation of equal protection. These simple-sounding principles are more easily stated than applied. Although I suggest below theories under which Section 2 could be deemed unconstitutional, each theory is in some sense speculative. The modern Court never has faced this precise problem.

1. Section 2's Abridgment of the Right of Access to a Federal Forum

A statute depriving both federal and state courts of jurisdiction to hear a claim has an obvious, drastic impact. Statutes that foreclose only lower federal court jurisdiction have more subtle but nevertheless serious substantive effects. Consider a statute like S. 158 that deprives lower federal courts, but not state courts, of jurisdiction to hear a class of cases. The provision cannot be justified, as some might claim, on the ground that inferior federal jurisdiction is not necessary to vindicate federal rights because of the availability of Supreme Court review of state court decisions. No litigant has any assurance that the Court even will agree to hear his case. And, in the aggregate, litigants with federal claims, even constitutional claims, have absolute assurance that the Court will not hear each of their cases.

It is not enough to say that state courts might perform well in abortion cases or that the Supreme Court might grant certiorari or that the lower federal courts might not be up to the task of protecting federal rights. These results may all occur with some frequency. The crux of the argument is

independent of state court performance. The framers undoubtedly realized that state courts often would suffice, but they chose to rely on independent and life-tenured federal judges for the vindication of federal rights. They knew that in some places, at some times, pressures are brought to bear on state courts that cannot be brought to bear on federal courts.

History has not proven them wrong. One is reminded of recent efforts in California to recall or to prevent reelection of state Supreme Court justices because of disagreement with their decisions. The state trial judge in the Los Angeles school desegregation case was the subject of a recall movement. The efforts failed but they display the continuing pressures state judges must face. Some might argue that such popular pressure on courts is desirable. But with respect to federal constitutional rights, at least, our system was meant to offer litigants life-tenured, independent judges. There is a difference. Whether or not the framers' conclusion was correct, the factors that support their position have not disappeared.

2. Section 2 As Abridging Abortion Rights

The Supreme Court's inability to review each case suggests a second potentially unconstitutional effect of S. 158, an effect going beyond the availability of a federal forum. To an individual whose federal claim is rejected by state courts and who fails to obtain Supreme Court review, the effect of a federal jurisdictional withdrawal may be indistinguishable from that of a substantive statute foreclosing his claim. Technical niceties could be employed to distinguish the two kinds of laws. Jurisdictional statutes are theoretically unrelated to primary behavior; they impose no direct duties or penalties. The fact that a law appears

in the jurisdictional section of the United States Code, however, does not mean that it lacks substantive impact. Thus, where state courts do not vindicate constitutional rights, the effect of a federal jurisdictional limitation on an individual denied Supreme Court review is strikingly close to a substantive law limitation. Any substantive statute with such effects on the vindication of federal constitutional rights would be struck down. Jurisdictional statutes should receive similar scrutiny. If they have unconstitutional substantive effects, they are themselves unconstitutional.

3. Discrimination Against Abortion Rights

Section 2 singles out one class of constitutional rights, abortion rights, for less protection than Congress affords all other constitutional rights. This discriminatory treatment suggests two overlapping bases for arguing that Section 2 is unconstitutional.

First, it is possible to argue that Section 2 should fall because it is motivated by hostility to an established constitutional right. Few problems of constitutional theory, however, have proved more difficult than deciding when a statute motivated by unconstitutional considerations should be invalidated. The Supreme Court's pronouncements in this area are hopelessly confused. They establish only that certain classes of first and fourteenth amendment rights may be protectable though motive-centered inquiries. They do not render unconstitutional all laws enacted to overturn constitutionally-based Supreme Court decisions or even all laws enacted with an unconstitutional motive.

There is one possible view under which Section 2 would fall for motive-related reasons. The Court's confusion in the motive field may reflect not doubt about whether motive ever

should provide a basis for invalidating a statute but when motive should provide such a basis. It is possible that the Court declares motive to be irrelevant as a way of expressing doubt about whether an unconsitutional motive exists in a particular case. See Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U.L. Rev. 152-55 (1977). If that is an explanation of the Court's hesitancy to use motive with respect to all constitutional rights, S. 158 may be subjected to motive scrutiny because there can be little doubt about the motives behind it. It is a frank effort to eliminate the rights found to exist in Roe v. Wade. And the motive underlying the effort, hostility to abortion rights, may well be viewed as unconstitutional.

Second, regardless of the motives underlying Section 2, it discriminates on its face against one class of litigants, those seeking to vindicate abortion rights. This raises the question whether Section 2 violates the principles of equal protection made applicable to federal legislation by the fifth amendment.

Under existing equal protection doctrine, Section 2 possesses neither of the characteristics that lead to virtually automatic invalidation of a challenged provision. That is, it neither affects a known fundamental right nor contains a suspect classification. Abortion rights have yet to be declared fundamental and discrimination among constitutional rights has yet to be declared a suspect classification. Nevertheless, abortion rights are closely related to rights of procreation and familial relations that are viewed as fundamental. The status of abortion rights for purposes of equal protection analysis must therefore be regarded as unsettled. It also is possible that Section 2 will be found to fall into a category of statutes for which a substantial

though not necessarily compelling governmental interest must be found. In that event as well, it is difficult to predict the results of the Court's analysis.

There is one other common mode of analysis under equal protection doctrine. All statutory classifications must be rationally related to a permissible purpose. If Section 2's evident purpose, the contraction of abortion rights, is viewed as impermissible, Section 2 may be one of those extremely rare laws that falls for want of a rational relation to a permissible purpose. It is possible, however, to state Section 2's purposes more sympathetically than the evil-sounding purpose "to contract a constitutional right." One could characterize Section 2 not as an effort to contract abortion rights, but rather as an effort to protect fetuses. Such a purpose hardly sounds like a basis for upsetting a statute and its acceptance as S. 158's purpose would undermine the motive-based argument against S. 158 as well as the straightforward equal protection argument. If, however, one accepts the natural, inexorable linkage between an increase in fetal rights and a decrease in those of women, a desire to protect fetuses may have to be viewed as the functional equivalent of a desire to contract the rights of pregnant women.

The conclusion that Section 2 may violate constitutional principles does not necessarily lead to the conclusion that courts would grant any particular relief from its operation. Serious problems of enforcement and interbranch relations attend any judicial decree in this area. That a constitutional right may not be readily amenable to judicial enforcement, however, does not deprive the right of its status. It becomes all the more important in such cases for Congress to be sensitive to constitutional values.

C. Article III Does not Confer Unlimited Discretion Upon Congress to Enact Jurisdictional Provisions

Nothing in the Constitution undermines the case against the jurisdictional limitations contained in S. 158. Article III, the constitutional provision that comes closest to speaking to Congress' power to control lower federal court jurisdiction, states:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . .
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

One reading of Article III is that Congress has discretion to ordain and establish lower federal courts. Given that power, Congress at least generally must be able to choose the cases in which lower federal courts have jurisdiction. Do these statements translate into a constitutional argument supporting Section 2?

There are two reasons for believing that they do not. First, in light of what has been shown to be the central role of the lower federal courts in fulfilling the role of the national judiciary, the previous paragraph's argument is seriously incomplete. A more persuasive interpretation of Article III is that Congress was granted initial discretion to establish lower federal courts because in 1789 there was no clear need for such courts to fulfill the role of the

federal judiciary. Because the framers in 1789 did not foresee the future explosion of federal constitutional rights, there was no need to command Congress to establish lower federal courts. This is why Article III reads as permissively as it does. But the unwritten assumption underlying Article III was that federal courts were to be available in each case to vindicate federal rights. When that assumption became unfulfillable without lower federal courts, Congress, to be consistent with the original plan, became obligated to create such courts or to devise other effective means to protect consitutional rights. Under such a view one cannot derive plenary congressional control over jurisdiction from the language of Article III.

Second, whatever guidance one derives from the text of Article III with respect to Congress' power to create lower federal courts (and not all agree that the text should be so read), Article III provides no express guidance with respect to Congress' control over their jurisdiction. In light of the fact that the framers expected Congress to create lower federal courts, that Congress did so, and that their existence spans the nation's existence, it seems particularly unrealistic to derive any additional control over the courts from some theoretical power to abolish them. In addition, constitutional infirmities that stem from the discriminatory aspects of Section 2 do not depend on whether Congress has plenary control of lower court jurisdiction. They depend only on finding the Constitution applicable to jurisdictional statutes.

Nevertheless, it seems clear that <u>in general</u> Congress must have the power to control lower federal court jurisdiction. There simply is no rational alternative. Can one articulate principles under which Congress has general

control over jurisdiction without having authority to withdraw constitutional cases in general or the cases embraced by Section 2 in particular? The answer is yes.

III. Congress' Power to Control Jurisdiction and Remedies

The conclusion that lower federal courts are essential to fulfilling the role of the national judiciary, and that S. 158 may therefore be unconstitutional, does not mean that any effort by Congress to control jurisdiction is unconstitutional. For even though federal courts were intended to vindicate federal rights, Congress has a substantial role to play in creating, refining or restricting federal rights.

In particular, Congress may enact jurisdictional laws that accomplish what it could have accomplished by means of a substantive rule. That is, it may enact any jurisdictional statute that does not prevent vindication of a constitutional right. In cases in which Congress may constitutionally prescribe a rule of decision, no federal right that could be vindicated under a constitutional claim is excluded from the federal courts by the withdrawal of jurisdiction. Thus, if no abortion rights survive enactment of Section 1 of S. 158, Section 2's curtailment of jurisdiction is constitutional.

In addition, because Section 2 does not completely remove lower federal court jurisdiction to hear abortion cases, the question remains whether the federal jurisdiction available under Section 2 is sufficient to vindicate abortion rights. Unless one of the remedies provided by Section 2 sufficiently protects abortion rights, Section 2 remains unconstitutional despite some residual federal jurisdiction to hear abortion cases. Section 2 does not foreclose inferior

federal court jurisdiction (1) to hear damage actions against officials who enforce unconstitutional antiabortion laws, or (2) to grant federal habeas corpus relief to those prosecuted under such laws. It is therefore necessary to decide whether either form of relief adequately protects abortion rights.

Neither remedy seems a sufficient mechanism through which to vindicate abortion rights. An antiabortion law has two effects. In some cases, it discourages a woman from seeking (or a physician from performing) an abortion. In other cases it imposes criminal penalties on women who obtain (or physicians who perform) abortions. As to those discouraged from seeking abortions by an unconstitutional antiabortion law, neither habeas corpus nor damages is an effective remedy. Relief from criminal liability is no consolation for those who obey an unconstitutional law, with a resulting unwanted birth. Damages at best are a crude form of compensation for an unwanted child. This truly is an area in which there is no adequate remedy at law.

The basic problem with both remedies is that they are retrospective in nature. They only function after the fact. Because of the irreversible nature of the birth process, abortion may be an area in which prospective relief, such as the declaratory and injunctive relief banned by Section 2, is the only effective relief.[4] The remedial rule here simply cannot require, as it does in the case of most taxes, initial obedience to the law followed by litigation. The later litigation too often will be too late. S. 158 seems to attempt to remove the only effective relief.

There is one other important class of jurisdictional statutes that may be within Congress' power. One should

---

4. I do not address the question whether Section 2 prohibits other forms of prospective relief.

not jump to the conclusion that Congress must vest lower federal courts to hear all constitutional cases. An overabundance of federal forums with unrestricted jurisdiction to hear all federal cases could in fact undermine the judiciary. A number of factors suggest the necessity for line-drawing. First, the expense of such a system might make it impracticable. Second, a large increase in the caseload would inevitably mean an increase in the number of judges and a decrease in the prestige attached to being a federal judge. Many commentators have stated that such prestige is needed if the federal bench is to continue to attract qualified lawyers, especially in areas where private practice is more lucrative. "Any deterioration in the quality of the district judges individually or of their performance collectively would destroy the very values the federal court system is meant to attain."

Thus Congress needs some authority to limit federal jurisdiction. The authority to curtail, however, is limited by its origins. It should not be used to restrict jurisdiction over narrowly defined classes of cases, such as those covered by Section 2, that pose little threat to efficiency; such selective curtailments would bear no rational relationship to the end sought, namely preservation of the quality of federal justice. The power to curtail is limited to prudent steps which help avoid case overloads. In fact, Congress' control of lower federal court jurisdiction has tracked the principles here enumerated. Any Congress enacting legislation not within these guidelines is not only risking a constitutional confrontation but also is breaking with the mainstream of its own traditions.

IV. Conclusion

Proposals to restrict federal court jurisdiction because of displeasure with court decisions are not infrequent. To have such proposals taken seriously is more unusual. Enactment of such proposals is extremely rare. You and your colleagues may stand at a crossroads in American history. Section 2 shifts the controversy from one about abortion to one about the structure of government. Congress is not simply passing upon the right to an abortion but also on whether Americans shall continue to enjoy their centuries old right of effective access to federal court to vindicate their constitutional rights. If Section 2 passes and is sustained, then any Congress hostile to any other constitutional right may contract that right by a similar measure. One trembles at the prospect.

---

UNIVERSITY OF CALIFORNIA, LOS ANGELES,
SCHOOL OF LAW,
*Los Angeles, Calif., April 28, 1981.*

Senator MAX BAUCUS,
*U.S. Senate,*
*Washington, D.C.*

DEAR SENATOR BAUCUS: This is in response to your letter of April 13, 1981, requesting my views as to the constitutionality of Section 1 of S. 158. My response may be summarized as follows: Section 1 is amenable to a straightforward interpretation under which it should be sustained as constitutional. Under an alternative interpretation, however, Section 1 raises grave constitutional questions.

Competing interpretations of Section 1 exist because Section 1, being merely declaratory, does not address the ultimate legal question in the abortion controversy, whether states may prohibit abortions. In particular, Section 1 does not deem state laws prohibiting abortions to be constitutional. Absent such an express statement, there is room for an interpretation of Section 1 that would avoid a direct constitutional confrontation over whether Congress may overturn the Supreme Court's decision in *Roe* v. *Wade.*

I. THE NONCONFRONTATIONAL INTERPRETATION OF SECTION 1

It is perfectly possible for the Supreme Court to accept Section 1's declaration about when life begins and nevertheless to strike down at least some state laws prohibiting abortion as violative of a pregnant woman's right of privacy.[1] Nothing

[1] I do not address the question whether Section 1 requires states to protect fetuses, or what process might have to attend deprivation of a fetus' right to life. It should be noted, however, that even if the fetus is a person for purposes of the fourteenth amendment, it is a person different in important respects from other persons protected by the fourteenth amendment. Therefore, the process due before a fetus may be deprived of life might well differ from the process due before other persons may be deprived of life.

in Section 1 challenges the formal holding of *Roe* v. *Wade*. It merely grants increased legal status to the fetus.

As written, the Section's principal effect is to require the Court to take account of the fetus' new status under the fourteenth amendment in considering a state's interest in protecting a fetus. Accepting Section 1, and therefore acknowledging the "personhood" of the fetus, nothing in Section 1 precludes the Court from balancing the fetus' strengthened status against a pregnant woman's right of privacy. Nor does Section 1 dictated the result of that balancing process. Even with Section 1 in place, the Court might well conclude that the balance should be struck in favor of the woman. This would seem particular likely if the case presented to the Court involved the fetus of a rape or incest victim, a fetus known to be terminally ill (as in the case, for example, of a fetus detected as having Tay-Sachs disease), or a fetus whose delivery would threaten the health of the mother. Section 1's broad brush approach permits no exceptions. And even in the case of routine pregnancies, the Court might conclude that the constitutional balance continues to rest in favor of the woman.

In short, Section 1 offers the Court the opportunity to sustain it as constitutional, to give it meaningful effect in striking a balance, and, if the Court concludes the Constitution so requires, to adhere to its formal holding in *Roe* v. *Wade*. In view of the grave constitutional difficulties that would attend the most likely alternative interpretation of Section 1, difficulties discussed below, this limited view of the Section's effect may have an irresistible appeal.

It is true that Section 1 undermines some of the reasoning employed in the *Roe* opinion. *Roe* replies in part on the Court's finding that the fetus is not a person within the meaning of the fourteenth amendment to conclude that a state has an insufficient interest in protecting the fetus to warrant intruding upon the pregnant woman's right of privacy. But to the extent the *Roe* opinion states what might happen to state abortion laws if the fetus were a person, as Section 1 seeks to establish,[2] the statements constitute dicta not necessary to the decision of the case. Once the Court's opinion concluded that the fetus is not a person, all discussions of what would happen if the fetus were a person became superfluous.

More importantly, such discussion was not offered in the context of a case in which any result turned upon that discussion. In light of this less than ideal context, it is not surprising that the superfluous discussion in *Roe* was seriously incomplete. In particular, the Court had no need to consider the inroad upon a pregnant woman's rights that attends any increase in the fetus' rights. Resolution of the abortion issue without such consideration could never be satisfactory. It is with good reason that the Supreme Court has not felt bound by extraneous utterances such as those in *Roe*.

The interpretation of Section 1 offered here should not be viewed as a veiled effort to frustrate the will of Congress. If Congress wishes to attempt to overturn the actual holding in *Roe* v. *Wade*, there is no legitimate reason for its failure expressly to do so. In the past, disagreement with Supreme Court decisions has led Congress to take just such direct action. For example, to the extent Congress took issue with the Supreme Court's upholding of literacy tests in *Lassiter* v. *Northampton County Board of Elections*, Congress did not resort to any indirect, ambiguous measure which left room for doubt about what Congress wished to accomplish. It did not, for example, merely declare that literacy tests have undesirable effects and then expect the Supreme Court to reverse itself. Given prior instances of Congress' unequivocal action in response to Supreme Court decisions, there is little reason to read more into Section 1 than is contained in its express language.

Furthermore, longstanding Supreme Court practice requires an express statement from Congress to undermine important existing rights. For example, section 1983 contains language that permits a rational reader to conclude that in enacting section 1983 Congress meant to abrogate state sovereign immunity. Nevertheless, in *Guern* v. *Jordan*, 440 U.S. 312 (1979), the Court stated that it would need an express statement of abrogation before eliminating such an important right. Similarly, in *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), and again despite the breadth of section 1983, the Court refused to limit the immunity from suit of state legislators without a more express statement from Congress. And in *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court refused to construe the exclusion of members of Congress from the definition of "employer" in Title VII as an effort by Congress to deprive its employees of the right to be free of discriminatory employment practices. Whether the rights at issue are those of states, legislators, congressional employees, or pregnant

[2] There is a serious question whether Congress may extend fourteenth amendment rights to beings not traditionally thought of as persons. This aspect of Section 1 differentiates it from the statute sustained in *Katzenbach* v. *Morgan*. Another difference is discussed below.

women the Court is reluctant to conclude that Congress wishes to contract those rights without an explicit statement from Congress. Given the Court's attitude in these matters, and Congress' knowledge of that attitude, the Court may regard nothing short of an express statement as an effort to abrogate a woman's right of privacy.

### II. THE CONFRONTATIONAL INTERPRETATION OF SECTION 1

Alternatively, the Court might interpret Section 1 as doing what it does not purport to do, addressing the ultimate issue in *Roe*, the extent to which states may outlaw abortions. Rather than addressing the intermediate issue of the fetus' status as a person under the fourteenth amendment. In such a case, Section 1 would have to be viewed as contradicting *Roe* v. *Wade*, and the scope of Congress' power to do so under the fourteenth amendment would be an unavoidable issue.

I would feel presumptuous in attempting to articulate any general theory of Congress' power under the fourteenth amendment. This is, in some sense, "the" constitutional question of this half-century, one with respect to which there is no generally accepted consensus and one that may not be susceptible of a general answer. I do, however, have two observations about Congress' fourteenth amendment powers that are pertinent in assessing Section 1.

First, it is beyond doubt that Congress' power to legislate under the fourteenth amendment is subject to limits. For example, suppose that Congress, in exercising its fourteenth amendment powers were to enact a provision declaring that *de jure* segregated school systems do not amount to a violation of the equal protection clause. Even if the legislation were accompanied by a strong factual showing as to the equality of segregated schools and the absence of psychological damage to minority children, it could not seriously be contended that the Supreme Court automatically should accept the declaration and findings and retract its decision in *Brown* v. *Board of Education*. Congress' power under the fourteenth amendment is at least subject to limitations contained in the Constitution, including, somewhat paradoxically, fourteenth amendment limitations. There is an unavoidable balance to be struck in such a case.

Thus, if *Roe* v. *Wade* amounts to a holding that a pregnant woman's privacy rights outweigh those of the fetus, a statute overturning that holding must be subjected to scrutiny in light of constitutional value, including a woman's right to privacy. Congress' fourteenth amendment power is not a magic wand that, when waved, eliminates all constitutional difficulties.

Second, one can assess Section 1 in light of the Supreme Court's most important precedent in this area, *Katzenbach* v. *Morgan*. Briefly stated, *Morgan* is so fundamentally different from any case likely to raise the constitutionality of Section 1 that *Morgan* should not be viewed as a direct precedent for sustaining Section 1.

Superficially, there is a resemblance between *Morgan* and a conceivable hypothetical case testing Section 1's constitutionality. In each instance Congress relies on its fourteenth amendment powers to modify Supreme Court decisions about the scope of the Constitution. Given the broad scope given Congress' power in *Morgan*, one might expect a similar result with respect to Congress' power to enact Section 1.

Yet only at a misleading level of generality does the parallel between *Morgan* and the Section 1 case exist. In more fundamental respects the cases differ. In *Morgan*, Congress' expansion of the content of the equal protection clause came at no individual's expense. Section 4(e)'s limitation on English literacy as a voting qualification merely assured the franchise to a group theretofore deprived of it. The only contraction of others' prerogatives resulted from the marginal dilution of other voters' voting power that accompanies any extension of the franchise.

In the Section 1 case, by contrast, Congress may accomplish the desired expansion of the fetus' rights only at the expense of the pregnant woman's choice, a choice *Roe* v. *Wade* suggests is of constitutional significance. In *Morgan*, this counterbalancing issue simply was not present. Similar reasoning would distinguish the Court's tangled pronouncements about Congress' fourteenth amendment power in *Oregon* v. *Mitchell* and about Congress' fifteenth amendment power in *City of Rome* v. *United States*, 446 U.S. 156 (1980).

Finally, the most disturbing feature of the second interpretation of Section 1 is that it may require resolution of an important constitutional question in the context of assessing what seems to be a legislative trick. The constitutional analysis submitted by supporters of Section 1 acknowledges that Congress' power to outlaw abortions is subject to a pregnant woman's right of privacy. It states, "if Congress enacted a federal criminal statute to prohibit abortion, its action would collide with the right to privacy." Cong. Rec. S. 294 n. 95 (January 19, 1981). Obviously, then, state statutes prohibiting abortion also must impinge upon the right of privacy. Yet under the second interpretation of Section 1, it seeks to assure that the right of

privacy will not prevail in cases testing abortion laws. If limitations on access to abortions interfere with rights of privacy, it seems they must do so whether the limitations are direct, as in the case of a federal statute outlawing abortions or indirect, as in the case of Section 1. Our system is not a very satisfactory one if an otherwise available constitutional right can be undermined so easily.

I hope this discussion is of assistance to your Subcommittee and appreciate your request for my views.

Sincerely yours,

THEODORE EISENBERG,
*Professor of Law.*

Senator EAST. Professor Rice?

## STATEMENT OF PROF. CHARLES RICE, NOTRE DAME UNIVERSITY, NOTRE DAME, IND.

Mr. RICE. Thank you, Senator.

I am pleased to be here for a number of reasons, one of which is that Professor Dorsen and I are old friends from New York University. It is a great pleasure to meet him here. I wish that some day we would have the opportunity to testify on the same side of an issue.

In any event, I sympathize with Professor Dorsen and Professor Eisenberg because they obviously are opposed to this bill. They think it is unwise. But we sometimes run the risk of translating objections as to the wisdom of legislation into conclusions as to the power of Congress.

The issue here in this hearing is not the wisdom of the legislation. The issue is whether this legislation is within the power of Congress to enact.

As far as the lower Federal courts are concerned, the Constitution did not create them. It left the issue of their creation or not entirely up to Congress.

I do not want to read long passages into the record. However, I do want to take a few sentences from the extensive and very descriptive dictum by the Supreme Court in the *Palmore* case in which the Court described this question of article 3 power over the lower Federal courts.

The Supreme Court said that Congress:

> . . . was not constitutionally required to create inferior Art III courts to hear and decide cases within the judicial power of the United States, including those criminal cases arising under the laws of the United States. . . . Nor, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art III. "[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." Congress plainly understood this, for until 1875 Congress refrained from providing the lower Federal courts with general Federal-question jurisdiction. Until that time the State courts provided the only forum for vindicating many important Federal claims. Even then, with exceptions, the State courts remained the sole forum for the trial of Federal cases not involving the required jurisdictional amount, and for the most part retained concurrent jurisdiction of Federal claims properly within the jurisdiction of the lower Federal courts.

We have several technical problems that do come up in this respect in terms of what a statute can do. The question is: Are there absolutely no limits on the power of Congress? In a sense, yes, but in another sense, no.

I agree with Professor Dorsen that a statute could not provide, for example, that Catholics or blacks may not sue in a U.S. district court. Why would this be so? It would be so because it would collide with another prohibition of the Constitution, not because Catholics or blacks have a constitutional right to appear in Federal court but rather because they have a right to be treated without discrimination with respect to their religion or race.

A criterion saying that a Catholic or a black could not sue in a Federal court would be a criterion having nothing to do with the character of the case. That is why it would be unconstitutional.

However, Congress can surely take jurisdiction away over a class of cases. Some of those litigants will be Catholic. Some of those litigants will be black, but they are not discriminated against because of their religion or their race.

The question then becomes can Congress do this where it has an impact on the substantive issues involved. Clearly this is not merely an economy measure. Clearly this bill is prompted by the abortion rulings. If it is enacted, it will be actuated by opposition to those rulings, but there is no limitation on article 3 such that Congress cannot take a substantive class of cases away from the Federal courts. There is absolutely no limitation which says that they cannot do it on the grounds that they disagree with those limitations. Of course they can.

There is a very basic principle that the courts should not inquire into the motive of the legislature. It is true that there has been development in racial discrimination cases, particularly where the Supreme Court has required purposeful discrimination. The reason why that has been a notable development is because it is an exception to the very healthful rule which has been retained since the early years of the Republic.

There is another limitation which we have to be careful about. The Human Life bill, or section 2 of S. 158, I believe clearly can take jurisdiction away from the U.S. district courts, as it does, but it would be improper for Congress to require the courts to decide a case in a particular way.

For example, it would be improper for the act to take away jurisdiction only to issue an injunction on one side instead of on the other side, in favor instead of against the abortion law. This, I think, is a limitation which is not violated by the language of section 2. Section 2 is evenhanded. It simply says they cannot issue an injunction either way or any way in such a case.

As far as the wisdom of the legislation is concerned, I would like to offer a remark on that because I really believe that the opposition of my distinguished colleagues is primarily based upon the fact that they disagree with the wisdom of the legislation. I respect their constitutional arguments, but they are without foundation. It comes down to a question of wisdom.

There is wisdom in section 2. It is a prudent piece of legislation because it puts the initial decision in the State courts. This is prudent because one of the valid objections to *Roe* v. *Wade*, even apart from what one thinks on the substantive issue of abortion, is that *Roe* v. *Wade* was an undue interference with the prerogatives of the States.

This is not a legal argument, but it is a prudential argument. In my opinion, it is a quite wise course for Congress to say we want to get the fullest possible ventilation of this issue in the State courts without having those courts short circuited right at the outset by interdiction from the Federal courts.

Those remarks go to the wisdom of the legislation, but there is just absolutely no question that Congress has the power to do this. It is not subject to any of the possible limitations on article 3 power over the lower courts, as I have discussed, and I just do not think there is even a ballgame about it. I think it is just so clear that it is period, paragraph, next case.

Thank you, Senator.

Senator EAST. Thank you, Professor Rice.

[The prepared statement of Professor Rice follows:]

## Prepared Statement of Professor Charles E. Rice

This testimony is limited to the constitutionality of Section 2 of the Human Life Bill (S. 158), which provides:

> "Sec. 2. Notwithstanding any other provision of law, no inferior Federal court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in any case involving or arising from any State law or municipal ordinance that (1) protects the rights of human persons between conception and birth, or (2) prohibits, limits, or regulates (a) the performance of abortions or (b) the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions."

The Constitution [Art III, Sec. 1] provides, "The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." The Constitution itself did not create the lower federal courts. Instead it left to Congress the decision whether to create such courts and, if Congress chose to create them, how much of the jurisdiction encompassed within the federal judicial power it ought to confer upon them. Congress need not have created such courts at all. Having created them, it need not vest in them jurisdiction to decide the full range of cases within the federal judicial power. For instance, until 1875, the lower federal courts had no general jurisdiction in cases arising under the Constitution or laws of the United States. [See Hart and Wechsler, The Federal Courts and the Federal System (1953), 727-33] Today, the jurisdiction of the lower federal courts is limited in some respects by the requirement of jurisdictional amount and in other respects as to the classes of cases in which they are empowered to exercise jurisdiction. The Norris-La Guardia Act, for example, withdrew from the lower federal courts jurisdiction to issue injunctions in labor disputes. The constitutionality of the Norris-La Guardia Act was sustained by the Supreme Court in Lauf v. E. G. Shinner and Co. [303 U.S. 323, 330 (1938)]

More recently, in an extensive dictum in Palmore v. U.S.

[411 US 389, 400-402] the Supreme Court summarized the status of the lower federal courts under Article III:

> Article III describes the judicial power as extending to all cases, among others, arising under the laws of the United States; but, aside from this Court, the power is vested "in such inferior Courts as the Congress may from time to time ordain and establish." The decision with respect to inferior federal courts, as well as the task of defining their jurisdiction, was left to the discretion of Congress. That body was not constitutionally required to create inferior Art III courts to hear and decide cases within the judicial power of the United States, including those criminal cases arising under the laws of the United States. Nor, if inferior federal courts were created, was it required to invest them with all the jurisdiction it was authorized to bestow under Art III. "[T]he judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." Cary v. Curtis, 3 How 236, 245, 11 L Ed 576 (1845). [9]Congress plainly understood this, for until 1875 Congress refrained from providing the lower federal courts with general federal-question jurisdiction. Until that time, the state courts provided the only forum for vindicating many important federal claims. Even then, with exceptions, the state courts remained the sole forum for the trial of federal cases not involving the required jurisdictional amount, and for the most part retained concurrent jurisdiction of federal claims properly within the jurisdiction of the lower federal courts.

9. [This was the view of the Court prior to Martin v. Hunter's Lessee, 1 Wheat 304, 4 L Ed 97 (1816). Turner v. Bank of North America, 4 Dall 8, 1 L Ed 718 (1799); United States v. Hudson, 7 Cranch 32, 3 L Ed 259 (1812). And the contrary statements in Hunter's Lessee, supra, at 327-339, 4 L Ed 97, did not survive later cases. See for example, in addition to Cary v. Curtis, 3 How 236, 11 L Ed 576 (1845), quoted in the text, Rhode Island v. Massachusetts, 12 Pet 657, 721-722, 9 L Ed 1233 (1838); Sheldon v. Sill, 8 How 441, 12 L Ed 1147 (1850); Case of the Sewing Machine Companies, 18 Wall 553, 577-578, 21 L Ed 914 (1874); Kline v. Burke Construction Co., 260 US 226, 233-234, 67 L Ed 226, 43 S Ct 79, 24 ALR 1077 (1922).

While various theories have been advanced to argue for restrictions on Congress' power over the jurisdiction of the lower federal courts, none of them is supported by the Supreme Court. Not only does the greater discretion to create, or not, the federal courts

themselves include the lesser power to define their jurisdiction, the evident intent of the framers was to vest in the Congress the capacity to make the prudential judgment as to which courts, state or federal, should decide constitutional cases on the lower and intermediate levels.

The jurisdictional provision of Section 2 of the Human Life Bill are clearly within the power of Congress under Article III.

Senator EAST. We deeply appreciate the comments of all three of you. As I have indicated, we will remind people of our time factor. We expect to adjourn at 1 o'clock. We would hope then to finish up this panel at 11:30, which would give us about 35 minutes.

If it is agreeable with my distinguished colleagues here, I will ask questions for about 10 minutes, and then we will turn it to Senators Baucus and Heflin. We will see if we cannot wind up our interrogations somewhere around 11:30.

It would be helpful to the three of us who hope to learn from the three of you if you would be as concise as you can consistent with making your point as far as our inquiries go. It will give the three of us the opportunity to probe further. If we want to follow up and get more from you, certainly each Senator would have the right and prerogative to do that.

For the uninitiated who may be with us for the first time this morning, we are discussing that section of S. 158 which deals with the question of whether the lower Federal courts would have jurisdiction to hear matters involving S. 158 and the issues that it raises.

We are focusing upon a facet of this bill dealing with court jurisdiction. That is what these gentlemen are here to testify about. We are trying to take it a step at a time.

Professor Dorsen, I would like to address my remarks to you. First, I would like to correct you in that there were two dissenters in *Roe* v. *Wade*, Byron White and William Rehnquist. They both said that this was an improvident and extravagant use of the power of judicial review. They both joined in that terminology to describe *Roe* v. *Wade*.

Then in a separate dissent, Justice Rehnquist called it judicial legislation. Both made it clear that in their judgment the Court had gone way beyond reasonable conceptions of the power of judicial review as envisioned in *Marbury* v. *Madison* or the *Federalist Number 78*.

I did want to correct the record there in that we did have two dissenting opinions. It is of interest when the Court itself, its own membership, has profound reservations about what it is doing and describes it so pointedly as improvident and extravagant. That is strong language to describe that institution's decision in this area.

Let me just put it in perspective. I would appreciate your response to this. I will put it in a little broader policy context.

What you are really seeing here—let us be candid about it—is a response of the legislative body—it is very much a problem of

separation of powers—to what is perceived by many, although agreed not all, as a very serious intrusion of the Federal judiciary into a legitimate legislative policymaking function.

There is little or no constitutional justification as these people see it, including Byron White and William Rehnquist, for what has been done here, and Congress is attempting to find some remedy, some way of response.

Let me put it this way: If *Roe* v. *Wade* had held that the unborn are protected from the time of conception and had defined that as a constitutional right as opposed to the right of privacy of the woman, there would be a strong movement in this country to try to change that result. I mean, it is inherent in the democratic process. There are deep poles on this question.

As Professor Rice is suggesting, and I will say candidly that I agree with him, it strikes me—I do not fault them because we all do this from time to time, perhaps consciously or unconsciously—that people are defending their political turf here.

Some people like the policy result of *Roe* v. *Wade*. They might have preferred that Congress had done it, or perhaps that all the States had done it individually, but they like it. They like it as a policy decision. Hence, when they perceive any threat to that either through legislative action by Congress or whatever, they are immediately quick to man the barricades and say this cannot be done and that cannot be done.

What we are doing here is simply accepting, as the defenders of the bill are saying, a tacit invitation by the Court to define when life begins. We have already been through that.

The second part is a matter of jurisdiction. With all due respect to both of you, and you state your arguments extremely well and I follow your line of reasoning, article 3 is rather categorical and has historically been so considered. It gets back to separation of powers, check and balance, and that there is the power of the Congress to create the Federal courts. We have the powers to abolish the lower Federal courts tomorrow. That would be generally conceded, would it not? We could abolish the courts of appeals and the district courts.

The only court that is required under article 3 is the Supreme Court. We could not abolish that one. We could take away all its appellate jurisdiction. We could leave it high and dry with its original jurisdiction.

However, great power is given by the Constitution to the Congress. It is first among equals. As a matter of political theory, I would argue that is very appropriate in a country predicated upon the idea of representative government, self government, where the major policy decisions are made by the legislative body, which is Congress.

Many people feel that over recent years there has been a gross intrusion here. I would hope the Court would take note of it. Maybe the dialog itself would cause them to put on the brakes. That right there would make the hearings useful.

To my point, is not what we are doing here a fairly modest thing? One, we are simply accepting an invitation to determine when life begins. Two, we are regulating jurisdiction, a power we have under article 3. Interestingly, we are only regulating the

lower Federal courts, leaving the Supreme Court the option to get in on the act and to determine if what we are doing here is appropriate. If they found it inappropriate, I suppose for those who wished to change *Roe* v. *Wade*, one would have to go the road of the constitutional amendment, but first things first.

I am suggesting it is a very modest approach, nothing particularly radical or dramatic or overbearing about it. It is just the little old Congress trying to assert its policymaking function and just putting its little feet in the water and seeing how it is going. A lot of folks, it seems to me, are trying to frighten us away by saying whoever heard of such a thing?

The framers heard of it. They put it in article three. It is part of the checks and balances. Congress has enormous power here over the Federal courts. We are not saying we ought to exercise it in every case. We are not saying we should exercise it casually or cavalierly or precipitously, but certainly we have that power.

When the Congress feels it has gone too far, why can it not intervene? What is the great constitutional crisis that we are creating? I would argue the constitutional crisis has been created by the Supreme Court. They put us in this box. Now we are trying to find some way out of it.

I do not know what Congress will eventually do with it. I hope it stays steady on course and begins to reassert its policymaking function in a whole host of areas. This is just one.

Whatever result we end up with, whether it is in abortion or busing or any of a variety of things—we may ultimately have to face the draft issue since we do not know what the court is going to do when it hands down that decision—sooner or later Congress is going to have enough willpower to say we are the principal policymakers and we are going to get involved. That is what this effort is right here.

On the modest question of article three, can I not get you to back off just a little bit and argue that what we are doing is very consistent with our constitutional prerogative?

Mr. DORSEN. I will interpret that as a question that you are directing to me.

First of all, I do want to thank you for correcting my error about the number of dissenters. I appreciate that very much. I had forgotten that Byron White had also dissented.

Let me comment on your various points. First of all, dissenters always say that the Supreme Court has usurped power. Seven justices disagreed with those two, including Mr. Justice Blackmun, a conservative justice from Minnesota, and the Chief Justice of the United States, who I have never yet heard accused of being a radical. They thought about this issue. They thought about it hard. They came out differently from Mr. Justice Rehnquist and Mr. Justice White.

Article 3 does speak in categorical terms. There are no exceptions in article 3 about the power of Congress. If that is true, why does my good and old friend Professor Rice say that a violation of the equal protection clause would occur if Congress attempted to exercise its power to cut back the jurisdiction of the Federal courts to hear cases by blacks or Roman Catholics or Jews or anybody else?

These three categories are not the only rights protected by the Constitution. There are also fundamental rights protected by the Constitution. One of those fundamental rights is the right of privacy and autonomy that seven justices of the Supreme Court, including not only the two conservatives I mentioned but also Mr. Justice Powell and Mr. Justice Stewart, again deep thinkers about the proper allocation of power in this country, upheld.

You stated very forcefully and helpfully your view of the dialog of the constitutional system. You stated that the key to our constitutional system is majority rule.

With respect, I think that is just one of the two great keys to our system. One is democracy and majority rule and I stand second to none in supporting that in situations where it is applicable.

However, there is another great key. That is the protection of minorities and the protection of dissenters and the protection of people who do not have their constitutional rights protected by the majority. We would not need the Supreme Court and we would not need the Federal courts to protect the majority, whose rights are secure in any event.

In that connection, I should note that I have testified before committees of Congress for many years on behalf of congressional power. I testified on behalf of congressional power in the war powers area and on behalf of congressional power in the executive privilege area when it was not altogether popular to do so, when many people were saying that the President has to run the country. I came before Members of Congress and said, "No. Congress must assert its authority. It must assert its authority on behalf of the people."

However, the second part of congressional responsibility and, if Congress does not exercise it, the responsibility of courts, is to protect individual rights. We could relitigate *Roe* v. *Wade* and try to come to a decision that would satisfy all of us. I doubt if we could have unanimity in a matter of that complexity and controversy, but suffice it to say that conservative justices of the Supreme Court concluded differently from the position you are taking, sir.

I want to say one final thing. I agree with Professor Rice and with you that the issue here is not wisdom at the moment. It is constitutionality. The dicta of the cases that Mr. Rice undoubtedly has quoted about the plenary power of Congress were stated in contexts bearing no remote relationship to the issue we have before us.

What we have here whether we like it or not, and some will like it and some will not, are seven justices of the Supreme Court saying there was a constitutional right. The question is not democracy. The question is whether Congress is going to undercut that constitutional right.

With respect, I do not think Congress has that power, although I would be willing to grant it vast powers in its appropriate domain.

Senator EAST. Thank you, Professor.

Let me just follow up with one question and then I will turn to Senator Baucus.

It strikes me that you and Professor Eisenberg are assuming the very thing we are setting out to decide. You are assuming the result or the conclusion. The right to privacy is what the Court

spun out of the Constitution. The critics will say it was out of wholly new cloth in order to reach their result, but be that as it may, they did do it. That is true.

However, what we are looking at here is the other side. Getting this back into the policy arena, there are very strong movements in this country, groups and individuals, who feel that the right to life is more critical than the right to privacy. That is a major and fundamental policy judgment. They are not content with the idea that the Supreme Court alone, uninhibited and unchallenged, can make that determination any more than in *Dred Scott* where the Court might hold that the black is a piece of property and that that would have settled the issue.

All I am saying is of course you can say that they determined the right to privacy is there, but this whole challenge is on the point that the right to life is a greater right. How do we bring that into the public arena for legitimate consideration?

Mr. DORSEN. I have an answer to that. The answer is the exact case you gave: Amend the Constitution. That is what they did after *Dred Scott*. That is what the people who oppose the Supreme Court have authority to do under our system, but not to do it through the back door in this way.

Senator EAST. I have one final comment on why we have done it this way and then to Senator Baucus.

*Roe* v. *Wade* is unique, so contend the supporters of S. 158, because of the contention that if they had known when life began, they would have come to a totally different conclusion. In short, the right to privacy self-destructs if you can determine when life begins. If the findings are that life begins at the time of conception, the right to privacy, under their own terms of the majority of *Roe* v. *Wade*, is overshadowed. That is the very unique situation that justifies the rationale for S. 158.

Mr. RICE. Senator, could I interrupt?

Senator EAST. In deference to my good colleagues, I would not like to preempt them any further. I am going to turn it over to my distinguished colleague here lest I impose any further.

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Rice, as I hear you, you make several points. No. 1, you say that Mr. Dorsen and Mr. Eisenberg are letting their feelings about this bill interfere with their analysis of the precise issue before us. You say they find the bill unwise.

Do you find this bill wise?

Mr. RICE. Yes, sir, I do. As I explained, with respect to section 2, which is the only part we are talking about today, I think it is wise because it leaves these decisions for the time being in the State courts initially. I think that is a healthful corrective for that aspect of *Roe* v. *Wade* which is subject to much legitimate criticism, that is that it interfered with the due prerogatives of the State courts.

Senator BAUCUS. You also state that you feel that those cases where Congress might attempt to limit the rights of Jews or Catholics to sue, Congress could not limit those persons and those categories of cases because it would violate the 14th amendment and equal protection guarantees. Is that correct?

Mr. RICE. I am glad you asked that because that is one of the things I wanted to address.

Senator BAUCUS. Why is that an exception to the very clear unequivocal phrasing of article 3?

Mr. RICE. It is not an exception to the power of Congress under article 3 at all. What it is is an overlay of another constitutional prohibition which comes into effect because there is a world of difference between what section 2 of S. 158 does and a bill that provided that no black could sue in a U.S. district court.

In the latter case, what you are doing is imposing a discrimination upon that person by means of a criterion having nothing whatever to do with the case.

Senator BAUCUS. The point I am trying to make is that there are exceptions to the unequivocal——

Mr. RICE. No, not at all.

Senator BAUCUS. Let me state it different.

Article 3 is not unequivocal?

Mr. RICE. Article 3 has to do with jurisdiction and even the very existence of those Federal courts.

Now of course——

Senator BAUCUS. However, you are giving examples where Congress could not limit inferior court jurisdiction.

Mr. RICE. When you look at the Constitution, you have to look at various prohibitions. We are talking about the fifth amendment here, the fifth amendment due process clause which incorporates in it an equal protection factor. This is something that governs all congressional legislation.

You can say Congress has the power to regulate commerce. Yes, of course, but Congress cannot provide that no black or no Catholic may open a store. You do not say that that means that Congress power over interstate commerce does not really exist. That is not so. It means that there is another specific prohibition. That is what is happening here.

Senator BAUCUS. In what other classes of cases could Congress not limit lower Federal court jurisdiction?

Mr. RICE. I think this sort of case would be the only type of case. Incidentally, if I may suggest, these points were covered at some length by Prof. Paul Bator of Harvard Law School in his recent testimony before the Subcommittee on the Constitution.

Senator BAUCUS. What about first amendment freedoms? Could Congress state that lower Federal courts could not have jurisdiction over first amendment cases?

Mr. RICE. Of course, certainly. For example, Congress has taken away jurisdiction in the Norris-La Guardia Act to issue certain injunctions.

Senator BAUCUS. Could Congress pass a statute saying in all first amendment cases, free speech, freedom of religion cases, there shall be no lower Federal court jurisdiction?

Mr. RICE. Yes, sir.

Senator BAUCUS. In every case?

Mr. RICE. Yes, sir. They have not done that.

Senator BAUCUS. Let me ask Mr. Dorsen or Mr. Eisenberg if they agree that Congress could constitutionally take away all first amendment cases from lower Federal court jurisdiction?

Mr. EISENBERG. I find it very difficult to discriminate among different classes of constitutional rights. My view is that litigants

must have realistic access to lower Federal courts for all constitutional rights. Included in that category would be first amendment rights.

However, I would also have to say that I would include rights to abortions in that category. Congress could no more eliminate abortion rights than it could eliminate first amendment rights.

Senator BAUCUS. You would disagree that the only class of rights that Congress could not remove from jurisdiction would be equal protection rights.

Mr. EISENBERG. I do not think anybody really believes that the only class of rights are equal protection rights.

Senator BAUCUS. Mr. Rice does.

Mr. EISENBERG. Mr. Rice did say that. He also said Congress could not confer jurisdiction in a way that ordered courts to reach a particular result. I do not find that anywhere in article 3. Apparently there are some unwritten exceptions in article 3 that have not been revealed to the rest of us.

I should also add that there is not a word in article 3 about jurisdiction over lower Federal courts. It talks about Congress power to ordain and establish them. It does not mention jurisdiction.

Senator BAUCUS. Mr. Rice, are there any public policy reasons why Congress should not limit lower Federal court jurisdiction in certain Federal cases?

Mr. RICE. I think you could advance prudential arguments on both sides of the question.

Senator BAUCUS. I am asking you what public policy reasons would there be against limiting Federal court jurisdiction?

Mr. RICE. I think the public policy reason would be that you would want to have a dual track in every instance so you would have a choice of enforcing your rights in either the State or Federal courts because State courts have jurisdiction to entertain these constitutional claims as well.

When you get into these so-called exceptions, they vanish. They are really not exceptions. For example——

Senator BAUCUS. Excuse me. Let us assume that this bill becomes law. Let us further assume that the legislation is the subject of litigation in most of the States. After a period of time it becomes obvious that only a very small percentage of the cases litigated in the State courts reach the U.S. Supreme Court. During that period of time, there is a wide variety of State court interpretations? Does it have any bearing whatsoever on whether or not individuals are denied remedies or effectively denied their constitutional rights if they have a difficult time reaching the U.S. Supreme Court?

I am painting a hypothetical picture, but say there is mass confusion among States and very few cases litigated in the State courts reach the Supreme Court. Does that in any way affect your feeling about the propriety, let alone the constitutionality, of this particular section of the bill?

Mr. RICE. I think it would be a consideration to keep in mind. However, you must remember that this is a very modest bill in that it preserves the appellate jurisdiction of the Supreme Court intact so that the Supreme Court would very quickly have an

opportunity to decide this case. That would be a precedent for other State jurisdictions.

Senator BAUCUS. You are arguing with my facts. My facts are that because of the caseload of the Supreme Court, it just cannot decide very many of these cases.

Mr. RICE. Senator, all you would need is one case in order to decide the constitutionality of this statute.

Senator BAUCUS. That is not my question. My question concerns the interpretation of different State statutes and whether the States are acting correctly or not. Different States could enact different statutes and each could present different circumstances.

Mr. RICE. Right.

Senator BAUCUS. One case alone could not handle all of these cases.

Mr. RICE. You have the first question which is the constitutionality of S. 158, assuming it passes. Is it constitutional for Congress to define the unborn child as a person and so forth? That is wide open for review as quickly as possible by the Supreme Court of the United States. There is no problem.

The State of New Jersey may enact a statute which may differ from the statute enacted by the State of Illinois. This is no different from questions which come up in other matters. You do not really add anything to the prudential wisdom of the thing by interjecting at the lower level U.S. district courts which under the circumstances would simply compound the confusion.

Senator BAUCUS. Let me ask another question. What is your view on how staticly or how rigidly the Constitution should be interpreted? The chairman raises the point that the framers intended that Congress should have the right to establish lower Federal courts and lower Federal court jurisdiction and that those are the plain words of the Constitution.

Mr. Dorsen and Mr. Eisenberg, particularly Mr. Eisenberg, outlined how at the time there were not many Federal cases that needed to reach the U.S. Supreme Court and so the circumstances when the Constitution was written were much different than they are today. The substantial increase in our population and in the Court's caseload have altered the Supreme Court's ability to hear the cases that the framers expected them to hear.

The question is how rigidly should one interpret those words in the Constitution given the circumstances and times when those words were written? Let us look for a moment at the first amendment. The first amendment says that Congress shall pass no laws abridging the freedom of speech and freedom of press. At that time there was no radio or television. The first amendment does not say anything about radio or television because there was no radio or television.

I think it is arguable, and not only arguable but probable that if the framers were to write the Constitution today, they might not use the word "press". They might use the word "media." Today they would phrase it in a way that would take radio and television into consideration.

Therefore, do you not think that when Congress passes laws and tries to determine what the Constitution means, that we must pay at least some attention to present circumstances?

Mr. RICE. I think your point argues strongly in favor of this provision in section 2.

Senator BAUCUS. How is that?

Mr. RICE. Section 2 is based on article 3, which according to the intent of the framers clearly gave to Congress the authority and responsibility of making continuing policy judgments. The framers were wise enough to envision that there would be changed circumstances.

The first amendment is flexible enough to include radio and television, as the commerce clause can include airplanes. This is an argument very strongly against freezing this thing and saying that Congress may not tamper with lower Federal court jurisdiction because circumstances may change.

The point here is if S. 158 passes, it will be because in the judgment of Congress circumstances have changed.

Senator BAUCUS. However, have circumstances not also changed with respect to an individual's ability to vindicate his or her constitutional rights? Haven't population and caseload affected access to the Federal courts?

Mr. RICE. That is a question for the judgment of Congress. One of the difficulties here arises from the Supreme Court's extravagant interpretation of the 14th amendment so as to apply the provisions of the Bill of Rights literally and strictly to the States contrary to the salutary rule of the *Twining* and *Palko* cases as articulated by Justices Cardozo, Frankfurter, and Harlan. The Supreme Court has reached out to take jurisdictions for itself and responsibilities for itself that have proven not to be wise.

Senator BAUCUS. Thank you very much.

Senator EAST. Thank you, Senator.

Senator Heflin?

Senator HEFLIN. Professor Rice, in your response to Senator Baucus you raised an issue that interested me and started me thinking on some things. That is, you indicated that the U.S. Supreme Court would quickly or rapidly rule on this bill if it were passed. You said something to that effect, which I assume is correct. I think this would be an issue that both sides would want to expeditiously know what the outcome would be.

If it is held unconstitutional, the prolife people would say, "Well, we wasted 2 or 3 years—as we say when hunting in the South—chasing rabbits. We went off on a detour, were led astray, and delayed the situation for 2 or 3 years during which time many abortions occurred."

On the other hand, if it is declared constitutional, then the prochoice people are going to be in a situation where I would anticipate from the feeling on this issue that a movement will be started for a constitutional amendment to reverse this bill.

Really, as I look at this, and I would like to get your thoughts, is this section 2 necessary in regard to anything pertaining to the constitutionality, or is it strictly procedural?

Mr. RICE. I do not think it affects the constitutionality of section 1. I think it is an independent judgment by Congress that it is a good thing or would be a good thing to let the State courts, unhindered from interference from lower Federal courts, come to grips

with this thing subject to review by the Supreme Court. I think you have to look at these sections independently.

Senator HEFLIN. Is it really a delaying provision?

Mr. RICE. No, I do not believe so. I really believe, Senator, that one of the major objections to *Roe* v. *Wade*, apart from the merits of abortion, is that it is an undue intrusion on the power of the States.

Here you have a device which would contribute to a rectification of that by saying, "State courts, we want you to consider this. We want you to give this full consideration without some U.S. district judge coming in and hurling a thunderbolt to stop your consideration." Then let us get an orderly review of this by the Supreme Court. That is federalism in operation. It seems to me to be a very salutary thing.

Senator HEFLIN. Is this an issue on which State court or lower court rationale and writing will affect the way the U.S. Supreme Court rules on it?

Mr. RICE. It very well may. I would not speculate about that.

Senator HEFLIN. It is not like school prayer and not like a lot of other issues. It is the issue of whether or not *Roe* v. *Wade* has ruled on the subject and whether it is the law of the land. That is debatable. In my judgment, you can read it both ways depending on how you want to read it.

However, is it not almost a single thrust issue that regardless of whether you go through the State courts or whether you go through the Federal courts, it is going to come up to a rather clear decision one way or the other?

Mr. RICE. I suggest there is another factor. That is that we have suffered for some years from judicial imperialism by lower Federal courts in various areas, the school desegregation area being a rather striking example. I think people are sick of that. I think the Congress has the responsibility to say we are going to treat the State courts as if they really are courts and as if they really can handle these things. There is no constitutional presumption that a U.S. district judge is any more capable than a State judge.

Here, I think, it is important in terms of the wisdom of this legislation for Congress to say, "Let us repose the initial decision in those State courts subject to the Supreme Court." That is what this does.

Senator HEFLIN. You are taking a States rights issue in that aspect, but, on the other hand, it has to be looked at as a Federal intervention issue in regard to the substantive thing of whether it is life, as opposed to whether the State legislature should declare that, or opposed to whether or not the Federal Government should.

I mean you are arguing States rights on the viewpoint of let them handle it. Yet at the same time, are we not involved in a Federal intervention to attempt to say one thing or to cure a social ill? Therefore, you are involved in a form of violation or deprivation of States rights.

Mr. RICE. No, sir, I do not believe so because the 14th amendment, section 5, is at issue when we are talking about the point you just raised. That is not the subject of what we are talking about here today.

I would argue that it is within the power of Congress for reasons that I am submitting separately to the committee. However, the federalism concept is something which goes throughout the Constitution and the 14th amendment is part of the Constitution and so is section 5 of the 14th amendment, as is article 3.

Article 3 is not subject to exceptions. For example, in the question that I raised saying that the Congress could not tell the courts how to decide a case, I am relying there on the *Klein* case in 1872, which involved the appellate jurisdiction of the Supreme Court, but I think it is a sound principle. Congress cannot tell the courts how to decide a case, but they can take jurisdiction.

Senator HEFLIN. Regardless of the federalism issue, is the State court route one from which you can expect more delay than would be under the Federal court route?

Mr. RICE. Not necessarily. I do not think you could generalize about that, Senator. In any event, that is a matter for prudential judgment on the part of Congress. It has nothing to do with the constitutionality of the legislation.

Senator HEFLIN. Mr. Dorsen?

Mr. DORSEN. I would like to add a word about this. It is an important question you raised, Senator, and goes beyond the immediate issue in a way.

It seems to me striking that what is being proposed here is really not a modest proposal, although I understand why the chairman put it that way in the context of his earlier remarks, but it is dealing with the structure, tinkering with the structure of the Federal courts vis-a-vis the American people's rights and vis-a-vis the Supreme Court.

In the 1950's, as I am sure we all know, many proposals were made to reverse decisions by the U.S. Supreme Court by playing around with the jurisdiction of the Supreme Court and in some cases the lower courts. Senators and Representatives who proposed those very sincerely believed that it was in the best interests of the country to cut out Supreme Court jurisdiction or lower court jurisdiction because they did not like a particular result, just the way some people do not like the result in *Roe* v. *Wade*.

The Senate of the United States considered many, many such bills. They were very powerfully argued by men of great ability and dedication. Not one of those bills passed. They did not pass for the simple reason that wisdom finally came through, not because people agreed with the Supreme Court decisions but because the Members of the Senate of the United States said they would not play around with the basic structure of the system.

Senator HEFLIN. I do not think that is in answer to my question. You really testified about that previously. I am looking at the issue from a viewpoint of some resolution. If this passes and you then go toward a decision, it seems to me that as soon as the decision is made, the whole country would be better off one way or the other.

Mr. DORSEN. You mean a decision on section 1?

Senator HEFLIN. On section 1 if it is decided.

The feasibility or the wisdom of section 2 under this set of circumstances to me is highly questionable. It is also questionable in the event of a postaffirmance that this act is declared constitutional. Then I can foresee that under this section you could have

State courts in certain States where they are very liberal that may respectfully dissent, but dissent in the same way and attempt to fashion decisions to prevent the full application of it. You would then be placed in a situation as after the *Brown* v. *Board of Education*, with which we are all familiar, when many, many crafty, intelligent jurists that disagreed with it attempted to fashion methods by which it would not have its full import.

Under this situation, it would be a long and delaying procedure postapproval to prevent those State court systems which disagreed from fashioning methods to try to disagree with it.

Mr. DORSEN. I agree with that analysis completely. I think it is absolutely correct.

Senator HEFLIN. You have a situation here where everybody says if this passes, then you need as expeditious a decision by the Supreme Court as possible. I raise the issue as to whether or not this will not really result in a delaying process by having to go through the State courts. Most State courts have their trial courts, then there is a court of criminal appeals, then a State supreme court, and then it would have to come up on that route there.

Mr. RICE. If I may, I would like to offer a very brief comment. We must remember that this is a statute that we are talking about. If at any time it proves to be inconvenient or burdensome or not working, you can change it right away.

It also must be remembered that the primary reliance of the framers of this Constitution for the enforcement of Federal constitutional rights in the initial stage, that is the initial enforcement of those rights, was on the State courts.

I think of course there is a possibility of diverse interpretations, but that is part of the Federal system, too. In any event, Congress retains the power since it is a statute to change it very quickly. We are not talking about changing the Constitution here.

Senator HEFLIN. I have no further questions.

Senator EAST. Thank you, Senator Heflin.

I would like to remind all participants that it is now 25 minutes to 12. We are already 5 minutes behind. Questions can certainly be submitted by all members of the subcommittee to you, that is written questions or subsequent reply.

As I understand it, Senator Baucus has one final question he would like to ask.

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Rice, I am still confused as to just what the purpose of section 2 is. Why is section 2 in this bill?

Mr. RICE. I think section 2 is in the bill for reasons of prudent federalism.

Senator BAUCUS. What do you mean by that?

Mr. RICE. As I was saying before, I think we have suffered greatly in this country in recent years from the autocratic actions of Federal judges who are unelected and appointed for life. If I were in Congress, I would vote for section 2 on the theory that it is about time for us to repose responsibility in the State courts and it is about time for us to realize that there is no inherent superiority of Federal judges over State court judges.

Senator BAUCUS. Responsibility for what? What responsibility?

Mr. RICE. For making initial constitutional determinations.

Senator BAUCUS. You are saying that lower Federal courts should not ever make constitutional determinations?

Mr. RICE. Oh, no, I would not generalize in that respect.

Senator BAUCUS. What is it about this case? Why limit lower court jursidiction in this area?

Mr. RICE. Because this obviously is a response to *Roe* v. *Wade*. It is a response which is based on the fact that not only is *Roe* v. *Wade* an exercise in bootstrap jurisprudence through the application of this right of reproductive privacy, which is of the Supreme Court's own invention, but beyond that, *Roe* v. *Wade* is an intrusion on the prerogatives of the State. It is entirely prudent to correct it in that respect.

Senator BAUCUS. I am just trying to understand your principle here. Your principle is that Congress should limit lower Federal court jurisdiction in those cases where the Supreme Court creates a new constitutional right?

Mr. RICE. I would not generalize beyond the particular bounds of this case, Senator. What I am saying is that with respect to this statute, it seems to me to be a prudent exercise of sound governance.

Senator BAUCUS. Is that because you disagree with the Supreme Court decision?

Mr. RICE. I think I would probably take the same position if I did not because there are many who agree with abortion, for example, who think that the Supreme Court decision was an abomination in terms of federalism.

Senator BAUCUS. Then in what cases other than equal protection cases would you think Congress should not limit the jurisdiction of the lower Federal courts?

Mr. RICE. Should not limit?

Senator BAUCUS. Yes.

Mr. RICE. I think the question should be phrased the other way: In which cases should Congress limit?

Senator BAUCUS. I am asking the questions. Other than equal protection cases, in what cases should Congress not limit the jurisdiction of the lower Federal court?

Mr. RICE. It should not interfere with the existing jurisdiction of lower Federal courts in cases other than those where there has been a grave problem created by judicial excess of the Federal courts, school busing for example.

Senator BAUCUS. When you disagree with what the Supreme Court has done, then you think Congress should limit lower Federal court jurisdiction?

Mr. RICE. I would put it more strongly than that. I would say not merely disagree with it but regard it as a grave problem of judicial excess. School busing is an example. Abortion is another example.

Senator BAUCUS. What other examples do you have in mind?

Mr. RICE. I think the three that come up in contemporary terms are abortion, school desegregation, and school prayer. I am primarily concerned about the first two. I think those are particularly significant in this respect.

Senator BAUCUS. Where you think the Supreme Court has indulged in some excess or has gone too far, then Congress should limit lower Federal court jurisdiction?

Mr. RICE. I think it is not simply going too far. We must remember that the right of reproductive privacy was discovered by the Supreme Court itself in 1965, somehow in the penumbras formed by the emanations from the Bill of Rights, whatever that means. This is a judicial creation out of the whole cloth. I think it is unrealistic to regard it, since it is such, as if it was written on tablets of stone on Mount Sinai.

Senator BAUCUS. When Members of Congress think the Court has gone too far on fourth amendment cases, search and seizure cases, do you think that then Congress should limit lower Federal court jurisdiction over fourth amendment cases?

Mr. RICE. I think it is something that might be considered. I would not offer an opinion without studying the particular thing.

Senator BAUCUS. You think it is arguable that in fourth amendment cases, too, Congress should limit the jurisdiction of the lower Federal courts?

Mr. RICE. I think you have the power in Congress to do this in every case.

Senator BAUCUS. Other than 14th amendment cases.

Mr. RICE. No, including 14th amendment cases. You have the power in Congress to do this in every case.

Senator BAUCUS. It is constitutionally permissible in every case.

Mr. RICE. Yes, sir.

Senator BAUCUS. Even in equal protection cases?

Mr. RICE. Of course.

Senator BAUCUS. So that we understand each other, in the hypothetical case that Mr. Dorsen presented earlier where Congress attempt to limit lower Federal court jurisdiction to Jews or Catholics, you think that is constitutional?

Mr. RICE. You are not talking there about jurisdiction over a class of cases. You are talking there about a supervening constitutional prohibition against discrimination based on a criterion having nothing to do with the case, a criterion of race or religion.

Senator BAUCUS. I am trying to understand where you are. You say in those cases Congress could not constitutionally limit the lower Federal courts?

Mr. RICE. I think that is a fair conclusion. If that were ever done, which is very difficult to imagine, I think it is a fair conclusion that the fifth amendment due process clause would prevent Congress from saying that blacks may not sue in a U.S. district court or that Catholics may not sue in a U.S. district court, not because the power of article 3 is limited but because there is another supervening constitutional prohibition.

Senator BAUCUS. However, you think in search and seizure cases, Congress could say no lower Federal court jurisdiction?

Mr. RICE. I have no doubt about that whatsoever, yes, sir.

Senator BAUCUS. Thank you.

Senator EAST. Gentlemen, we thank you for coming.

Our next three witnesses are not a part of a composite panel. They will be speaking individually. Hence, it will not be possible to let them all speak and then to ask questions.

Again because time presses on, I would appreciate their summarizing their remarks as concisely as possible. I would also appreciate it if all of us here on the subcommittee could keep our ques-

tions as pointed and brief as possible so that all three panelists might have an opportunity to get a fair share of the time remaining.

I would like briefly to introduce Professor Witherspoon. He is the Thomas Shelton Maxey Professor of Law at the University of Texas. He received his bachelor of arts degree at the University of Chicago, his LL.B. at the University of Texas, and his S.J.D. at Harvard. He is the author of numerous works on jurisprudence, administrative law, and civil and political rights.

Professor Witherspoon, we welcome you. Please proceed.

## STATEMENT OF PROF. JOSEPH P. WITHERSPOON, UNIVERSITY OF TEXAS SCHOOL OF LAW, AUSTIN, TEX.

Mr. WITHERSPOON. Mr. Chairman and other distinguished members of this subcommittee, I want to thank you very much for extending to me the opportunity to appear before you today.

It is my purpose to speak in behalf of the general principle embodied in S. 158 and to suggest an alternative form of a human life statute which, in my considered opinion, will better implement the basic principle involved in S. 158, assure that the Supreme Court will sustain the statute when challenged, and attain the goals to which the statute is directed.

In speaking to this purpose and in presenting my written statement of about 100 pages on which I have worked for approximately 6 years to you——

Senator BAUCUS. In preparation for this hearing?

Mr. WITHERSPOON. Not for this hearing, but in response to Senator Bayh's challenge that there was nothing in the legislative history of the 13th or 14th amendments to support the proposition that the unborn child is a person within the scope of those amendments.

This is only a very small portion of the data I have turned up. I speak as a professor of law who has taught in the field of constitutional law and civil and political rights since 1948. I am one of the principal draftsmen of three of the leading human life amendments. I have also served as a legal consultant to legislative committees of State legislatures throughout my career and have drafted numerous legislative measures.

The reason for this hearing and the proposal of S. 158 is of course *Roe* v. *Wade*, the decision that is usually referred to as the abortion decision. As you know, the Court held in that case, first, that the unborn child is not a person within the meaning of the 14th amendment, and therefore necessarily held that it is not entitled to the protection of the safeguards for the right to life contained in section 1 of that amendment.

The Court also held that a pregnant woman has a constitutional right to destroy her unborn child at any time through an abortion performed by a consenting physician. I take this to be a proper statement of the holding in light of the Court's definition of the term "health" at several points of the opinion in this case and in *Doe* v. *Bolton*, which was decided at the same time, and in light of the Court's holding that the pregnant woman's right extends to an abortion for reasons of "health" after her child becomes viable

despite a valid State statute prohibiting abortion of viable unborn children.

I think you will find the first part of my four-part paper useful as a kind of summary of what has been presented to you by other legal scholars. I think each of the groups of scholars who have appeared before you represent a fairly universal point of view among legal scholars that the decision of the Supreme Court in *Roe* v. *Wade* is to be severely faulted.

Prof. Robert Bork is fairly typical of the first group of scholars who say, as he did, that it is "an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority * * *."

Many scholars adhering to this view, however, as you have heard, do favor the allowance of abortion as a matter of public policy. The underlying reason for their criticism—I want to underline this—is basically their view that there is an absence of any basis in the Constitution for the Court's interpretation of the 14th amendment.

This negative aspect is particularly and very well stated by Prof. John Hart Ely of Harvard in his *Yale Law Journal* article with which I am sure you are familiar. He says the decision "lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine."

However, these same scholars also oppose S. 158. The reason advanced, as in the letter to you, Senator Baucus, of my colleague, Prof. Charles Allen Wright, is usually that "Congress [does not] have authority by statute to overrule a constitutional decision of the Supreme Court."

Other legal scholars, of which I am one, accept the criticism made of the decision by this first group of scholars. To this criticism, however, they add a criticism which we may properly characterize by way of contrast as positive or affirmative.

While the basis of this additional criticism will differ from scholar to scholar in this second group, each of them takes the position that the Constitution positively or affirmatively provides protection for all human life, including the life of the unborn child.

You have heard the testimony of the distinguished legal scholars, Professors Noonan, Rosenblum, Uddo, and Nagel, and their views of this affirmative basis. Each of them argue that this protection for these lives can be reinstated, despite the abortion decision of the Supreme Court, by an exercise of the power of Congress to enact appropriate legislation to enforce the provisions of section one of the 14th amendment.

They rely, as you know, on a series of cases beginning with *Katzenbach* v. *Morgan*. I need not go over that ground that they have spread before you. They take the view that there is basically a factual question presented; that Congress is especially expertise in resolving any form of factual question, especially this kind of factual question, that the Court did not purport to address or resolve this factual issue, and that this situation leaves it open for Congress to resolve the issue.

The position is basically the position of Stephen H. Galebach, a young lawyer here in the city who recently published an article discussing it.

For purposes of my testimony today, I accept the proposition that a human life statute can be based upon the theory of the power of Congress to enact it advanced by this second group of scholars.

The alternative human life statute which I propose for your consideration would retain this position as a secondary basis for it. However, there are serious problems with this theory. They have been outlined by the first group of scholars who take the view that S. 158 is unconstitutional. My own colleague, Professor Wright, stated basically, I think, the hard core of the difficulties with this theory.

To my mind, a more serious problem is that Congress, by enacting S. 158 in its present form with its present basis, does not frontally attack the interpretation of the Constitution made by the Court in its abortion decision. In effect, it accepts the ground of the decision by not attacking it and seeks to bypass it through resolution of an issue that the Court did not address or seek to resolve.

The difficulty with this approach is that the Court, when faced with a challenge to S. 158 in its present form, is likely to say in light of its holdings in that case, to which I have referred briefly, and in light of its statement about the rights of a pregnant woman not being subject to being overridden by a statute, that the question of when human life begins is, as the Court views it, simply not relevant to the proper resolution of the question that was before it.

I am not saying I agree with this probable reasoning by the Court at all. I disagree with it. However, I am saying that this is what the Court is likely to do.

I think the Court will simply say that the issues are legal issues that had to be resolved in *Roe* v. *Wade*. They still remain legal issues that have to be resolved in passing upon the validity of a human life statute. These issues relate to the meaning of the term person or the concept of person that is in section 1 of the 14th amendment and the term liberty in the same section insofar as it includes the right of privacy of a pregnant woman.

Thus, when the Supreme Court is faced with deciding the question of the validity of S. 158 in its present form, it will have no necessary occasion, as I see it, to reexamine and reconsider the correctness of its basic interpretations of section 1 of the 14th amendment. The Court in all probability would simply rule that its prior interpretations in *Roe* v. *Wade* are still the supreme law of the land and that Congress, which has not challenged their correctness, is without constitutional authority to undercut them by declaring the unborn child to be a person on the basis of scientific evidence that human life begins at conception.

If S. 158 were enacted, I think that part of the total suggestion of the Congress to the Court to reexamine its position in *Roe* v. *Wade* should be based upon a finding as to when human life begins. However, as I say, given the present panel and the present orientation of the Supreme Court justices, I think it is not unlikely that the Court would invalidate the statute.

I ask the question what is the primary object of any form of a human life statute? It seems to me this is to move the Supreme Court to reexamine the correctness of its decision in *Roe* v. *Wade* and to reverse that decision.

The only way, in my humble opinion, that Congress can assuredly proceed to cause the Court to reexamine the correctness of that decision is to challenge the correctness of the two interpretations of the 14th amendment on which it was based and to demonstrate as it can be demonstrated, as I have demonstrated in my written statement, that the constitutional safeguards to the right to life, of which there are several in the Constitution, when properly interpreted apply to unborn children.

Having made what it believes and can demonstrate is the correct interpretation of these constitutional safeguards for the right to life, Congress can then proceed to exercise its granted powers to protect the lives of unborn children from abortion through one or more means.

Nothing less than a frontal attack by Congress through an appropriate human life statute upon the Court's interpretation of the 14th amendment in *Roe* v. *Wade* and a thorough demonstration by Congress of the correctness of its own independent interpretation of the constitutional safeguards of persons with respect to the right to life as applying to unborn children is likely to move the Court to reverse its decision in that case or to sustain the validity of the corrective statute.

I realize I have very little time and I must summarize and must rely upon your reading, if you feel so moved to do so, of my written statement.

The second part of my written statement does what none of the professors who have opposed S. 158 have done either in their testimony or their published works. It reviews the relevant data for determining if Congress has the constitutional authority to make its own, independent interpretation of any part of the Constitution including the 14th amendment, including the 13th amendment, and including the fifth amendment due process of law clause.

From reading that material which begins at page 9 and continues through up to page 32 of my written statement, you will see that the Republican Party largely came into power in 1860 with a platform that pledged that it would by legislation speak to eliminate the problem that had been created for Congress in regulating the matter of slavery in the territories of the United States by the Supreme Court in 1857 by its *Dred Scott* v. *Sandford* decision.

That position was the position upon which Abraham Lincoln was elected. It was the position that was articulated by every major participant in the Republican leadership between 1862 and 1866 when the 14th amendment was submitted, namely that Congress does have this power to make its own independent interpretation of the Constitution although in conflict with a decision of the Supreme Court and with a view of course to moving the Court to reconsider the decision.

As a matter of fact, as I demonstrate to you in my written statement, there were 11 statutes which this Republican leadership was responsible for proposing and obtaining the enactment of between 1862 and 1865 which rejected the Supreme Court's interpretation of the due process clause of the fifth amendment in the *Dred Scott* case. Indeed, between 1862 and the submission of the 13th amendment, Congress enacted statutes in almost the very words, if

not the very words, that were used in submitting the resolution for the ratification of the 13th amendment.

Not only that, but during the Roosevelt administration, as shown in my written statement, the Democratic Party was responsible for doing much the same thing, if not the same thing: proposing enactment and securing enactment of legislation under the commerce power of Congress which probably, in view of leading decisions of the Supreme Court, were unconstitutional and, indeed, were held to be unconstitutional up through 1946.

Yet this was a way of Congress proposing to the Supreme Court that it change its view of the meaning of the commerce clause. The Court-packing bill was mentioned this morning. However, as Professor Burns shows in his work concerning the Roosevelt administration, the Court-packing bill was a far more drastic form as compared with this S. 158 mild form of stimulating the intellect of the Supreme Court.

As Professor Burns pointed out, the Court-packing bill was primarily designed according to President Roosevelt to get the Court to reconsider its interpretations of the commerce clause. That was his hope. The Court did reconsider and eventually did sustain the new interpretation of the commerce clause by the Roosevelt administration which was the basis of the various measures which were proposed and enacted.

I am suggesting to you largely that section 2 of the 13th amendment, section 5 of the 14th amendment, section 2 of the 15th amendment really represent a codification of this view of the power of Congress to enact legislation upon a basis of its own independent and careful interpretation of a constitutional provision so as to stimulate, if you please, the intellect of the Supreme Court to cause it to reconsider whether or not it has made a faulty decision such as *Dred Scot* and such as *Roe* v. *Wade*. That is the second part of my paper.

Now the third part of my written statement basically is addressed to this problem of assigning meaning to the Constitution. Any scholar in the field of constitutional law, legislative process, civil political rights, and most any other field of public law knows that the Supreme Court totally, wholly, and completely, as Professor Ely has taken the position, disregarded the proper concepts for assigning meaning to the Constitution, and particularly to the 14th amendment which was involved in the *Wade* case. There is no question about it.

The question then is if you take these proper concepts for assigning meaning to the Constitution, what do you come up with? This third part is directed, first of all, to outlining the main aspects of this set of concepts for assigning meaning to the Constitution: No. 1, that the Constitution should be construed as a whole; No. 2, the purpose factor, that meaning should be assigned to the concept of person involved in the 13th and 14th amendments on the basis of the purpose and intent of the framers of those amendments.

Not once did the Court address the legislative history, the total historical background which underlay the proposal and the ratification by the ratifying States of the 13th and 14th amendments.

Third is the justice factor. I do not address that in this paper. I have not yet had time to put it in form, but I hope to present to

the staff of your committee a paper done upon John Locke's concept of the person, which is the same as the concept of the framers of the 13th and 14th amendment so far as persons are concerned.

John Locke, as well as these framers and the ratifying States, time and time again indicated by unquestionable evidence that they conceived of the unborn child as a person to be protected and who was protected by the legal order.

Let me just go to two parts of that evidence and then I will conclude. Justice Black, in the *South-Eastern Underwriters* case cited in part three, stated that those who would confine a concept which is the base of a constitutional provision to something less than the coverage that it had at the time it was adopted face a heavy burden of demonstrating that the framers and the ratifying States did not intend to give full operation to the meaning of the concept at the time the constitutional provision was submitted, and that they intended that purpose or term to be confined to something less than what it was generally understood to apply to.

If you take this criterion and you put it to work with the relevant data, what do you find? So far as the ratifying States are concerned, you find protection for the unborn child, not just for a few years but for at least two centuries in the common law, both on its civil side and its criminal side.

It does not matter that the criminal side of the common law picked up the protection of the unborn child at the point of quickening, the 15th or 16th week of gestation. The important point is that the child's life was protected because the child was considered to be a person and that protection was given when the law could be certain that it existed at the point of quickening. On the civil side, the unborn child's interests were protected from the point of conception or being begotten.

If you take a look at the statute law of the States, especially the statute law concerning abortion that was enacted between roughly 1850 and 1873 or 1876, you find that statute law responding to the proposal of the American Medical Association to provide protection for the unborn child in the womb from the point of conception.

This was the position of the AMA committee on criminal abortion headed by a doctor and lawyer, Dr. Horatio Storer of Boston. In a study published in 1860 through the auspices of the American Medical Association, this gentleman proposed a model statute which greatly improved upon the existing State anti-abortion statutes. This was circulated to the President of the United States and to every legislature of the States and territories.

In the period between 1857 and 1873, you have 35 States and territories enacting anti-abortion legislation to protect the unborn child as a person because that unborn child was conceived to be a person by the proposers of this legislation and by those who enacted the legislation.

If we look at Congress itself, what do we find? No. 1, Congress passed the Assimilative Crimes Statute that adopted for Federal enclaves the criminal law of the States including the criminal law against abortion, in situations where there was no Federal law specifying a crime. This statute adopted the law of every State against abortion because there were Federal enclaves in every State at the time of the adoption of this statute in April 1866.

In 1873, Congress enacted a law which specifically spoke to the problem of unlawful abortion. The statute was an exercise of the right to regulate the mails, the right to regulate foreign commerce, and the right to regulate places within the field of exclusive jurisdiction of the United States. The statute refers to stopping the sale of abortifacients, stopping the mailing of abortifacients, and stopping the importation of abortifacients where the article or drug was designed to bring about unlawful abortions.

This statute was a reference back to the 1866 assimilative crimes statute. It was a reference to the District of Columbia law against unlawful abortion. It was a reference to a similar law for application to the foreign commerce of the United States, and, of course, to the anti-abortion laws of the territories.

Third, you had the enactment of the 11 statutes against slavery previously mentioned. There was a point where the Congress of the United States specifically discussed whether or not slavery was such that it applied to the unborn child. I cite in my written statement the discussion of Senator Sherman of Ohio, Senator Cowan of Pennsylvania, and Senator Wilson of Massachusetts.

Concerning a bill that was enacted by both the Senate and by the House in a different version. This bill was to give the State of Missouri several millions of dollars, $10 million in the one case and $20 million in the other, to aid that State in freeing slaves and paying compensation to their owners.

The question came up whether money had to be appropriated to assist the State to pay the slave owners compensation for their slaves who were to be freed. The question was whether they had to pay for the freeing of unborn children.

Senator Sherman of Ohio took the position that, yes, the unborn child is subject to the system of slavery, is part of the property of the slave system, trades at about 5 percent of the price of the mother in the slave markets, and must be paid for by the State.

Senator Wilson and Senator Cowan opposed appropriating money for freeing unborn children of slaves, saying not that they did not recognize that the unborn child was subject to the institution of slavery but rather that the States did not lack power to free unborn children without paying compensation. That is, until the birth of the unborn child that child was a human being whom the States could free and the vested right of property of the slave owner in that child was not such that the State could not act to grant it freedom without having to pay compensation. Therefore, the Federal Government did not have to appropriate money to assist Missouri to free unborn children of slaves.

I suggest to you that each of these 11 antislavery statutes enacted by Congress between 1862 and 1865, and the 13th amendment, itself, are statutes and part of our fundamental law in which the framers of that amendment and the 14th amendment and the enactors of these 11 statutes recognize that the unborn child is a person in our constitutional order who is to be freed from slavery and other denials of fundamental rights. These statutes and these parts of our fundamental law recognized that the unborn child had been subject under the law of the States to the institution of slavery and the framers intended by freeing the slaves through

these 11 statutes and the 13th amendment to give protection to unborn children as persons.

That essentially is the presentation I make in my written statement. I will end with this statement: Part four sets forth an alternative to S. 158 which builds precisely upon its provisions, which retains, other than section two, its basic ideas, and which will, I think, produce better Federal and State cooperation than S. 158 in its present form.

Senator EAST. Thank you, Professor Witherspoon.

The heart of your argument, as I understand it, is that the statutory approach is the appropriate one as opposed to a constitutional amendment, but you feel S. 158 is not adequate to the task because it does not sufficiently frame the issue and hence would fail for lack of boldness. Perhaps bills are not bold or timid, but it fails for lack of defining the nature of the conflict between what Congress might decide and what the Court might decide.

I gather that this is the nub of your argument.

Mr. WITHERSPOON. If I may make one point, I still strongly favor the adoption of a Human Life Amendment. I think that is essential. I see S. 158 in its present form, or in its alternative form which builds upon its present form, as an interim step, an extremely important step which may to a large extent, like the 11 statutes enacted between 1862 and 1865, help us solve the problem meanwhile.

Senator EAST. I think your testimony is very helpful. It does suggest to me that we could have a range of options in dealing with the impact of *Roe* v. *Wade*. I would like to offer the thought as chairman of the subcommittee that we are beginning a part of the dialog to determine what those options might be.

I am not really at odds with what you are saying. I would just offer this thought on S. 158. As a matter of constitutional principle and in terms of the political arena and the potential conflict between the Court and the Congress, I have been suggesting, and you certainly, while maybe damning with faint praise, are suggesting that it is a relative modest approach. You are saying it is maybe too modest.

Again, I am not being argumentative about it because I think you make a number of excellent points, but I am just offering this thought. In resolving major constitutional problems, it has always struck me as an approach that it is a fairly sound principle to start with the most modest thing that might solve the problem.

For example, I wish the Supreme Court would simply reverse itself. That would spare us the agony of all of this. However, it is apparently not going to do that, although it did it in *Brown* v. *Board of Education* with reference to *Plessy* v. *Ferguson*.

Here we are simply inviting the Court in S. 158 to take another look at this issue in view of the fact that we have now defined when life begins. It is a very modest approach. It is an invitation to reconsider and decide.

It may be, as you suggest, that a stronger approach would be more appropriate as a beginning. Maybe even those approaches ought to be discarded and one ought to go for broke, if you will, with a Right to Life Amendment of some kind, although there are

clearly differences of opinion over what form that amendment ought to take.

To me, the value of your testimony is you are suggesting there is a range of options here that serious students of this problem would want to look at. You are saying that just within the statutory realm there are other possibilities that one might consider. Is that correct?

Mr. WITHERSPOON. I am, Mr. Chairman.

Senator EAST. I appreciate that.

Senator Baucus, since the hour is pressing on, I think I will take no more time.

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Witherspoon, are you saying this bill is or is not, in your view, constitutional?

Mr. WITHERSPOON. I am saying S. 158, with the interpretation of the Constitution articulated by this committee that I have suggested in whatever form—it need not take the form that it is here—is a constitutional exercise of the power of Congress.

I think my proposal, which I have been developing for about 6 years, is an equally modest proposal as the one that is involved in S. 158. I think that this is an exercise of a power which Congress has exercised regularly since 1862.

Senator BAUCUS. My question is, If Congress passes the bill as it is presently drafted, will the Supreme Court find the bill constitutional?

Mr. WITHERSPOON. I would say if you at least put into the legislative history of S. 158 the demonstration I have prepared showing that the framers of the 13th and 14th amendments considered the unborn child a person to be protected by the Constitution and laws, and I would strongly suggest this to the subcommittee, I would hope that this necessarily, whatever the Court might do with respect to the basic finding upon which S. 158 is based, would mean that the Court would have to say that this is a constitutional exercise of the power of Congress.

Senator BAUCUS. What do you suggest the legislative history would include?

Mr. WITHERSPOON. It would include at least the demonstration that is in this written statement submitted today of the meaning of the concept of person as addressed by the 13th amendment, the 14th amendment, and the fifth amendment. Given this interpretation which the Congress has the constitutional authority to give as a basis for legislation, that precludes the Court from saying, as it might say with respect to S. 158 based upon a case like *Katzenbach* v. *Morgan,* that this is an unconstitutional exercise of the authority of this Congress.

Senator BAUCUS. The sponsors of this amendment rely heavily upon the 14th amendment insofar as they believe the 14th amendment gives this committee the power to define as a medical and scientific matter when life begins.

As you know, a prior witness appearing before this subcommittee stated that there is no reference at all to abortion or to the unborn in the course of the congressional debates on the 14th amendment.

Mr. WITHERSPOON. That is absolutely false. I can show the Senator that some Representatives and Senators spoke about abortion.

Senator Sumner spoke of a 7-month abortion indeed. The reference is not in my written statement, but I can show that at least 10 Members of Congress at that time utilized the term abortion whenever they really wanted to criticize something as being terribly bad. Others spoke of their aim to protect "unborn millions," "posterity," and unborn children.

Senator BAUCUS. My question is: Can you point to a position of the debate on the 14th amendment where there are in fact references to abortions?

Mr. WITHERSPOON. I do not have to point to them, Senator. As a constitutional law scholar and a scholar in the field of legislative process and the whole art of interpretation at which I have spent a lifetime, I do not have to do that because that is a wrong interpretative theory. Correct interpretative theory allows the Court and Congress to take a look at the actions and statements of Members of Congress with respect to related legislative matters.

On April 9, I believe 4 months after the ratification of the 13th amendment and 2 months before submission of the 14th amendment for ratification, these same framers of the 13th and 14th amendments adopted the Assimilative Crime Statute which adopted the new form of State antiabortion statutes.

In 1860, they adopted the D.C. Divorce Statute which explicitly distinguished between the child that was begotten at the time of a divorce for a bigamous marriage contracted in good faith and the child who was born prior to that divorce. Both were granted the status of legitimacy by the statute.

Senator BAUCUS. Is there a record of the debate on the 14th amendment?

Mr. WITHERSPOON. Oh, yes.

Senator BAUCUS. Was there a Congressional Record at the time?

Mr. WITHERSPOON. There was the Congressional Globe at that time.

Senator BAUCUS. Can you point to any pages in the Congressional Globe where Senators or House Members referred to abortion or to the unborn during the course of the debate on the 14th amendment?

Mr. WITHERSPOON. No, I cannot refer to specific terms like that, but I can refer to specific terms like posterity, unborn millions, that they are legislating so far as the 13th amendment to protect our posterity.

Senator BAUCUS. It would be helpful certainly to this Senator and I think also for the committee if you could provide for the record citations to those provisions in the Congressional Globe which bear most directly upon this question.

What I am looking for are citations to portions of debate which refer to the unborn or to abortion. I am not concerned about whether Congress during those years passed other bills that bear upon abortion. I am concerned about the congressional intent as it was expressed during the debate on the 14th amendment.

If there are any references to the subject during that debate, that would be helpful.

Mr. WITHERSPOON. Those references will be in the footnotes. I finished writing about the hundredth footnote at 4 a.m. this morning. I had to cut off at that moment, but I will submit the full

footnotes that reference the very point you are talking about. There are many, many references of this in the debates looking to the 13th amendment, in the debates looking to the first Federal Civil Rights Act of 1866 based upon the 13th amendment, and in the debates leading to the 14th amendment.

The relevant history which the Court totally ignored is the history back of the 13th amendment. That is where most of the discussion took place with respect to the meaning of the concept of person.

Senator BAUCUS. Was the term fetus every utilized in any debate concerning the 14th amendment?

Mr. WITHERSPOON. The term was not even used by physicians. Dr. Storor, speaking for the American Medical Association in his report for the committee on criminal abortion, the report which was unanimously adopted by the American Medical Association, talked about the unborn child or infant. That is how it was referred to in those days.

Senator BAUCUS. Thank you very much.

Senator EAST. Thank you, Professor Witherspoon. We thank you for coming.

[The prepared statement of Professor Witherspoon follows:]

PREPARED STATEMENT OF PROFESSOR JOSEPH P. WITHERSPOON

Mr. Chairman and Distinguished Subcommittee Members,

I.*

The Nature of the Issues Presented

Thank you for extending to me the opportunity to appear before you today. It is my purpose to speak in behalf of the general principle embodied in S. 158 and to suggest an alternative form of a Human Life Statute which, in my considered opinion, will better implement that basic principle, assure that the Supreme Court will sustain the statute when challenged, and attain the goals to which the statute is directed. In speaking in behalf of the general principle embodied in S. 158 and the alternative form of a Human Life Statute I represent only myself as a professor of law who has taught and practiced in the fields of constitutional law and civil and political rights since 1948. It has been my privilege to serve as one of the principal draftsmen of three leading versions of the Human Life Amendment which have been introduced in this Congress between 1973 and the present time.[1] I have served as a legal consultant to legislative committees of state legislatures throughout my career and have drafted numerous legislative measures for consideration both by this Congress and state legislatures.[2]

The reason for this hearing and the proposal for a Human Life Statute is the Supreme Court's abortion decision of January 22, 1973, in Roe v. Wade.[3] That decision has produced a profound shock and civic awakening among a broad spectrum of our American citizens. Substantial opposition to the decision developed immediately upon its rendition and that opposition has continued to grow with each passing year as our citizens have come to understand the scope of the decision and have witnessed its tragic effects. The chief effect has been that more than 10,000,000 unborn children have been killed by abortion between 1973 and the present time under the authority of that decision. The criticism of this decision that has produced this holocaust reflects, in my judgment, an intuitive civic response -- one that proceeds from a deeply held judgment concerning what a human being is and from a a judgment that our American system of law was originally designed to

---

*Parts II-IV from The Human Life Statute Policy Issue, Copyright, 1981.

Note.--Footnotes appear at end of prepared statement.

protect all human beings and to protect them equally. It is precisely because these millions of our citizens perceive that the unborn child is a human being and that our legal order exists to protect the weak against aggression by the strong that they recoil at this Supreme Court decision which subjects innocent children to the ultimate violence.

As we all know, the Supreme Court held that an unborn child of human parents is not a person within the meaning of Section 1 of the Fourteenth Amendment. For this reason, the Court necessarily held that the life of an unborn child is not protected by the Due Process and Equal Protection Clauses of that amendment throughout the pregnancy of of its mother until its birth. The Court also held that a pregnant woman has the constitutional right under the same section ~~of~~ that amendment, as part of her right to privacy, to obtain an abortion from a consenting physician for the purpose of destroying her unborn child. Since the Court stated that the abortion encompassed by this right could be performed for any reason of "health" throughout the period of pregnancy and since the Court defined the term "health" to include substantially any economic or other reason,[4] the Court in effect created a constitutional right in a pregnant woman to destroy her unborn child at any time through an abortion performed by a consenting physician.

In addition to the criticism of this decision by a large segment of our American citizens there has been widespread, if not almost uniform, criticism of the decision by legal scholars. Professor Robert H. Bork is fairly typical of one group of these scholars who view the decision, according to his testimony before this Subcommittee, as "an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority . . ."[5] Many of the scholars adhering to this view, however, favor the allowance of abortion as a matter of public policy. The underlying reason for their criticism is the <u>absence</u> of any basis in the Constitution for the Court's interpretation of the Fourteenth Amendment. The <u>negative</u> aspect of this criticism is underlined by Professor John Hart Ely of Harvard Law School by his statement that the Court's decision "lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine."[6] Many, if not most, of these scholars favor neither a Human Life Statute nor a Human Life Amendment. This, I gather, is the position of my colleague at the University of

Texas, Professor Charles Allen Wright.[7] They generally oppose S. 158 upon the ground that it is unconstitutional. The reason advanced is usually that "Congress (does not) have authority by statute to overrule a constitutional decision of the Supreme Court."[8]

Other legal scholars, of which I am one, accept the criticism made of the decision by the scholars whose position has just been summarized. To this criticism, however, they add a criticism which we may properly characterize as "positive" or "affirmative". While the basis of this additional criticism of the decision will differ from scholar to scholar in this second group, each of them take the position that the Constitution positively or affirmatively provides protection for all human life, including the life of the unborn child. You have heard the testimony of distinguished legal scholars, such as Professors John T. Noonan, Jr., Victor G. Rosenblum, Basile J. Uddo, and Robert F. Nagel, which outlined their views of the positive or affirmative basis in the Constitution that extends protection for the lives of unborn children.[9] Each of them argue that this protection for these lives can be reinstated, despite the abortion decision of the Supreme Court to the contrary, through the exercise by Congress of its power to enact "appropriate legislation" to enforce the provisions of Section 1 of the Fourteenth Amendment, a power granted to it by Section 5 of that amendment. Relying upon a series of decisions beginning with Katzenbach v. Morgan,[10] they take the position that these decisions permit the Congress to engage in a fact-finding process with respect to the beginning of human life and to make the finding of fact, based upon scientific and medical evidence, that human life begins at conception. Based upon this finding and the position of the Supreme Court expressed in its abortion decision that it "need not resolve the difficult question of when life begins" and should not "speculate as to the answer",[11] they assert that Congress can more appropriately and should resolve the question. They thus further assert that S. 158, which essentially makes the finding that "present-day scientific evidence indicates a significant likelihood that actual human life exists from conception" and declares that the term "person" in the Due Process Clause of the Fourteenth Amendment includes all human life "from conception, without regard to race, sex, age, health, defect, or condition of dependency", is "appropriate legislation" under Section 5 of that amend-

ment for enforcing this clause and, thus, constitutional. The position of these scholars largely follows the position outlined by Stephen H. Galebach, Esq. in a recently published article.[12]

For purposes of my testimony today, I accept the proposition that a Human Life Statute can be based upon the theory of the power of Congress to enact it advanced by Professors Noonan, Rosenblum, Uddo, and Nagel. Moreover, in the alternative Human Life Statute which I propose for your consideration, I suggest retention of this theory as a secondary basis for the statute. There are, however, serious problems with the theory. One of these problems has been discussed by Professors Lawrence H. Tribe, Robert H. Bork, and William Van Alstyne, who have previously testified before this Subcommittee,[13] and by Professor Charles Allen Wright, who submitted a statement to Senator Baucus.[14] A more serious problem, to my mind, is that Congress, by enacting S. 158 in its present form and with its present basis, does not frontally attack the interpretation of the Constitution made by the Court in its abortion decision. In effect, it accepts the ground of that decision by not attacking it and seeks to by-pass it through resolution of an issue that the Court did not address or seek to resolve. The difficulty with this approach is that the Court when faced with a challenge to S. 158 in its present form is likely to say that its holdings in Roe v. Wade and the statement in the Court's opinion in that case relative to "the rights of the pregnant woman" not being subject to being overridden by a statute mean that the question of when human life begins is, as the Court views it, simply not relevant to the proper resolution of the question that was before it. That question, as the Court is likely to state, is not a question of fact insofar as that question is related to the Constitution, whether it be the Court or any legislature, including Congress, that considers the question. Rather, the Court will likely assert, that the question of when human life begins is, in relation to the Constitution and, more particularly, the Fourteenth Amendment, a question of law concerning the meaning of the term "person" and the term "liberty" insofar as it includes the right of privacy of a pregnant woman. Thus, when the Supreme Court is faced with deciding the question of the validity of S. 158 in its present form, it will have no necessary occasion to reexamine and reconsider the correctness of its basic inter-

pretations of Section 1 of the Fourteenth Amendment. Since Congress in S. 158 does not challenge these interpretations, it is highly probable that the Supreme Court would simply rule in a challenge to the constitutionality of this statute that the Court's prior interpretations of the Fourteenth Amendment in Roe v. Wade are still the supreme law of the land and that Congress, which has not challenged their correctness, is without authority to undercut them by simply declaring the unborn child to be a person on the basis of scientific evidence that human life begins at conception.

The primary object of any form of a Human Life Statute is to move the Supreme Court to reexamine the correctness of its decision in Roe v. Wade and to reverse that decision. The only way that Congress can assuredly proceed to cause the Court to reexamine the correctness of that decision is to challenge the correctness of the two interpretations of the Fourteenth Amendment upon which it was based and to demonstrate that the Constitution's safeguards for the right to life, when properly interpreted, apply to unborn children. Having made what it believes and can demonstrate is the correct interpretation of these constitutional safeguards for the right to life, Congress can then proceed to exercise its granted powers to enforce them by enacting a Human Life Statute designed to protect the lives of unborn children from abortion through one or more means. Nothing less than a frontal attack by Congress through an appropriate Human Life Statute upon the Court's interpretations of the Fourteenth Amendment in Roe v. Wade and a thorough demonstration by Congress of the correctness of its interpretation of the constitutional safeguards of persons with respect to the right to life is likely to move the Court to reverse its decision in that case or to sustain the validity of the corrective statute.

Two questions are presented by the proposal that Congress base its Human Life Statute upon a frontal attack upon the Court's interpretations of the Fourteenth Amendment in Roe v. Wade and upon its own independent interpretation of the constitutional safeguards for the right to life. The first of these questions is whether Congress has the constitutional authority to base its exercise of a granted power to legislate upon its own interpretation of a constitutional provision that conflicts with the Supreme Court's interpretation of that provision. The second question is whether the proper interpretation of

these safeguards is that they apply to and protect unborn children.

Each of these questions must clearly be answered in the affirmative as a result of the application of the proper and well-established methods of constitutional interpretation to the relevant constitutional provisions and data concerning their meaning and scope. The constitutional scholars who have testified in opposition to S. 158 and asserted that Congress does not have the constitutional authority to legislate upon the basis of its own interpretation of a constitutional provision that conflicts with the Supreme Court's interpretation of that provision have simply not done their homework well. Even more astonishing, they have not even addressed the second question. They have not demonstrated that they have examined the relevant data for determining whether the constitutional safeguards for the right to life, in light of the proper methods of constitutional interpretation, protect the lives of unborn children as one of the classes of persons covered by these provisions. They content themselves in criticizing the Supreme Court's decision with saying that it is "unpersuasive" and does not flow from the "text" or "history" of these safeguards. Their approach, as previously stated, is essentially negative. They do not examine these safeguards through application of the proper methods of constitutional interpretation to determine whether they apply to unborn children. They do not examine into the affirmative reach or bearing of the concept of person as used in the constitutional safeguards for basic human rights. By their failure to do so, as I shall demonstrate, they make the same fundamental error that the Supreme Court committed in Roe v. Wade.

My proposal for enactment of a federal statute, now generally referred to as the Human Life Statute, based upon the proper interpretation by Congress of the constitutional safeguards for the right to life was first made in my testimony before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee on April 11, 1975,[15] and more fully before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee on February 4, 1976.[16] Since that testimony was given, I have done extensive additional research concerning the proper answers to the question of the authority of Congress to enact such a statute and to the question of whether the constitutional

safeguards of the right to life protect unborn children. My paper entitled "The Human Life Statute Policy Issue", based upon that research,[17] will soon be published. The analysis of the above two questions which follows is drawn from that paper.

II.

Power of Congress to Legislate in Contradiction of a Supreme Court Interpretation of the Constitution

A.

Introduction

In the second part of this paper we examine the constitutional authority of Congress to exercise its delegated legislative powers upon the basis of its own independent interpretations of the Constitution even though these contradict a prior interpretation handed down by the Supreme Court. Part B is designed to demonstrate the general acceptance of this view by the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments and the basis for their position. This part will also examine the numerous instances in which these framers exercised this authority between 1862 and 1865 in contradiction of the decision of the Supreme Court in Dred Scott v. Sandford[18] in 1857. It will also examine the acceptance and implementation of this view by the framers of numerous New Deal legislative measures during the early years of the administration of Franklin D. Roosevelt when the Congress and the President determined to address the greatest economic ills the nation had ever faced by legislation that was likely to be invalidated by the Supreme Court if it continued to follow constitutional interpretations involved in a line of decisions beginning with that in United States v. E.C. Knight Co.[19] of 1895. In both of these situations the Supreme Court either acquiesced in the congressional exercise of power or affirmatively abandoned the earlier decisions with which the legislation was in conflict after having at first invalidated some of this legislation.

Part C of this second part of the paper is designed both to illustrate the general theory of the power of Congress under discussion with respect to Section 5 of the Fourteenth Amendment and to demonstrate that under this Section Congress has legislated to protect persons in the enjoyment of basic human rights protected by that amendment against

private action. Although the Supreme Court held in the Civil Rights Cases[20] that Congress did not possess this power under Section 5 of that amendment and invalidated an 1875 public accommodations type of civil rights statute upon this basis, Congress had enacted other civil rights statutes under this section addressed to private action and has done so during the last two decades.[21] In a 1966 decision of the Supreme Court six justices took the position that Congress had the constitutional authority under Section 5 of the Fourteenth Amendment to enact a provision of the Civil Rights Act of 1870 protecting any person from action by private individuals that would prevent them from enjoying or exercising the right to equal protection of the laws.[22] Moreover, in other decisions the Supreme Court has elaborated a general legal theory of the scope of Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment that strongly supports the position taken by the six justices in the 1966 Supreme Court decision.[23] Legal scholars now generally take the position that Congress possesses this authority.[24] Moreover, lower federal courts have generally so held.[25] More fundamentally, the framers and supporters of these enforcement provisions took the position that Congress could regulate wholly private action that violates Section 1 of each of these amendments.[26]

B.

The General Theory of the Power of Congress

Prior to the adoption of the Thirteenth, Fourteenth, and the Fifteenth Amendments various American political leaders had taken the position that the Supreme Court could not bind the coequal branches of the Federal Government by its interpretations of the Constitution so as to divest them of the power to perform their particular functions as delegated to them by that basic document. Thomas Jefferson, for example, stated his position as follows:

> (T)o consider the judges as the ultimate arbiters of all constitutional questions--(is) a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is, 'boni judicis est ampliare jurisdictionem', and their power (is) the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that, to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments coequal and cosovereign within themselves. 27

> My construction of the Constitution is...that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action, and especially where it is to act ultimately and without appeal.
>
> (Otherwise) (t)he Constitution...is a mere thing of wax, in the hands of the judiciary, which they may twist and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any Government is independent, is absolute also; in theory only at first, while the spirit of the people is up, but in practice as fast as that relaxes. Independence can be trusted nowhere but with the people in mass. 28

Similarly, President Andrew Jackson, in the message setting forth his veto of the Bank Bill on July 10, 1832, observed that

> It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by the precedent and by the decision of the Supreme Court. To this conclusion I cannot assent...
>
> If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of the Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution...It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve. 29

The views of Thomas Jefferson and Andrew Jackson, as well as the similar views of James Madison,[30] were very influential with the framers of the Thirteenth, Fourteenth and Fifteenth Amendments and with the States that ratified these amendments. The Supreme Court decision that triggered the emergence of the issue for them with respect to the power of Congress to legislate in contradiction of a decision interpreting the Constitution by the Supreme Court was that of Dred Scott v. Sandford[31] in 1857. One of the holdings of the Court in that case was that a slave brought permanently into a territory of the United States is property within the meaning of the Due Process Clause of the Fifth Amendment, rather than a person, so that Congress was held to have no constitutional power to grant the status of freedom to that individual. The decision was handed down at a point in time in the development of the anti-slavery movement when slavery had become the overriding political issue in the nation. The doctrines of abolitionism had become the cen-

tral position of the newly formed Republican Party and a majority of the people of the free states adhered to these doctrines. The decision was perceived by these people and their political leaders as establishing a principle that converted slavery as an institution that was essentially a local one into a national one. As Representative I. Washburn of Maine stated the commonly held position:

> (I)f the Dred Scott decision is good law, and it shall be acquiesced in as such, the question of freedom or slavery in this country is irrevocably settled; the Constitution which the builders constructed is overthrown, and the Union for liberty and republicanism, which rested thereon, exists no longer...I perceive that this decision embraces and involves every question in respect to the existence, extension, and perpetuation of slavery. ...it forbids the prohibition of slavery extension; it declares, in effect, that the Constitution, ex proprio vigore, carries slavery into every Territory and every State of the Union, and extends to slave property a degree of favor accorded to no other kind of property; it vindicates the slave trade, and demands, by an imperious logic, its reopening and legalization;... 32

The Republican Party in the campaign of 1860 adopted as its central platform a commitment to reverse the Dred Scott decision by legislation stating:

> That the normal condition of all the territory of the United States is that of freedom; that as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty, by legislation whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority...to give legal existence to slavery in any territory of the United States. 33

Prior to this campaign, in his debates with Senator Stephen A. Douglas, Abraham Lincoln had stated the nature and basis of the authority of the Congress to legislate in contradiction of a Supreme Court decision which it believed to be erroneous:

> We oppose the Dred Scott decision in a certain way...as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision. We do not propose to be bound by it as a political rule in that way, because we think it lays the foundation for spreading the evil (of slavery) into the States themselves. We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon that subject.34

In his first inaugural address Lincoln stated one of the underlying reasons for the Republican Party position that Congress could by legislation give effect to an interpretation of the Constitution contrary to that of the Supreme Court:

> (N)or do I deny that such decisions (of the Supreme Court on constitutional questions) must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. ...At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.[35]

The victory of the Republican Party in the 1860 campaign not only brought the anti-slavery movement political power. It also constituted a mandate from the people who gave it that victory to reverse the Dred Scott decision by legislation. Senator Henry Wilson, one of the outstanding Republican leaders and later Vice President of the United States described this mandate as follows:

> The people, the loyal people of our struggling country condemn that Dred Scott decision as a violation of the spirit of the Constitution of their country and an outrage upon our common humanity....(t)he people who sent us here are, by an uncounted majority, against that judicial crime and its author. ...(W)e (are) the chosen representatives of a people who have reversed that unrighteous decree, trampled it beneath our feet with loathing and scorn unutterable...[36]

In the period between 1862 and 1865 prior to its submission of the Thirteenth Amendment proposal to the States Congress proceeded to enact a series of eleven statutes overturning in different contexts the principle of the Dred Scott decision.[37] Many of these statutes prohibited slavery and involuntary servitude in the very words later used by Congress in submitting the Thirteenth Amendment proposal to the States. Thus, on June 19, 1862, the following statute was approved:

> That from and after the passage of this act there shall be neither slavery nor involuntary servitude in any of the Territories of the United States now existing, or which may at any time hereafter be formed or acquired by the United States, otherwise than in the punishment of crimes whereof the party shall have been duly convicted.[38]

The Republican members of Congress who were responsible for this legislation were also, by and large, the same members of Congress who submitted the Thirteenth, Fourteenth, and Fifteenth Amendments for ratification to the States. Each of these amendments contains a clause granting to Congress "power to enforce this article (or the provisions of this article) by appropriate legislation." Thus, their action between 1862 and 1865 in reversing the principle of the Dred Scott decision by legislation constitutes a practical construction of the con-

cept of "appropriate legislation" contained in this type of clause granting power to Congress to enforce the safeguards for civil or political rights contained in these amendments.[39] The leading members of Congress responsible for the drafting and explanation of the provisions of these amendments also explicitly articulated their conception of what is appropriate legislation by Congress to implement the safeguards for basic human rights contained in the Constitution. Roscoe Conklin, who was an outstanding constitutional lawyer, served as a United States Representative from New York between 1859 and 1867 and as a United States Senator between 1867 and 1885. He was a member of the Joint Committee on Reconstruction which was responsible for developing the content of the proposal for the Fourteenth Amendment. So outstanding was his talent that he was offered appointments both as an Associate Justice and subsequently as Chief Justice of the Supreme Court of the United States, offers which he declined. His view of what is "appropriate legislation" by Congress relative to protection of basic human rights was as follows:

> (T)he decisions of the Supreme Court are not obligatory upon Congress in any sense; but, like other arguments, are addressed to the discretion of Congress. ...whenever a decision is, in the judgment of Congress, subversive of the rights and liberties of the people, or is otherwise hurtfully erroneous, it is not only the right, but the solemn duty of Congress, persistently to disregard it.[40]

Rejecting the claim of the Democratic Party that decisions of the Supreme Court were the supreme law of the land so as to bind the Congress in the exercise of its functions under the Constitution, he stated:

> If the construction, now for the first time contended for by the party calling itself Democratic, be true, the apostles of limited government, in their earliest ministrations, installed a power practically as irrevocable and irresponsible as an artificial power could be, and more sweeping and absolute in its supremacy than any judicial tribunal mentioned in history.
>
> The department thus inflated with supremacy is the one removed furthest from the origin of all political power in this country; the one least in sympathy with the people; and restrained from trampling on popular rights by nothing save that most unreliable of safeguards, the fidelity of unwatched human nature.
>
> It is, sir, essentially an irresponsible power; but little less, at best, than an oligarchy in the Republic.
>
> Can it be that such was the intention of the fathers of the Government? Unnatural, ruinous, culpable as such a perversion of reason and common sense would have been in the structure of the earliest and rudest democracy, it could hardly have crept into a fabric raised by men who built, not in the gray twilight of the morning, but with the rays of enlightened centuries streaming upon them.[41]

Examining the various provisions the Constitutional Fathers utilized to avoid the danger of unlimited power to make laws, the relative impotency of the veto power compared "with the dictatorship now proposed for the Supreme Court", and the rejection of a proposal for a council for revision composed of the judiciary with power to prevent any act of Congress from becoming a law, he concluded that there could have been no intention on their part "to give the judiciary absolute, final power to defeat legislation."[42]

John A. Bingham served as a United States Representative from Ohio between 1854 and 1873 except for one term. He also served on the Joint Committee on Reconstruction and was the author of both the first and final version of Section 1 of the Fourteenth Amendment. He stated:

> The (Supreme) Court has no power in deciding the right of Dred Scott and of his children to their liberty to decide, so as to bind this body, that neither Congress, nor a territorial legislature, nor any human power, has authority to prohibit slavery in the Territories. ...The judiciary are entitled to respect but if they arrogate power not conferred upon them, and attempt by such arrogation of power to take away the legislative power of the whole people, and to deprive large members of them of their natural rights, I claim, as a Representative, the right to disregard such assumed authority and as a citizen and a man, to appeal from such decision to that final arbiter, the public opinion of the country. I would claim for myself, in common with all my fellow citizens, the right to question their propriety, to denounce their injustice, and to insist that whatever is wrong therein shall be corrected. This is one of "the powers reserved to the people."[43]

Charles Sumner has been generally recognized to have been, along with Abraham Lincoln, one of the two most influential men in public life during the period he served in the United States Senate from Massachusetts between 1851 and 1874. An able constitutional lawyer, he served as Chairman of the Foreign Relations Committee and the Select Committee on Slavery and Treatment of Freedmen. He stated:

> The multiplication table tells us that two and two make four. Now, if a tribunal honored like the Supreme Court should undertake to declare that two and two make five, ...I do not think that it would be presumptous in me to call that decision in question. But the Dred Scott decision was as absurd and irrational as such a reversal of the multiplication table, beside shocking the moral sense of mankind...I enter a standing protest against that atrocious judgment, which was false in law and also false in history with which it was sought to maintain its false law.
>
> (N)o court can afford to do an act of wrong. Its business is justice; and when under any apology it ceases to do justice, it loses those titles to reverence which otherwise are so willingly bestowed.[44]

In urging enactment of a statute to abolish slavery and involuntary ser-

vitude in the District of Columbia, Senator Sumner referred to four different sources of power in the Constitution that Congress might utilize as a basis for enacting the statute, stating

> But all those provisions are something more than powers; they are duties also. And yet we are constantly and painfully reminded in this Chamber that pending measures against slavery are unconstitutional. Sir, this is an immense mistake. Nothing against slavery can be unconstitutional. It is only hesitation (on the part of Congress in enacting proper statutes to abolish slavery) which is unconstitutional. 45

Finally, Senator Sumner discussed the correlative roles of the federal courts, the Congress, and the people in the federal political society for dealing with the grossly erroneous interpretation of the Constitution of the Constitution by the Supreme Court in the Dred Scott case:

> (T)he great question recurs, that question that dominates this whole debate, How shall slavery be overthrown? The answer is threefold: first by the courts, declaring and applying the true principles of the Constitution; secondly, by Congress, in the exercise of the powers which belong to it; and, thirdly, by the people, through an amendment to the Constitution. Courts, Congress, people, all may be invoked, and the occasion will justify the appeal. 46

Senator Lyman Trumbull, who was Chairman of the Senate Judiciary Committee that submitted the proposal for the Thirteenth Amendment and author of the first federal civil rights act that was enacted in 1866, took basically the same position as the other Republican congressional leaders. In reply to a question relating to a territorial law that chose to recognize slavery which the courts upheld, he observed:

> If the Supreme Court of the United States should make a decision so utterly variant from the repeated decisions of the courts in the southern States and of the former decisions of the Supreme Court itself, as to say that one person had a right to hold another as a slave in a Territory by virtue of any action of the inhabitants of a Territory, I should legislate against that asserted right. I would acquiesce in the decision of the court as to the particular case,...but it would be a decision in that case, and in that case only, and I would contest it on the morrow in the next.
>
> (T)he decision of a a case would no more establish slavery in a Territory, except as to the individual case, than has your decision as to Dred Scott...The idea that the Supreme Court of the United States can establish political principles in this country is a new article in the creed of the Democratic party.47

Before enacting the eleven statutes abolishing slavery and involuntary servitude in various contexts during the period between 1862 and 1865, the Republican majority took pains to state the reasons, based upon careful application of modern interpretation doctrine, why it rejected the interpretations of the Constitution upon which the Su-

preme Court based its two major holdings in the Dred Scott case.[48]

From the foregoing, it seems clear that the framers of the Thirteenth, Fourteenth and Fifteenth Amendments which contained clauses granting power to Congress to enforce their safeguards of civil or political rights by "appropriate legislation" understood that granted power to include the power to enforce those safeguards and to protect individuals as persons whom the Supreme Court had previously held not to be persons or entitled to protection in the enjoyment of basic human rights. These framers acted upon this view of Congressional power prior to the adoption of these amendments many times. Indeed, the first proposal for the Fourteenth Amendment submitted by the Joint Committee on Reconstruction and authored by Congressman Bingham was in the form simply of a grant of power to Congress: It read as follows:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several states; and to all persons in the several States equal protection in the rights of life, liberty, and property.[49]

This form of the amendment emphasized that Congress was to be the vital force in providing through legislation for the protection of citizens and other persons in the enjoyment of equal protection of the laws with respect to the rights to life, liberty, and property. The final form of Section 1 of the Fourteenth Amendment, together with its Section 5 granting to Congress power to enforce the provisions of the amendment by appropriate legislation, as explained by its author Congressman Bingham, continued the basic purpose of the first form of the amendment. The addition of the prohibitions against a State depriving a person of due process of law or denying a person of equal protection of the laws was a response to the felt need to make the States subject to a rule of the Constitution that could not be wiped out by future sessions of the Congress. It must be concluded, therefore, that the power granted to Congress to enforce the safeguards of civil or political rights contained in the Thirteenth, Fourteenth and Fifteenth Amendments constitute a confirmation of the power of Congress to legislate for this purpose upon the basis of its own interpretations of the Constitution, including these safeguards, even in contradiction to an interpretation thereof by the Supreme Court.

The position of the Republican Party with respect to the power of

Congress to legislate in contradiction of an interpretation of the Constitution by the Supreme Court was adopted by the Democratic Party in the early years of the New Deal. The Roosevelt administration took over the reins of political power in the midst of the worst economic distress the nation had ever faced. The nation's banks were closed; fifteen million people were unemployed; farm prices, factory production, retail trade, and securities were at very low levels; poverty was rampant; and business failures and home mortgage foreclosures were widespread. The outgoing President conceded that the nation was "at the end of our string."[50] The new President launched a legislative offensive to raise the nation by its bootstraps. He sent measure after measure to Congress mainly based on the Commerce Power and the notion that intrastate matters could be regulated through their relationship to interstate commerce.[51] Earlier Supreme Court decisions concerning that clause made it quite uncertain that this notion as applied in these legislative measures would pass muster with the Court.[52] Indeed, in a series of cases beginning in 1935, the Supreme Court began to invalidate some of the New Deal measures. In Railroad Retirement Board v. Alton Railroad Co.,[53] the Court held that the law imposing a retirement and pension plan upon carriers regulated by the Interstate Commerce Act was invalid because it was said not to be a regulation of interstate commerce. If fostering the morale of employees was accepted as sufficiently related to interstate transportation, the Court believed there would be no effective limit to regulation under the Commerce Clause by Congress. In Schechter Poultry Corp. v. United States,[54] the Court invalidated the National Industrial Recovery Act of 1933 holding that the wages and hours of Schechter's employees were beyond the power of Congress to control under the Commerce Clause. The intrastate activity related to poultry purchased from commission men in New York City and transported to slaughterhouses in Brooklyn where sales were made to retailers. The effect of this activity upon interstate commerce was held to be merely indirect because the rate of wages and hours worked involved in this activity merely affected prices. If this type of effect was the basis for exercise of the Commerce Power by Congress, that body would have discretion to reach and regulate any item of cost of doing intrastate business. In Carter v. Carter Coal Company,[55] the Supreme Court invali-

dated the Bituminous Coal Conservation Act of 1935 which regulated maximum hours and minimum wages in coal mines. The basis of the invalidation was the Court's holding that the extraction of coal from a mine involves local activities, viz., production not trade, so that the subject matter of hours and wages was not subject to regulation by Congress under the Commerce Clause. The effect of these hours and wages upon interstate commerce was said to be merely indirect. In United States v. Butler,[56] the Supreme Court invalidated the Agricultural Adjustment Act of 1933 upon the basis that it was a regulation of agricultural production, a matter beyond the power of Congress under the Commerce Clause. The interpretations of the Commerce Clause applied in these and other cases originated in earlier decisions by the Court beginning in 1895 with the case of United States v. E. C. Knight Co.[57] Despite these earlier decisions President Roosevelt urged enactment of the laws later invalidated upon the basis that the situations to which they were addressed were urgent and the benefits to be produced so great that doubts concerning constitutionality should be resolved in favor of the proposals.[58] The invalidation of the New Deal measures in these later cases cast considerable doubt upon the fate of other major statutes sponsored by the administration.

This is not the place to review the nature and effect of the President's Court-Packing plan.[59] It is clear, however, that the controversy generated by the plan was one of the factors that moved the Supreme Court to reconsider the correctness of the line of prior Supreme Court decisions it had utilized in invalidating much of the New Deal statutory measures. In National Labor Relations Board v. Jones & Laughlin Steel Corp.,[60] the Supreme Court sustained the validity of the National Labor Relations Act of 1935,[61] which regulated unfair labor practices relative to collective bargaining in industries affecting interstate commerce. The Court abandoned its view that the employer-employee relationship, including bargaining between the parties to it with respect to wages, hours, and working conditions, is a subject-matter that "is purely local in nature". The Court observed that stoppage of the respondent's manufacturing operations by industrial strife would have a most serious effect upon interstate commerce. This was enough, the Court held, to warrant the exercise of power by Congress under the Commerce Clause. In language approaching closely the lang-

uage used by the framers of the enforcement clauses of the Thirteenth, Fourteenth and Fifteenth Amendments, the Court observed

> The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement"; to adopt measures "to promote its growth and insure its safety"; "to foster, protect, control and restrain." That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." 62

The New Deal legislation of the early 1930's represented the exercise of the same kind of authority by Congress that the Abolitionist legislation of the early 1860's represented: the authority of Congress to enact legislation based upon its own independent view of the correct interpretation of the Constitution although in conflict with an interpretation by the Supreme Court in a prior case. Just as Abraham Lincoln and the Republican Party believed the Dred Scott decision "la(id) the foundation for spreading the evil (of slavery) into the States themselves" as it had spread that evil into the Territories, so President Franklin D. Roosevelt and the Democratic Party believed that the interpretation of the Commerce Clause in such cases as Knight,[63] Hammer,[64] and Drexel Furniture[65] by the Supreme Court laid the foundation for preventing Congress from dealing effectively with the evil of economic crisis and deep depression that was spreading to every level of our society. Both parties rejected the interpretation of the Constitution by the Supreme Court that prevented Congress from dealing with the respective evils presented and both moved Congress to enact corrective legislation based upon what Congress deemed to be the proper interpretation of the Constitution. The Supreme Court in each instance either acquiesced or affirmatively approved, after some tardiness, the Congressional interpretation rejecting the prior Court interpretation.

C.

Recent Congressional Rejections of Supreme Court Interpretations of the Constitution

In the Civil Rights Cases,[66] the Supreme Court examined the validity of two sections of the Civil Rights Act of 1875 in relation to the power granted to Congress under both the Thirteenth and Fourteenth Amendments to enforce their provisions by "appropriate legislation." These sections of the statute prohibited racial discrimination by private individuals with respect to making available to members of the public their accomodations, advantages, facilities, and privileges in inns,

public conveyances, theaters, and other places of public amusement. The Supreme Court held these sections to be unconstitutional under the Fourteenth Amendment upon the ground that the power granted to Congress under its Section 5 to enforce the provisions of its Section 1 is a power only to enact legislation "for correcting the effects of . . . prohibited state laws and state Acts, and thus to render them effectually null, void and innocuous" as well as "the action of state officers executive or judicial, when these are subversive of the fundamental rights in the Amendment."[67] Since the provisions in question reached private action that was unconnected with state action, they were held to be beyond the power of Congress to enact under Section 5 of the amendment. The Supreme Court recognized that the Thirteenth Amendment, which was also relied upon by the United States as authorizing Congress to enact these provisions, gave authority to Congress to regulate or prohibit private action that violated the amendment. It also recognized that Congress had authority under this amendment to enact legislation for protecting the right to freedom of every human being with respect to the enjoyment or exercise of the basic human rights. Nevertheless, the Court held that this particular type of regulation did not fall within the sphere of the authority granted to Congress to regulate private action by that amendment.

In 1965 Congress exercised its power under Section 2 of the Fifteenth Amendment to enforce by "appropriate legislation" the provisions of Section 1 of that amendment. As previously stated, Section 2 of the Fifteenth Amendment is identical in substance with Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment. Persuaded that judicial enforcement of the prohibition against racial discrimination by a State with respect to the right of citizens of the United States to vote had been ineffective, Congress enacted the Voting Rights Act of 1965.[68] As originally enacted, the Act, as you know, is primarily based upon the Fifteenth Amendment. However, Section 4(e) of the Act was based upon the power of Congress under the Fourteenth Amendment. This latter section provides that no person who demonstrates that he has successfully completed the sixth primary grade in certain schools in which the predominant classroom language is other than English should be denied the right to vote in any election because of his inability to read, write, understand, or interpret any matter in

the English language.[69]

All of the provisions of the Voting Rights Act of 1965, whether based on the Fifteenth or Fourteenth Amendments, are enforced through a variety of procedures and sanctions. An important enforcement provision for purposes of the present discussion is that contained in Section 11(b) of the Act which provides that

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to initmidate, threaten, or coerce, . . . any person for voting or attempting to vote. . .70

Similarly, Section 12(a) of the Act provides that

> Whoever shall deprive or attempt to deprive any person of any right secured by sections 2, 3, 4, 5, 7 or 10 of this Act or shall violate section 11(a) of this Act, shall be fined not more than $5,000, or imprisoned not more than five years, or both. 71

The first of these latter two sections explicitly reaches purely private action and the second may also be construed to reach this type of conduct. Considered as a whole, the Act clearly imposes the most severe and burdensome remedies in the history of civil rights legislation. It does so in the interest of finally assuring that the promises of the Fourteenth and Fifteenth Amendments will be realized effectively. In 1975 Congres s again exercised its power to enforce the safeguards of the Fourteenth Amendment with respect to equal protection of the laws relative to voting under its Section 5 when it expanded the coverage of the Voting Rights Act to specified "language minorities."[72] A major reason moving Congress to expand the coverage of the Act was the frequent occurrence of private action directed against the language minorities with a view to deterring them from voting. The Senate Committee on the Judiciary observed:

> The exclusion of language minority citizens is further aggravated by acts of physical, economic, and political intimidation when these citizens do attempt to exercise the franchise. Witnesses testified that local law enforcement officials in areas of Texas patrol only Mexican American voting precincts, and harass and intimidate Mexican American voters. Much more common, however, are economic reprisals against minority political activity. Fear of job loss is a major deterrent to the political participation of language minorities. . . . People whose jobs, credit or housing depend on someone who wishes to keep them politically powerless are not likely to risk retaliation for asserting or acting on their own views. 73

This activity by persons in the private sector is prohibited at least by Section 11(b) of the Act and may also be covered by Section 12(a) of the Act. Section 12(d) authorizes the Attorney General to institute for the United States an action for preventive relief against such

private action interfering with the right to vote of a person because of the latter's membership in a racial or language minority group.[74] Moreover, Section 12(f)[75] and 14(e),[76] which were added by the 1975 amendments to the Act, clearly contemplate that a person whose right to vote has been denied or abridged because of his membership in a racail or language minority group as a result of wholly private action has a civil cause of action for either damages or equitable relief, or both against the private individual engaging in that action.

It is thus clear that the Voting Rights Act, which is based upon both the Fourteenth and Fifteenth Amendments, reaches not only state action but also private action. Congress in exercising its power to enact "appropriate legislation" to enforce the first sections of these amendments which are, in terms, directed against state action that denies, for example, equal protection of the laws interpreted the enforcement sections of these amendments as authorizing it to reach and regulate wholly private action. In so acting, the Congress rejected the interpretation of the Fourteenth Amendment made by the Supreme Court in the Civil Rights Cases.

The Supreme Court in 1966 sustained the constitutionality of the Voting Rights Act of 1965 as against the challenge by South Carolina that Congress did not have the power to enact its Sections 4(a)-(d), 5, 6(b), 7, 9, 13(a), and 14 under Section 2 of the Fifteenth Amendment. The case in question was South Carolina v. Katzenbach.[77] Equating the power of Congress under Section 2 of the amendment to the power of Congress to implement all express powers of Congress, the Court cited the classic formulation set forth by Chief Justice Marshall in McCullough v. Maryland[78] as providing the basic test to be utilized by the Court in determining the validity of particular exercises of power by Congress under this section. The Court stated that

> As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. 79

The Court held that each of the challenged sections of the Act were within the power of Congress to enact under Section 2 of the Fifteenth Amendment because they were directed to eliminating an evil, racial discrimination in voting, which was the purpose of that amendment and because these sections were appropriate means of combatting that evil. The Court did not consider the constitutionality of the sections of

the Act that prohibited private action that interfered with a person's voting or attempt to vote or that deprived a person of any right secured by the Act.

Subsequent cases, such as Katzenbach v. Morgan,[80] have continued to apply the new view of the power of Congress under Section 2 of the Fifteenth Amendment and under Section 5 of the Fourteenth Amendment. In United States v. Guest[81] the Court sustained the application to private conduct of a statute designed to give effect to the Equal Protection Clause of the Fourteenth Amendment, among other constitutional provisions. The defendants in this criminal case challenged this application upon the ground that the statute simply reduplicated the Equal Protection Clause and thus did not reach wholly private action. The statutory provision in question was 18 U.S.C. 241, a codification of Section 7 of the Civil Rights Act of 1870. It provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States or because of his having done the same;
>
> They shall be fined not more than $5,000 or imprisoned not more than ten years, or both. 82

One paragraph of the indictment charged the defendants with having conspired to injure, oppress, threaten, and intimidate Negro citizens in the free exercise and enjoyment of the right to equal utilization without discrimination upon the basis of race of certain public facilities near Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or one of its subdivisions. However, the indictment named only private individuals and did not explicitly allege that their action constituted or was part of state action. It did allege that the defendants caused the arrests of Negroes by means of making false reports that the latter had committed criminal acts. Interpreting the statutory provision to do no more than to duplicate the substantive content of the Equal Protection Clause, which was the constitutional provision invoked by the indictment as enforced by the statutory provision, two justices in an opinion for the Court nevertheless found that the indictment was a sufficient one in that it could be construed as permitting proof of co-operative state and private action in the effectuation of the alleged conspiracy. Six of the nine justices, however, took the affirmative position that Congress had the authority

under Section 5 of the Fourteenth Amendment to regulate and prohibit the wholly private conduct involved. Three of these, Mr. Justice Clark, Mr. Justice Black, and Mr. Justice Fortas, concurred with the opinion of the Court but stated:

> (I)t is, I believe, both appropriate and necessary under the circumstances here to say that there now can be no doubt that the specific language of s. 5 empowers the Congress to enact laws punishing all conspiracies--with or without state action - that interfere with Fourteenth Amendment rights. 83

Three additional justices, Mr. Justice Brennan, Chief Justice Warren, and Mr. Justice Douglas, took the position that Section 7 of the Civil Rights Act of 1870 covers certain wholly private conduct, which was properly alleged in the indictment, and that the section is a constitutional exercise of the power of Congress under Section 5 of that amendment. This position was expressed in the separate opinion of Mr. Justice Brennan which stated:

> A majority of the members of the Court expresses the view today that s. 5 empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy. Although the Fourteenth Amendment itself, according to established doctrine, "speaks to the State or to those acting under the color of its authority," legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, s. 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies is necessary to its full protection.
>
> I acknowledge that some of the decisions of this Court, most notably an aspect of the Civil Rights Cases, . . . have declared that Congress' power under s. 5 is confined to the adoption of 'appropriate legislation for correcting the effects of . . . prohibited State laws and State acts, and thus to render them null, void, and innocuous." I do not accept -- and a majority of the Court today rejects -- this interpretation of s. 5. It reduces the legislative power to enforce the provisions of the Amendment to that of the judiciary, and it attributes a far too limited objective to the Amendment's sponsors.84

Since the decision in the Guest case, a number of United States Courts of Appeal have held that Congress has the authority under Sec- 5 of the Fourteenth Amendment to provide a civil cause of action against a person whose wholly private conduct deprives another person of equal protection of the laws.[85] Moreover, most legal scholars considering the question of the power of Congress under Section 5 of the Fourteenth Amendment have concluded that Congress may prohibit purely private conduct.[86] Congress has continued to enact legislation under Section 5 of this amendment,[87] citing the opinions of the six justices in the Guest

case as agreeing with its own interpretation of its power under that section.[88]

The process by which Congress disagreed with the interpretation of its power to enact legislation enforcing the provisions of Section 1 of the Fourteenth Amendment set forth in the Civil Rights Cases by the Supreme Court, made its own independent determination as to the correct interpretation of that amendment, and then proceeded to enact legislation enforcing Section 1 of that amendment illustrates the historically appropriate role of Congress as a co-equal, coordinate branch of the Federal Government. As the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments expressed it, this is the appropriate role of Congress whenever it judges that a prior interpretation of the Constitution by the Supreme Court is grossly erroneous, subverts the rights and liberties of the people, arrogates power not conferred upon the Court, or shocks the moral sense of the nation. Those framers exercised this power under the Fifth Amendment to reject the interpretations of the Constitution by the Court in the Dred Scott case and to enact legislation to protect the rights of the persons subverted by that case. They did so numerous times before the adoption of the post-War amendments. The enforcement clauses of these amendments must be interpreted as codifying this view of the role of Congress so clearly expressed by the Republican leadership which submitted these amendments for ratification and so frequently acted upon by that lea-

## III.

## Constitutional Safeguards for the Right to Life Apply to All Human Beings, including Unborn Children

### A.

### Introduction

We have previously demonstrated that Congress has constitutional authority to make its own independent interpretation of the constitutional safeguards for the right to life as a basis for exercising its express power to enforce the provisions of these safeguards, even though its interpretation conflicts with an interpretation made by the Supreme Court. We have also previously demonstrated that Congress has constitutional authority in enforcing these safeguards to prohibit or regulate both state action and wholly private conduct that denies or abridges the right to life of a person. In light of these demonstra-

tions only one question remains to be explored in this paper concerning the constitutionality of a Human Life Statute which prohibits any person, whether acting under color of law or as a private individual, from depriving an unborn child of its life. This is the question of who is a person entitled to the protection of his or her life under the constitutional safeguards for the right to life.

The Supreme Court in Roe v. Wade, as previously noted, made two basic interpretations of the Fourteenth Amendment. It held that an unborn child is not a person within the meaning of Section 1 of the Fourteenth Amendment and, thus, that its life is not protected by the safeguards for the right to life contained in the Due Process and Equal Protection Clauses of that amendment until its birth. The Court also held that a pregnant woman has the constitutional right to privacy, as part of the liberty protected by that amendment, to have her unborn child destroyed by an abortion performed by a consenting physician. Her right to an abortion may be exercised virtually on demand prior to the birth of her child for any reason accepted by her physician including personal, social, economic, or psychological reasons such as the mother's "distress . . . associated with the unwanted child" or the "family (being) already unable, psychologically or otherwise, to care for it."[89]

The position of this paper is that the Court's interpretations in Roe v. Wade of Section 1 of the Fourteenth Amendment were grossly, obviously, and tragically incorrect. The Court made no effort to utilize the techniques of interpretation that it had long since established as the proper methods to be used in assigning meaning to the Constitution and that it has usually employed in performing this function. Application of these techniques to the relevant data and considerations, in the author's opinion, clearly requires that the constitutional safeguards for the right to life of persons be interpreted to apply to all human beings, including their unborn children.

B.

The Basic Concept of Constitutional Interpretation

1.

Construing the Constitution as a Whole

It is a basic notion in constitutional interpretation, as in

statutory interpretation, that meaning be assigned a particular provision only after considering the entire document, here the Constitution, as a whole. This notion is particularly important to observe where the constitutional provision in question stands in an intimate relationship to other provisions of the Constitution. As Mr. Justice Bradley stated for the Court in Boyd v. United States with reference to the constitutional safeguards contained in the the Fourth and Fifth Amendments:

> We have already noticed the intimate relation between the two Amendments. They throw great light on each other.[90]

The Court in Roe v. Wade made its epochal and Draconian interpretations of the Constitution with reference to but one of the several provisions in it that are concerned with the right to life, the Fourteenth Amendment. Two of the most important of these are the Fifth and the Thirteenth Amendments. The Fifth and Fourteenth Amendments have Due Process Clauses that are identical in substance, the first being applicable to the United States and the second to the States. . . Moreover, the Fifth Amendment has an Equal Protection component that is substantially identical with the Equal Protection Clause of the Fourteenth Amendment. Both of these amendments were designed by their framers explicitly to protect the right to life of persons through these clauses or components. The Thirteenth Amendment, as even the majority of the panel in the Civil Rights Cases recognized,

> has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States (and protecting) those fundamental rights which are the essence of civil freedom, . . . 91

Congressman Martin R. Thayer of Pennsylvania in early 1866 shortly aft er the adoption of this amendment made a comment shared by its framers and supporters:

> Sir, it was a revolutionary measure. It was one of the greatest, one of the most humane, one of the most beneficial revolutions which ever characterized the history of a free state. It was a revolution for the relief of human nature, a revolution which gave life, liberty, and hope to millions whose condition until then appeared to be one of hopeless despatch. 92

Seanator Lyman Trumbull of Illinois, as Chairman of the Senate Judiciary Committee, reported the amendment to the whole Senate and later introduced the bill based upon its authority which became the Civil Rights Act of 1866, now codified in 42 U.S.C. 1981, 1982, 1987,

and 1988 and constituting one of the most important areas of our modern civil rights law. In explaining the scope of the amendment, he spoke of the nature of the fundamental rights secured by it as follows:

> What was the object of the constitutional amendment abolishing slavery? It was not . . . simply to take away the power of the master over the slave. Did we not mean something more than that? Did we not mean that hereafter slavery should not exist, no matter whether the servitude was claimed as due to an individual or the state.
>
> I consider that under the constitutional amendment Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights of person and property; and any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the Constitution; . . .
>
> It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end. . . . Sir, we can go along hand in hand together to the consummation of this great object of securing to every human being within the jurisdiction of the Republic equal rights before the law, . . . 93

Congressman John A. Bingham of Ohio also stated his understanding of the scope of the protection of the fundamental rights provided by the formula contained in Section 1 of the Thirteenth Amendment. His statement was made in reference to a bill abolishing slavery in the District of Columbia which set forth the same formula contained in Section 1 of the Thirteenth Amendment. It is of particular importance since Congressman Bingham was, as previously noted, a member of the Joint Committee on Reconstruction and author of Section 1 of the Fourteenth Amendment. Like all of the Republicans in Congress at that time, he viewed the Due Process Clause of the Fifth Amendment and the Declaration of Independence as the sources of the two basic principles concerning human rights which were to be given effect by the Thirteenth Amendment formula. He stated:

> The provision of our Constitution is, "no person shall be deprived of life, or liberty, or property without due process of law." . . . this new Magna Charta to mankind declares the rights of all to life and liberty and property; that no person, by virute of the American Constitution, by the majesty of American law, shall be deprived of life or liberty or property without due process of law.
>
> What was your declaration at Philadelphia on the 4th of July, 1776, that "ALL MEN are created equal" but a reiteration of the great truth announced by the apostle . . .?

> What but this is the sublime principle of your Constitution, the equality of all men before the law?
>
> (F)or some sixty years this provision for the protection of the rights of mankind, under the law and by the law, upon the very hearthstone of the Republic, has been disregarded, and not only disregarded, but violated by the Federal Government, . . .
>
> Today we deliberate whether we shall make good, by legislation, this vital principle of the Constitution, here in the capital of the Republic. . . .
>
> I would pass this bill, not only for the sake of giving present relief to the unfortunate human beings for whose special relief it is designed but I would pass this bill for the purpose as well of giving assurance . . . that no man shall ever, in the coming future, . . . be deprived of his life, of his liberty, or his property without due process of law. 94

After a careful examination of the antislavery background of the Civil War amendments and their legislative histories, one of the leading legal historians, Professor Jacobus tenBroek, wrote in his study of the Fourteenth Amendment:

> The Thirteenth Amendment nationalized the right of freedom. It thereby nationalized the equal right of all to enjoy protection in those natural rights which constitute that freedom.
>
> The Fourteenth Amendment reenacted the Thirteenth Amendment and made the program of legislation designed to implement it constitutionally secure or a part of the Constitution.
>
> The clause of equal protection of the laws . . . (a)s the basic conception underlying the Thirteenth Amendment and involved in the debates upon it, as the heart of the Freedmen's Bureau and civil rights bills and the debates upon them, as the common denominator of the drafts of the Fourteenth Amendment, as the pith and substance of section 1 in its final form, this was the meaning understood and accepted by friend and foe alike. Protection of men in their fundamental or natural rights was the basic idea of the clause; equality was a modifying condition. The clause was a confirmatory reference to the affirmative duty of government to protect men in their natural rights. 95

Many of the Senators and Congressmen who voted for submission of the Fourteenth Amendment proposal considered that the amendment was not necessary. Doubts had been raised about the authority of Congress to enact the Civil Rights Act of 1866 under the authority of the Thirteenth Amendment. This Act provided extensive protection of citizens with respect to fundamental human rights and guaranteed them equal protection of the laws. Congressman James G. Garfield, for example, who later became President, stated that he had no doubt that this Act was constitutionally enacted under the authority of the Thirteenth Amendment. He nevertheless stated:

> The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law when-

> ever the sad moment arrives when that gentleman's party comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. 96

From the foregoing analysis, it must be concluded that the right to life of all persons is protected by three principal provisions of the Constitution: the Fifth, Thirteenth, and Fourteenth Amendments. The Thirteenth Amendment is undoubtedly the vital component of this triad of constitutional provisions for understanding whom the framers of the latter two amendments and the ratifying states considered to be protected with respect to the right to life. This was the "revolutionary" amendment. It made permanent the overruling of the Dred Scott decision that some human beings were not persons, but property, under the Due Process Clause of the Fifth Amendment, with its Equal Protection component. The Fourteenth Amendment largely reenacted basic principles safeguarding human rights already replaced into the Constitution by the Thirteenth Amendment. The Fifth Amendment was given an authentic legislative interpretation by the framers of the Thirteenth Amendment which realigned the content of the Due Process Clause of the former amendment with the concept of due process of law and equal protection of the laws which was at the core of the right to freedom established by the Thirteenth Amendment. No judicial or or legislative interpretation of the constitutional safeguards of the right to life of persons with respect to who is protected by them should be based upon the Fourteenth Amendment alone for the above reasons, as was the interpretation in Roe v. Wade, but rather should be based also upon the Fifth and Thirteenth Amendments and especially upon the crucial legislative history of the latter amendment and the general historical background which produced it.

2.

## Assigning Meaning to a Constitutional Provision in Light of Its Purpose

It is also a basic notion in constitutional interpretation that the Supreme Court in assigning meaning to a constitutional provision do so by an examination of the legislative and contemporary history of the provision in question with a view to determining what those who conceived, shaped, and brought about the adoption of the provision had in mind with respect to the

reasons or purposes for which they proposed its inclusion, the evils which they aimed to eliminate, and the objects which they sought to obtain. Upon making these determinations, the Court must then assign such meaning to the provision as will give effect to these reasons or purposes behind the provision, eliminate the evils its was designed to suppress, and promote the objects it was constructed to obtain. As stated by Mr. Justice Strong in the Legal Tender Cases

> when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction applied alike to statutes, wills, contracts and constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose and so as to subserve it. In no other way can the intent of the framers of the instrument be discovered. And there are more urgent reasons for looking to the ultimate purpose in examining the powers conferred by a constitution than there are in construing a statute, a will, or a contract. We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines. 97

While the understanding and purpose of the members of Congress who framed a proposed constitutional amendment is important for determining its meaning, this basic notion in constitutional interpretation requires that great weight must also be given to the general understanding by the people of the states who, through their elected representatives, ratified the amendment. Moreover, in assigning meaning to a constitutional provision, the Supreme Court has long since recognized the relevance and significance for this purpose of the ordinary meaning commonly given to its terms at the time of its adoption. A leading case in which the Supreme Court gave effect to these interpretive principles is its 1920 decision in Hawke v. Smith.[98] Still more significantly, as Mr. Justice Black stated in United States v. South-Eastern Underwriters Asso., the Supreme Court

> (o)rdinarily do(es) not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution (or a provision thereof) was written (parenthetical phrase added). 99

He asserted that one who supports a construction of a constitutional provision running contrary to this principle faces "a heavy burden" of demonstrating that the framers and the states ratifying the provision did not intend to give full operation to the meaning of the words of the provision that they had at the time it was adopted.[100] Where the constitutional provision is one concerned with the

protection of fundamental human rights to life, liberty, or property, this interpretive principle is even more imperative, and indeed, the courts generally give words of this type of provision, where otherwise appropriate, a more extensive application. As Mr. Justice Bradley stated in Boyd v. United States

> constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. 101

Also, where the constitutional provision concerns fundamental rights of a person, such as the Due Process and Equal Protection Clauses, the Supreme Court will give substantial weight to the way all or most states have solved a problem of procedural or substantive justice concerning persons. This was the approach, for example, used by the Court in Duncan v. Louisiana.[102] Thus, how the states gave meaning or significance to a concept used in a constitutional provision at the time it was adopted through their common law, statutes, or constitutions is extremely important in this regard. A 1980 decision of the Supreme Court in Richmond Newspapers, Inc. v. Virginia[103] has emphasized the necessity for this approach.

If there ever was a term in a constitutional provision to which the Supreme Court should assign meaning only after carefully considering the general understanding of the people who through their elected representatives ratified that provision with respect to that meaning, that term is "person" or "human being" which were the focus, the very reason for the Thirteenth and Fourteenth Amendments being proposed. If there ever was a constitutional provision concerning fundamental human rights to which the Supreme Court should assign meaning affecting those rights only after carefully considering the way all or most states have acted through their common law, statutes, and constitutions to resolve problems of justice affecting those rights, the safeguards for the right to life in these two amendments are each such a provision. The reason that these propositions are sound is that the question of who is to be considered a "person" or "human being" is the most important question that can be presented under the Constitution insofar as it affects the people of this country. The determination of who is a "person" or a "human being" operates to settle whether an individual or a class of individuals is to have any protection under the Constitution for fundamental human rights. The very notion of representative government is at stake in the determi-

nation of this question. Since no proposed amendment to our Constitution becomes part of our fundamental law until it is ratified by the people of the States through one of the specified methods, it is essential that the Supreme Court determine who is a "person" or "human being" protected by the Thirteenth and Fourteenth Amendments by carefully ascertaining the general understanding of the people of the States with respect to who is included within these concepts at the time these amendments were adopted.

3.

The Justice Factor in Constitutional Interpretation

Finally, it is a basic notion in constitutional interpretation that no meaning be assigned to a provision of the Constitution that offends against the most fundamental of human rights and principles of justice. This is a principle which has traditionally been honored by the courts in assigning meaning to all forms of law, including the rules of the common law, equity, statutes, administrative regulations, and the various forms of private law contained in contract, conveyances, wills, trusts, and other private instruments. As Senator Charles Sumner stated in 1864 with reference to the proposed Thirteenth Amendment:

> (N)o court can afford to do an act of wrong. Its business is justice, and when under any apology it ceases to do justice, it loses those titles to reverence which otherwise are so willingly bestowed. 104

And speaking of the Supreme Court's decision in the Dred Scott case that held a Black human being could not be freed from the status of slavery by Congress in a Territory of the United States because he was a property of another, rather than a person, under the Due Process Clause of the Fifth Amendment, he observed that

> one of the saddest chapters in our history has been the conduct of judges, who have lent themselves to the support of slavery. Injunctions of the Constitution, guarantees of personal liberty, and prohibitions against its invasion, have all been forgotten. Courts which should have been asylums of liberty have been changed into barracoons, and the Supreme Court of the United States, by a final decision of surpassing infamy, becames the greatest barracoon of all. It has been part of the calamity of the times, that under the influence of slavery, justice, like Astraea of old, has fled. 105

The interpretive principle that requires the Supreme Court to assign meaning to a provision of the Constitution that will not offend against fundamental principles of justice has been regularly honored by that Court with certain historic exceptions. Mr. Chief Justice Marshall, early in the history of the Court,

in construing the bankruptcy and contract clauses of the Constitution, stated that

> To punish honest insolvency by imprisonment for life, and to make this a constitutional principle, would be an excess of inhumanity which will not readily be imputed to the illustrious patriots who framed our constitution, nor to the people who adopted it. 106

This interpretive principle has been especially observed by the Court in interpreting the constitutional safeguards for basic human rights. Mr. Justice Frankfurter in Rochin v. California spoke of the proper interpretive approach to application of the Due Process Clause of the Fourteenth Amendment to state action in securing evidence from the stomach of a person later convicted of a crime:

> Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples toward those charged with the most heinous offenses.". . . 107

> Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," . . . or are "implicit in the concept of ordered liberty."

> Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. It is conduct that shocks the conscience. . . . They are methods too close to the rack and the screw to permit of constitutional differentiation.

> Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice". 107

Similarly, in interpreting the Equal Protection Clause of the 14th Amendment the Supreme Court has regularly honored this interpretive principle. It has insisted that when state legislation distinguishes between human beings upon some basis that is an immutable characteristic of a class determined solely by the accident of conception, such as sex, race, or handicap, or solely by the accident of birth, such as national origin or illegitimacy, or solely by conditions largely beyond the control of the individual, such as age or poverty, there must be adduced some more or less strong reason to support the discrimination affected, particularly when an important human interest is disadvantaged. It is a basic concept in our constitutional order that, as a matter of justice, "legal burdens should bear some relationship to individual responsibility. . ." 108

4.

The Supreme Court Committed Wholesale Violations of the Basic Concept in Constitutional Interpretation

The Supreme Court in Roe v. Wade committed wholesale violations of the

basic notions in constitutional interpretation just outlined. It did not, in determining whether an unborn child is a person protected by the constitutional safeguards for the right to life of persons, look to the Constitution as a whole and to the principal safeguards of that right contained also in the Fifth and Thirteenth Amendments. The Court did not once consider or even seek to determine the purposes or reasons that the framers and ratifying states had in mind with respect to the human beings to be protected as persons by the safeguards for the right to life contained in the Fourteenth Amendment, the evils which they aimed to eliminate, and the objects which they sought to obtain. Because the Court made no such effort, it did not, a fortiori, make any effort to assign meaning to these safeguards for the right to life so as to give effect to these reasons or purposes, eliminate these evils, or promote these objects. The Court did not seek to determine the general understanding of the concept of "person" by the people of the States who, through their elected representatives, ratified the Thirteenth and Fourteenth Amendments. For this reason, the Court did not even consider that, in light of the fact that unborn children were protected by the common law and statute law of the states that ratified this amendment, those who were trying to move the Court to construe the term "person" in the Fourteenth Amendment as not applying to unborn children were required to discharge "the heavy burden" of demonstrating that this term was used in a less broad sense than used in the law of the ratifying states. The Court, moreover, did not honor the interpretive principle that a constitutional provision for the security of person should be liberally construed with respect to the scope of the persons to be covered by it. As previously pointed out, the Court instead utilized a wholly verbal technique for assigning meaning to the safeguards for the right to life of persons in Section 1 of the Fourteenth Amendment. Looking to other provisions of the original Constitution and of the first ten amendments, which had been adopted long before the adoption of the Thirteenth and the Fourteenth Amendments and which were not addressed to resolving the severe problems in civil and political rights to which these latter amendments were directed, the Court examined such provisions as the clauses listing the qualifications for representatives and senators and the qualifications for the Presidency, the Extradition provisions, the Emolument Clause, and the Electors provisions. Since it would not be possible for an unborn child to run for election to federal office, to commit a crime, to hold an office of profit or trust under the United States, or to serve as an Elector to cast a vote

for the President, it is not surprising that the provisions of these clauses and provisions dealt with human beings who were adults. Having examined these and like provisions of the Constitution, the Court gravely concluded that "in nearly all these instances, the use of the word is such that it has application only post-natally." The Court never probed into the actual purpose of the framers of the Preamble to the Constitution with respect to the persons to be protected by its provisions although they stated that they acted to ordain and establish the Constitution to "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to our selves and our Posterity, . . ." Neither did the Court inquire into what the general understanding was at the time the Declaration of Independence was made or the Due Process Clause of the Fifth Amendment was adopted concerning the application of the term "person" or "men" to unborn children. Finally, the Court in Roe v. Wade never framed the issue before it with respect to whether unborn children were persons as a question of justice. Although Section 1 of the Fourteenth Amendment and the Thirteen Amendment are in all of their aspects concerned with the resolution of questions of basic justice, the Court treated the question of the scope of the concept of "person" as if it had nothing to do with justice.

## C.
## Application of the Proper Concepts of Constitutional Interpretation

### 1.
### The Issues Presented in Light of the Purposes of the Constitutional Safeguards for the Right to Life

Application of the proper principles for interpretation of the Constitution to relevant data provides a clear answer to the question of whether an unborn child is a person protected by the constitutional safeguards for the right to life of persons contained in the Thirteenth and Fourteenth Amendments and, because of their adoption, in the Fifth Amendment. As previously demonstrated, the crucial amendment to be regarded in this triad of provisions is the Thirteenth Amendment. Its adoption established the revolutionary principles concerning the right to freedom. Those principles were simply reenacted by the framers of the Fourteenth Amendment. The framers of both the Thirteenth and Fourteenth Amendments gave an interpretation to the Due Process Clause of the Fifth Amendment which precisely aligned the substantive content of that clause to the substantive content of these two subsequently adopted amendments. The legislative history and historical back-

ground of the Thirteenth Amendment provide ample and persuasive evidence that its framers and the ratifying states had the following purposes in mind:

(1) to redefine the concept of person as used by the Supreme Court in the Dred Scott case so as to include all human beings within the protection provided by the amendment;[109]

(2) to abolish slavery and involuntary servitude; to eliminate each aspect of these institutions, usually termed the "badges and incidents" of slavery; and to accomplish this objective with respect to all who were subjected to the deprivations of these institutions;[110]

(3) to establish a constitutional safeguard for the right to freedom of each human being against both official and private action that abridges or denies this right;[111]

(4) to include within this constitutional safeguard for the right to freedom the right of each human being to protection in the exercise or enjoyment of the fundamental rights to life, liberty, and property and to equal protection of the laws for the security of these vital human interests;[112]

(5) to authorize Congress to enforce the prohibition against slavery and involuntary servitude and to protect the right to freedom of each human being by enacting appropriate legislation for this purpose;[113]

(6) to deal with present denials of the right to freedom to any human being, including those directed at Blacks who were still subjected to slavery in actual practice, at free Blacks who were subjected to discrimination because of their race or former status of slavery with respect to most of the important opportunities in community life, at Whites who were denied rights included within the right to freedom because of political or other activity directed against slavery, at Whites who had remained loyal to the United States during the recent war, at Mexican-Americans and Indians who were subjected to a form of involuntary servitude called peonage in the Southwest, and at persons who were subjected to discrimination because of their national origin or alien status with respect to important opportunities in community life; and[114]

(7) to deal with any future denials of the right to freedom to any human being.[115]

Of these seven purposes the first two have especial importance with regard to our effort to determine whether the Thirteenth Amendment's safeguard for the right to freedom to exercise and enjoy the basic human right to life and the similar safeguards of the Fifth and Fourteenth Amendments apply to unborn children.

More specifically, our question becomes this: Did the framers of the Thirteenth and Fourteenth Amendments and the states that ratified them consider that unborn children were included within the class of all human beings for whom, as persons, their safeguards for the right to life were established? A closely related question is the following: Did the framers of the Thirteenth and Fourteenth Amendments and the states that ratified them consider that unborn children were among the human beings who were subjected to the deprivations of the institution of slavery that was abolished by the first of these amendments? When the proper principles for interpretation of the Constitution are applied to the relevant data concerning the adoption of these amendments, the answer to both of these questions is clearly in the affirmative.

2.

The General Understanding in the Ratifying States of the Concept of "Person" and the Right to Life

We have noted previously that a basic notion in constitutional interpretation is that meaning be assigned to a provision of the Constitution in light of the reasons or purposes for which its framers and the ratifying states acted in proposing and adopting it, respectively. One of the basic means for getting at the reasons or purposes of these framers and ratifying states in designing the Thirteenth and Fourteenth Amendments to apply to all human beings as persons is to examine the general understanding with respect to the scope of the concept of "person" or "human being" at the time these amendments were adopted. That general understanding as reflected in the common law and statutes of the ratifying states has particular importance in this regard. An examination of these two forms of state law reveals that the unborn child was protected with regard to its life and its property by the law of every state. This was also true of the law of the territories. As Dr. Horatio R. Storer, M.D. and LL.B., stated in his medico-legal study of abortion prepared at the request of the American Medical Association in 1860

> (t)he civil rights of an infant in utero are respected equally throughout gestation; at every stage of which process, no matter how early, it may be appointed executor, is capable of taking as legatee, or under a marriage settlement, may take specifically as "a child" under a general devise, and may obtain an injunction to stay waste. [116]

Moreover, even in 1860, this common law view of the civil rights of an unborn child as a person was over one hundred years old. As one court observed in 1941:

> It has been the uniform and unvarying decision of all common law courts in respect of estate matters for at least the past two hundred years

> that a child en ventre sa mere is "born" and "alive" for all purposes for his benefit. [117]

The extension of the principle that an unborn child is a person from and after its conception to the field of tort law and of statutes relating to wrongful death took place more gradually. Under Lord Campbell's Act of 1846, a child who was unborn at the date of its father's wrongfully caused death was held in 1871 to have the right to sue to recover damages due to that death.[118] Because medical science was for a long time incapable of tracing the causal relationship between negligent action of third parties and injuries inflicted by that action upon unborn children, relatively few suits were filed under the common law to recover damages for prenatal injuries inflicted as a result of tortious action of third parties. When medical science attained the capacity to trace the causal relationship between tortious action and injuries inflicted by that action upon unborn children, suits began to be filed under the common law to recover damages resulting from such action. After some adverse decisions, the courts have generally recognized the right of children to recover damages for the tortious infliction of injuries upon them while in their mother's womb.[119] These courts have based their decisions upon the notion previously stated that an unborn child is a person or entity protected by the common law upon its coming into existence at conception. Moreover, by and large state courts recognize that this right to sue for damages for prenatal injuries exists irrespective of the time after conception that they were tortiously inflicted. Thus, the unborn child need not have been "viable" or "quick" in its mother's womb at the time the injury was inflicted in order to sue and recover for those damages.[120]

Moreover, under the common law of crimes the unborn child was provided considerable protection for its life against abortion. At the time of the ratification of the Thirteenth and Fourteenth Amendments, the states were in the process of replacing this common law and earlier statutes codifying it with anti-abortion statutes specifically designed to provide far better protection for the life of the unborn child.[121] Blackstone in his famed Commentaries, the first volume of which was published in 1765, dealt specifically with the protection the common law of crimes provided for the life of the unborn child. By 1775 Blackstone's Commentaries had been purchased almost as extensively in America as in England.[122] In 1860 it was still widely utilized as an outstanding analysis of the common law. He stated:

> The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

> 1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offense in quite so atrocious light, but merely as a heinous misdemeanor.
>
> To kill a child in its mother's womb, is now no murder, but a great misprision (homicide or manslaughter): but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them (explanatory phrase added). 123

In light of Blackstone's citation of W. Hawkins and Sir Edward Coke as authorities for his account of this part of the common law of crimes, it is clear that he described the protection of the unborn child as a person by this law as beginning when the child is "formed and animated" by his reference to the child being able to stir in its mother's womb and the woman being quick with child. Since the unborn child is "formed and animated" long prior to the fifteenth week of gestation when a mother is usually able to feel and since he had reason to know from spontaneous abortions and available literature that the unborn child is so "formed and animated",[124] Blackstone may be asserting that the protection of the child's life by the common law begins earlier than this point in gestation. Nevertheless, there remained the problem of proving the commission of the crime of abortion. To make this proof it was necessary to prove that an abortional act was performed upon a woman at a time when an unborn child existed in her womb. Blackstone's use of the language "quick with child" could have meant that this proof is properly made only when the mother is able to feel the movements of her unborn child within her womb.

England replaced her common law of abortion by a statute enacted in 1803.[125] It imposed greater penalties for commission of the crime of abortion upon a woman "quick with child" than for commission of the crime upon a woman "not being, or not proved to be, quick with child." The term "quick with child" was construed in 1811 to mean that the pregnant woman could feel the movements of the child within her and thus to be identical with the notion of "quickening".[126] This statute was the first specific protection of unborn children prior to their having reached the stage of gestation known as "quickening". The statute was amended in 1837 to eliminate the "quickening" distinction relative to degree of punishment for commission of the crime of abortion.[127] All violations of the statute, irrespective of the age of the unborn child, became punishable by the same pen-

alties. In the following year an English court held that the common law rule that prohibited execution of a death sentence against a woman who is "quick with child" protected a woman under such a sentence from and after the conception of her unborn child.[128] The court rejected the "quickening" concept as a basis for interpreting this rule. Both of these developments seem related to the discovery of the human ovum and its function in human conception, which was made in 1827.[129] They appear to represent an effort to provide protection by both the statute and the common law for unborn children from and after the moment of conception.

In the United States between 1821 and 1840 some of the states began to replace the common law respecting abortion by statutory provisions.[130] Five states either explicitly or by practical implication made abortion a crime only after the "quickening" of the child just as the common law had been administered. These states were Connecticut (1821), Missouri (1825), Illinois (1827), Arkansas (1837), and Mississippi (1839). Five additional states made abortion a crime throughout the period of pregnancy, providing a more severe penalty when it was performed after the "quickening" of the child. In utilizing this approach to the crime of abortion they followed the lead of England provided by the latter's statute of 1803. These states were New York (1828), Ohio (1834), Indiana (1835), Maine (1840), and Alabama (1840). Nevertheless, the requirement that proof be made of the pregnancy of the woman subjected to an abortion as well as of an intent to cause a miscarriage effectively precluded prosecution of persons for performing abortional actions prior to "quickening" of the child.[131] Even in 1860 it was still true that it was impossible for a physician to be certain that a woman was pregnant prior to "quickening" or the foetal pulsations becoming evident to the ear: "(t)he only infallible sign of pregnancy (then being) the sound of the foetal heart, not always to be detected, even by the double stethoscope."[132] Since sixteen of the twenty-six states forming the United States in 1840 still dealt with abortion through the common law which generally punished abortion only after the "quickening" of the child, the law of the states against abortion as of that year represented essentially a continuation of the common law approach, despite the enactment of the statutes mentioned earlier.

Several developments in science and social habits in this country converged in the period between 1840 and 1855 to cause physicians to launch the first right to life movement in this country. Prior to 1827 scientists and physicians in

this country were uncertain as to just when the life of the unborn child began. The discovery of the human ovum and its function in human conception in 1827 became generally known and accepted in scientific and medical circles during the following decade. Thus, Dr. Horatio R. Storer, who served as chairman of the Committee on Criminal Abortion of the American Medical Association beginning in 1857, wrote of the general understanding by physicians of this discovery

> the product of conception is in reality endowed with vitality from the moment of conception. It is important, therefore, to decide in what the moment of conception consists. It has now been ascertained that every variety of animal life originates from an egg, . . . the human species being no exception to this general rule. Before this egg has left the woman's ovary, before impregnation has been effected, it may perhaps be considered as a part and parcel of herself, but not afterwards . . .(After impregnation,) it has assumed a separate and independent existence, though still dependent upon the mother for subsistence. For this end, the embryo is again attached to its parent's person, temporarily only, . . . 133

Dr. Storer wrote this description of human conception for popular consumption by non-physicians. He cited technical works on the subject that had long since been available to physicians.

Coincident with the general recognition among scientists and physicians by 1840 of the facts concerning when human life begins, however, there was also a great increase in the incidence of abortion in America.[134] In the early part of the decade between 1840 and 1850 advertisements began to appear with increasing frequency concerning the availability of abortion services by abortionists and of abortifacients by druggists. These advertisements were made in every form in which other services and goods were advertised.[135] Married women as well as single women resorted to abortions. One homoeopathic medicine spokesman, Edwin M. Hale, in 1860 wrote that, in his opinion based upon his practice in Chicago, one in every five pregnancies was terminated by abortion. He took the position that the abortion procedure that he had developed in the 1850's was very safe and, if carefully performed, would not result in more than one woman out of a thousand dying as a result of an abortion.[136] Similarly, the advertisements made by abortionist physicians and druggists engaged in selling abortifacients also assured their readers of the safety and effectiveness of their services and products.[137]

Physicians during the period between 1844 and 1857 became aware of the great increase in abortion in their communities and states and publicly deplored the development.[138] Many of these physicians assisted legislators in states that had not previously enacted anti-abortion statutes to replace their common law on the subject.[139] Eight states enacted their first anti-abortion statutes in the per-

iod between 1845 and 1849.[140] These were Massachusetts (1845), Michigan (1846), Vermont (1846), Virginia (1848), California (1849), New Hampshire (1849), New Jersey (1849), and Wisconsin (1849). These statutes, with perhaps one exception, did not represent an advance over the anti-abortion statutes enacted between 1821 and 1841. The statutes of both periods were largely unenforceable where they applied to abortions performed before "quickening" of the unborn child. They were also inadequately enforced relative to abortions performed after the "quickening" of the child.[141]

Professors of Obstetrics at Harvard University and other universities and medical schools began to lecture concerning and against the practice of abortion.[142] Within their own states individual physicians began to prepare studies concerning abortion and the need for change in the common law and anti-abortion statutes in order to deal more effectively with the evil of abortion.[143] The founding of the American Medical Association in 1847 initiated a collective effort by physicians that was shortly to provide a framework within which they could formulate and pursue social policies concerning which their professional knowledge and experience enabled them to provide the general community with wise counsel.[144] One of these social policies was the protection of human life. Thus, their knowledge concerning when human life begins enabled them to formulate and to advocate a policy against abortion.

Dr. Horatio R. Storer and other physicians brought the matter of the great increase in abortions to the attention of the American Medical Association at its annual meeting in 1857.[145] The Association responded by appointing a Committee on Criminal Abortion with Dr. Storer as its chairman. The charge to this committee was to conduct a study concerning the incidence of abortions and to make recommendations concerning the proper course of action for the Association to take concerning the evil of abortion. After an intensive study the committee made its report and recommendations in 1859 to the Association at its annual meeting.[146] It reported that "criminal abortion prevails to an enormous extent in New York, and that it is steadily and rapidly increasing." It found that in Massachusetts "the frequency of abortions as compared with still-births at full time, seems at least eight times as great in Massachusetts as in the worst sta-

tistics of the City of New York."[147] However, it concluded that the situation in Massachusetts was "no worse with regard to abortion than many other portions of the country, . . ."[148] The committee estimated that abortions were causing "yearly thousands of foetal and . . . frequent maternal deaths."[149] According to the chairman of the committee, physicians could have but one view concerning how to view the increased incidence of abortion. He stated

> Physicians have now arrived at the unanimous opinion, that the foetus in utero is alive from the very moment of conception . . .(T)he wilful killing of a human being, at any stage of its existence, is murder. . . .(A)bortion is, in reality, a crime against the infant, its mother, the family circle, and society. 150

The committee submitted its recommendation concerning resolutions for adoption by the Association. These resolutions, which were adopted unanimously at the 1859 annual meeting of the Association, were these:

> Resolved, That while physicians have long been united in condemning the act of producing abortion, at every period of gestation, except as necessary for preserving the life of either mother or child, it has become the duty of this Association, in view of the prevalence and increasing frequency of the crime, publicly to enter an earnest and solemn protest against such unwarrantable destruction of human life.
>
> Resolved, That in the pursuance of the grand and noble calling we profess, the saving of human lives, and of the sacred responsibilities thereby devolving upon us, the Association presents this subject to the attention of the several legislative assemblies of the Union, with the prayer that the laws by which the crime of procuring abortion is attempted to be controlled be revised, and that such other action may taken in the premises as they in their wisdom may deem necessary. 151

The committee also submitted a study to the Association which was the basis for its recommendations.[152] Included in this study was a model statute for the prohibition of abortion designed to provide better protection for unborn children.[153] The study carefully analyzed both the common law and existing statute law bearing upon abortion and pointed out the weaknesses in both for adequately protecting the lives of unborn children against abortion.[154] The model statute together with this study were at the direction of the American Medical Association published in 1860 and widely distributed throughout the country.[155] It proved to be very influential with legislators. In 1860 the Judiciary Committee of the Connecticut Legislature requested appointment of a committee by the American Medical Association to frame a suitable anti-abortion statute to replace its existing statute on the subject.

The committee was appointed, prepared a statutory proposal, and the Connecticut Legislature then enacted a new anti-abortion statute remarkably similar to the model statute recommended in the study prepared by AMA's Committee on Criminal Abortion.[156]

As a result of the work of physicians and lawyers under the leadership of persons like Dr. Storer to secure enactment of effective anti-abortion statutes, 35 states and territories between 1848 and 1876 either enacted their initial anti-abortion statutes to replace the common law or acted to improve the effectiveness of earlier enacted statutes.[157] All of these statutes complied with one or more of the guidelines laid down by the model statute for making an anti-abortion statute more effective for protecting unborn children. These guidelines were: (1) prohibiting abortion at every stage of pregnancy; (2) prohibiting the abortional act without the necessity for proving that the unborn child was destroyed; (3) eliminating the necessity for proving intent to destroy the unborn child while requiring proof only of an intent to produce a miscarriage in theaabsence of lawful justification; (4) eliminating the requirement for proving pregnancy of the woman upon whom the abortional act is performed; (5) covering every means of performing an abortional act; (6) making the prohibition of abortion applicable to the woman upon whom the abortional act is performed; (7) increasing the punishment for committing the crime of abortion substantially as compared with the relatively slight punishment specified in existing statutes; and (9) recognizing as justification for causing a miscarriage of a woman only the necessity for preserving the life of the woman or of her unborn child.[158]

The states and territories enacting an initial statute or improvements in existing statutes between 1848 and 1876 that complied with one or more of the above guidelines were the following: Arkansas (1875), Arizona (1865), California (1861), Colorado (1861) (1868), Connecticut (1860) (1866), Florida (1868), Georgia (1876), Hawaii (1869), Idaho (1864), Illinois (1867) (1871-72) (1874), Indiana (1859), Iowa (1858), Kansas (1859) (1874), Louisiana (1856) (1870), Maryland (1868), Massachusetts (1860), Maine (1857), Michigan (1869) (1873), Minnesota (1873), Montana (1864), Nebraska

(1873), Nevada (1861), New Jersey (1849) New York (1869) (1872), North Dakota (1867), Ohio (1864) (1867) (1876), Oregon (1864), Pennsylvania (1860) (1870), Texas (1857), Utah (1876), Vermont (1867), Virginia (1849), West Virginia (1862), Wisconsin (1858), and Wyoming (1869).[159] All but the States of Virginia and New Jersey enacted their initial or improved anti-abortion statutes after the American Medical Association initiated its study of abortion in 1857. Virginia had the benefit of the leadership of a physician who persuaded the codifiers of its statutes to protect the unborn child from abortion from and after conception.[160] All but five of the states and territories listed above acted after the American Medical Association adopted its resolutions condemning abortion as the destruction of human life and requesting protection of unborn children throughout the period of pregnancy. Two of the states acting prior to 1859 enacted statutes that Dr. Storer highly praised for their effectiveness in accomplishing the objectives of the resolutions and of his committee's report and study.[161] Four states continued in effect during this period from 1848 to 1876 anti-abortion statutes enacted prior to this period.[162] Seven additional states during this period retained in effect their common law of crimes which provided protection for the life of unborn children after their "quickening".[163] Thus, most of the states and territories during the period from 1848 to 1876 adopted initial or improved anti-abortion statutes that were far more effective tools for preventing abortion than the common law or the earlier anti-abortion statutes.

The above analysis of the legal protection accorded to the unborn child under the legal order of the various states and territories shows that the child was protected as a person with regard to various of its interests. Under the civil sector of the common law the unborn child received protection of property rights throughout the period of its gestation. Under the English wrongful death act of 1846 this principle of the common law was extended by a decision in 1871 so as to protect the unborn child for the loss of a parent whose death was wrongfully caused. The criminal sector of the common law protected the unborn child against abortion from the point of its quickening, or at approximately 15 to 16 weeks of gestation. Between 1848 and 1857 individual physicians began to seek enactment of anti-abor-

tion statutes that would provide better and more extensive protection of unborn children against abortion, the frequency of which was rapidly increasing. In 1859 physicians instituted a collective effort to accomplish this objective through the American Medical Association. The basis of this campaign was their judgment, based upon scientific discoveries concerning the human ovum and human conception, that the unborn child exists as a human being and person from and after the moment of conception. This campaign and earlier individual physician efforts were generally successful. Between 1857 and 1876 most states and territories acted to adopt initial or improved anti-abortion statutes that adopted one or more of the guidelines for providing more effective protection for the life of the unborn child as recommended by the study prepared by the Committee on Criminal Abortion and its chairman, Dr. Storer.

Thus, at the time the Thirteenth and Fourteenth Amendments were proposed by their framers and ratified by the states the people of these states as well as of the territories that were to become states had legal orders that dealt with unborn children as persons. For at least twenty years prior to the submission of the Thirteenth Amendment for ratification physicians had been working to inform lawmakers of the fact that the unborn child comes into existence at conception and to move them to protect that child from abortion from and after that moment. The public and state legislators became concerned with the great increase in the incidence of abortion as a result of the efforts of physicians and acted, especially in the period between 1857 and 1876, to meet that public problem by securing enactment of more effective anti-abortion statutes. This concern with the unborn child as a person protected by the legal order was not new. The common law, both in its civil and its criminal sectors, in the states and territories already provided protection for the unborn child as a person. Application of the proper principles for constitutional interpretation, in light of the foregoing data concerning the treatment of the unborn child as a person protected by states and territories through their common law and statutes, requires us to conclude that the persons for whom the framers of the Thirteenth and Fourteenth Amendments designed their safeguards for the right to life included

unborn children. Moreover, those who have urged that unborn children should not be included within the class of persons protected by these amendments must, under the proper principles for constitutional interpretation, discharge a "heavy burden", as Mr. Justice Black stated, of demonstrating that the framers of these amendments and the states that ratified them had the purpose of limiting the persons for whom their safeguards for the right to life were designed to human beings who had been born. They must discharge this burden for, as the above data demonstrates, the concept of persons in the legal orders of the ratifying states comprehended unborn children. Moreover, these legal orders and those of the territories that were to become states protected the lives of unborn children from abortion. Most of them protected their lives from the moment of conception while some protected them from the fifteenth or sixteenth week after conception. All protected the property interests of the unborn child from the moment of conception. It was not possible for those who made the claim before the Supreme Court in Roe v. Wade that unborn children were not intended to be protected by the safeguards for the right to life in the Fourteenth Amendment to discharge their "heavy burden" of proving an intention to cover less than all who were, as a matter of general understanding as reflected in the legal orders of the states, considered persons. There is not a shred of evidence to which these claimants can point. As will be noted below, the evidence is quite to the contrary.

3.

The Framers' Construction of the Concept of "Person" and the Constitutional Safeguards of the Right to Life

The framers of the Thirteenth and Fourteenth Amendments were, of course, drawn from the states they represented and were familiar with the use of the legal orders of these states, both at common law and by statutes, to protect the lives and other interests of unborn children as persons. In the absence of a specific reason for excluding unborn children from the persons for whom the safeguards for the right to life contained in these amendments were designed, these framers should be deemed, like the ratifying states, to have used the concept of person in these amendments as it was used in the legal or-

der of the ratifying states. No such reason is manifested in the entire legislative history or background of either the Thirteenth or Fourteenth Amendments.

Indeed, there are strong reasons manifested in the legislative history and background of these amendments for continuing to include within the concept of person the unborn children of all human beings. These reasons are based upon the views of the framers with respect to the concept of "person" or "human being" and upon their actions through various legislative measures which provided protection for unborn children. The first of these measures to be considered is the Assimilative Crimes Statute which was enacted on April 5, 1866, four months after ratification of the Thirteenth Amendment and about two months before submission of the Fourteenth Amendment to the States for ratification.[164] This legislation made applicable the criminal law of any state to any area which the state had ceded to and placed under the exclusive jurisdiction of the United States, usually called federal enclaves, where an offense specified by that criminal law was not prohibited by the criminal law of the United States. Since there was no federal statute proscribing abortion, federal courts were authorized by this statute of 1866 to exercise jurisdiction over the the offense of abortion when committed by a person within a federal enclave such as an Army Base, a Naval Base or Station, or an Army Fort. Thus, the Assimilative Crimes Statute made the abortion statutes of many states applicable as federal law to the enclaves in those states.[165] Since in the few years just before or just after the ratification of the Thirteenth and Fourteenth Amendments most of the states had responded to the call of the American Medical Association for enactment of better designed statutes to protect the lives of unborn children against abortion, the Assimilative Crimes Statute adopted the view of these states that the unborn child exists as a human being from the moment of conception and that it has a right to life to be protected from destruction by abortion from and after that time. The enactment of this statute by the very framers of the Thirteenth and Fourteenth Amendments in the short period of time between the ratification of the former amendment and the submission for ratification of the latter amendment clearly constitutes an interpreta-

tion by them of the concept of "person" in the federal legal order with respect to the protection of the right to life. It is an interpretation to the effect that the concept of "person" in covering all human beings includes the unborn children of those human beings and that they are entitled to protection of their right to life against those who would destroy it in federal enclaves by abortion.

That this is the view that was held by these framers of these amendments is confirmed by the legislative history of the federal statute enacted on March 3, 1873, entitled "An Act for the Suppression of Trade in, and Circulation of . . . Articles of Immoral Use."[166] Section 1 of this Act provided

> That whoever, within the District of Columbia or any of the Territories of the United States or other place within the exclusive jurisdiction of the United States, shall sell, or lend, or give away, or in any manner exhibit . . . any drug or medicine, or any article whatever . . . for causing unlawful abortion, shall be deemed guilty of a misdemeanor, and, on conviction thereof in the District of Columbia, or in any Territory or place within the exclusive jurisdiction of the United States, where such misdemeanor shall have been committed; and on conviction thereof, he shall be imprisoned at hard labor in the penitentiary for not less than six months nor more than five years for each offense, or fined not less than one hundred dollars nor more than two thousand dollars, with costs of court (emphasis added).

This Act is an explicit recognition by Congress that the Assimilative Crimes Act of 1866 operated to provide a federal law against abortion in federal enclaves by adoption of the anti-abortion law of the state in which the enclaves are located. This is necessarily the case since this is the only federal statute that makes abortion unlawful in "places within the exclusive jurisdiction of the United States." It accomplishes this result by adoption of state anti-abortion statutes for application in these enclaves since there was no specific federal statute prohibiting abortion in these enclaves. The Assimilative Crimes Act of 1866 and the Act for the Suppression of Trade in Articles of Immoral Use of 1873 constituted the first federal statutes directed to the evil of abortion. The earlier act defined by adoption of state anti-abortion laws what was "unlawful abortion" when performed in federal enclaves. The later act prohibited the sale of drugs or medicine or any article whatever "for causing unlawful abortion" as specified by the earlier act in federal enclaves.

The 1873 Act also has additional significance as a legislative interpretation of the scope of the concept of "person" in the federal legal order. It recognizes that there is federal law dealing with "unlawful abortion" in the District of Columbia and in the Territories of the United States upon which the prohibition with respect to trade in drugs, medicines, or articles for causing unlawful abortion builds. The federal law dealing with unlawful abortion in the District of Columbia was undoubtedly the law of Maryland in this regard which continued to control conduct in the District until replaced by specific federal legislation. The federal law dealing with unlawful abortion in the Territories was undoubtedly the measures enacted by the Territorial Legislatures under the authority delegated to them by Congress. Under the District Clause of Article I, Section 8, and under the Territorial Clause of Article IV, Section 3, Congress was granted plenary authority to enact all legislation or rules and regulations necessary or appropriate for governing the affairs of the District of Columbia, federal enclaves, and Territories. The 1873 Act and the prior 1866 Assimilative Crimes are, of course, properly to be considered as the exercise of its power under one or the other of these clauses. But the Act may also properly be considered as an exercise of its power to enforce by appropriate legislation the safeguards for the right to life protected by the Fifth, Thirteenth, and Fourteenth Amendments in behalf of unborn children as part of all the human beings who are persons within the meaning of these amendments. Stated otherwise, the 1873 Act and the prior 1866 Act, because they protect the right to life of unborn children against "unlawful abortion" as specified in state anti-abortion statutes for federal enclaves, as specified in Maryland law for the District of Columbia, and as specified in the territorial anti-abortion statutes for the Territories of the United States, constitute a congressional interpretation of the concept of "person" for whom the safeguards for the right to life were designed that are contained in the Thirteenth and Fourteenth Amendments and, because of the interpretation of the Fifth Amendment by the framers of the former, in the Fifth Amendment. The 1866 Act was an interpretation of this concept by the very framers

of the Thirteenth and Fourteenth Amendments. At the time of the enactment of the 1873 Act many of the outstanding congressional leaders responsible for the submission of these two amendments and enactment of legislation implementing them were still members of Congress. Among those still present were Senators Justin S. Morrill, Charles Sumner, Henry Wilson, Lot Morrill, John Sherman, Roscoe Conklin, James Harlan, William Windom, Samuel C. Pomeroy, Allen G. Thurman, and Lyman Trumbull. On the House side among those present were John A. Bingham, James A. Garfield, Samuel Shellabarger, Luke P. Poland, Nathaniel P. Banks, James G. Blaine, Samuel S. Cox, Henry L. Dawes, John F. Farnsworth, William D. Kelley, John Lynch, Leonard Myers, Samuel J. Randall, Glen W. Schofield, and John P. C. Shanks.[167]

The 1873 Act also has a third significance for our purposes. Section 2 of the Act prohibited the use of the mails for transmitting "any article or thing designed or intended for the . . . procuring of abortion".[168] It also imposed a far more severe sanction for the violation of the section than for a violation of Section 1 of the Act. Section 3 of the Act prohibited any person from importing into the United States from any foreign country any drug or medicine or any article whatever for causing unlawful abortion.[169] These section are, of course, exercises of the power of Congress to regulate the mail and commerce. They also constitute, however, a solid interpretation of the Fifth Amendment by Congress of its authority to enforce its equal protection component, recognized by the framers of the Thirteenth Amendment, to protect the right to life of unborn children. They demonstrate that the framers of the Thirteenth and Fourteenth Amendments and their immediate successors did not see any incompatibility between their authority to regulate the mails and commerce and any limitation upon their authority stemming from the Fifth Amendment as reinterpreted by them in the submission of the former amendments.

By way of summary, it may be said that the 1866 Assimilative Crimes Act and the 1873 Act for the Suppression of Trade in Articles of Immoral Use represented the adoption by Congress of the new wave of state anti-abortion statutes that had been specifically designed to protect the unborn child as a person from the moment of its con-

ception with respect to its right to life. In the case of the Territories, the 1873 Act represented the sanctioning by Congress of the enactment of the new wave of similar statutes by Territorial legislatures under authority previously granted to them by Congress. Those statutes recognized the unborn child to be a person deserving of protection of its life against destruction by abortion. All of these statutes protected the child against the abortionist. Ten of these statutes protected the child also against its mother when she performed the abortion herself.[170] The 1866 Act was enacted by the very framers of the Thirteenth and Fourteenth Amendments. The 1873 Act was enacted by a Congress to which many of the same framers still belonged and by the immediate successors of the other framers, a Congress still controlled by the Republican leadership that had submitted these two amendments for ratification. The action of Congress in enacting these two Acts is a construction of its authority under the Fifth, Thirteenth, and Fourteenth Amendments that condemns the interpretations of the Fourteenth Amendment in Roe v. Wade as grossly, obviously, and tragically erroneous.

In order to determine the proper meaning to be assigned the concept of "person" for whom the safeguards for the right to life in the Fifth, Thirteenth, and Fourteenth Amendments were designed to protect we have so far examined two kinds of extrinsic evidence of the purpose underlying these provisions. The first kind of extrinsic evidence relates to the purpose of the ratifying states in this respect as reflected in the general understanding of the concept of "person" incorporated into the legal order of these states. The second kind of extrinsic evidence relates to the purpose of the framers of the latter two amendments as reflected in legislation concurrently adopted by them to protect the right to life of unborn children against abortion. We now turn to an area of extrinsic evidence relating to the purpose of the framers of the Thirteenth and Fourteenth Amendments that takes us to the very heart of the Thirteenth Amendment, and, because it is a reenactment of that amendment, of the Fourteenth Amendment. This evidence concerns the action of Congress in enacting more than ten statutes in the very words later incorporated into Section 1 of the Thirteenth Amendment and in submitting the Thirteenth

Amendment itself for ratification.[171] Congress in enacting these statutes between 1862 and 1865 and in submitting this amendment made a judgment concerning just who was to be freed from the bonds of slavery by these actions. We have already noticed that a paramount purpose of the framers of the Thirteenth Amendment was to abolish slavery and involuntary servitude; to eliminate each aspect of these institutions, usually termed the "badges and incidents" of slavery; and to accomplish this objective with respect to all who were or might again in the future be subjected to the deprivations of these institutions.[172] The history of the slavery institution clearly indicates that the unborn child of slaves was subjected to the operation of this institution. The legislative history of the above-mentioned statutes and of the Thirteenth Amendment also clearly reveals that their framers understood that the slavery institution operated upon unborn children and that they acted to free unborn children of slaves along with their born brothers and sisters and parents.

In the operation of the slave system the unborn children of slave women were often dealt with in the wills of their owners.[173] A favorite type of devise was one in which the owner would give the unborn child of a slave woman to a child or grandchild of the testator. Slave women were often pledged as security for the repayment of a loan or sold on credit.[174] The debtor in these unseemly transactions was often a free Black who was utilizing the transaction as a means of securing freedom for the slave woman and "wife". When the slave women were seized by the creditor for nonpayment of the full amount of the money borrowed or purchase price, the creditor under the slavery system also seized any child that had been born and perhaps even conceived before entry into the transaction in question.[175] Unborn children could be sold in the slave markets separate from the mother and thus had its own market price.[176] Thus, the unborn child was subjected to the rigors and restrictions of the institution of slavery in several of the ways in which born children and adults were subjected to them.

The framers of the legislation between 1862 and 1865 which freed those who were slaves in various contexts through use of the very words of the Thirteenth Amendment dealt with the subject of freeing unborn

children from slavery in a very specific way. The principal occasion in which this occurred concerned the effort of President Lincoln and of the Congress to assist the loyal states that still maintained the institution of slavery in acting to grant freedom to slaves. On April 10, 1862, Congress adopted a joint resolution stating

> That the United States ought to cooperate with any State which may adopt gradual abolishment of slavery, giving to such State pecuniary aid, to be used by such State in its discretion, to compensate for the inconveniences, public and private, produced by such change of system. [177]

In July of the same year a select committee appointed in the House of Representatives to consider the question reported a bill favorably to accomplish the object of this resolution. It provided

> That whenever the President of the United States shall be satisfied that any one of the States of Delaware, Maryland, Virginia, Kentucky, Tennessee, or Missouri, shall have emancipated the slaves therein by law, within and throughout such State, it shall be the duty of the President, assisted by the Secretary of the Treasury, to prepare and deliver to such State, an amount of bonds of the United States, bearing interest at the rate of five per cent. per annum, and payable at thirty years from the date thereof, equal to the aggregate value of all the slaves within such State, at the rate of $300 for each slave, . . . the whole amount for any one State to be delivered at once, if the emancipation, or in ratable installments if it shall be gradual.[178]

On January 6, 1863, the House passed a bill similar to the above which dealt only with the State of Missouri.[179] It appropriated the amount of $10,000,000 in United States bonds to this State upon its passage of a good and valid act of emancipation of all the slaves in that state. The sum was appropriated "for the purpose of paying to the loyal owners of such slaves in said State a just compensation for the loss of the services of such slaves; . . ."[180] On February 12, 1863, the Senate passed the House bill with amendments.[181] The main amendment raised the amount appropriated to $20,000,000 and limited the amount that could be paid by Missouri to owners of slaves to an average of $300 for each slave.[182]

When the bill was under consideration in the Senate, Senator Sherman of Ohio took the position that while Missouri could under its State Constitution act to free children from their status of slavery by a declaration that all persons born after the date of the declaration, its General Assembly was precluded from emancipating the mothers of unborn children without paying their owners "a full equivalent for such slaves so emancipated."[183] He stated that the right

of the owner of slave women to their "increase", that is, their unborn children and children to be conceived in the future, was part of the property of the owner. He stated:

> According to the information I have, that right to the increase is estimated as equivalent to ten per cent. of the value of the slaves. Taking the old and the young, the males and the females, and considering the aggregate value of those slaves at $50,000,000, which would be $500 for each slave, the value of the probable increase of those slaves would be estimated at $5,000,000. That sum would secure the freedom of all born after the passage of the act, and would as effectively end slavery in Missouri as an immediate and positive prohibition. 184

Senator Edgar Cowan of Pennsylvania took issue with Senator Sherman over the necessity for appropriating money to enable Missouri to pay slave owners for "children yet unborn." He stated:

> There is nothing to prevent the State of Missouri to-morrow from passing an act declaring that all children born, for instance, after the 1st day of November shall be free at the age of twenty-one years, or any other time. There is nothing to prevent that. I do not know that there is any vested right in the issue of this species of property on the part of the master. 185

Senator Henry Wilson of Massachusetts also objected to appropriating money to Missouri for this purpose. He observed:

> The Senator (from Ohio) earnestly deprecates such radicalism as cares for the rights and interests of the slave. He announces that he is willing to tax the people of America to pay for children not yet born; no, not yet begotten. I am not. . . . he accepts the abhorrent dogma that slave masters have a right to the unborn, unbegotten issue of his slaves, a right he is willing to tax the people of Ohio to pay. I, sir, give no such vote. I will never consent to tax the people of Massachusetts to pay for unborn children twenty-two years hence. 186

The disagreement between these Republican senators was not over providing for the freedom of unborn children. All agreed that the State of Missouri could and should act to free them from the bonds of slavery. All agreed that unborn children, as "increase", were property of the slave masters who owned their mothers. They simply disagreed upon the legal effect of an act of the Missouri General Assembly declaring "the freedom of all born after the passage of the act." Senator Sherman took the position that until unborn children attained the age or arrived at the date fixed for their freedom, they remained the property of the master owning their mother. Since they were property under Missouri law, the Missouri Constitution required the State General Assembly to pay "a full equivalent for such slaves so emancipated." 187 Senators Cowan and Wilson took the

position, however, that the property of the slave master in the unborn child of a slave woman owned by him was not so vested a property right that it could not be divested by the General Assembly before its birth without having to pay the master compensation for the property. Senator James R. Doolittle of Wisconsin suggested to the disagreeing senators what he deemed a better solution. After reviewing the statutes by which other states had acted to emancipate slaves and noting the variety of ways that had been utilized, he observed:

> Mr. President, I beg simply to refer to these statutes for the purpose of showing that, on the question as to the mode of conducting this great scheme of emancipation, it is a matter of wisdom to leave it to the Legislatures of the States interested; at all events, to leave to them an alternative. 188

While the bill to provide Missouri with funds to be used by it to compensate slave owners for the slaves it emancipated was passed by both Houses of Congress with slight variations, the conflicting versions of the bill were not resolved before the end of the session. When Congress reconvened, the situation had changed because of the developments on the war front and because it appeared likely that the proposal for the Thirteenth Amendment to abolish slavery would be considered.[189] Although the bill did not become law, it provides an extremely important insight into the operation of the institution of the slavery institution with regard to unborn children, to the understanding of the members of Congress of this operation, and to their purpose and desire to provide for the grant to them of the right to freedom. What this right to freedom was to mean for unborn children was the same that it meant for others who had been subjected to the yoke of slavery. It was, first of all, to be recognized as a "person" like other human beings in this country. It was also to mean, as a result of the enactment of the more than ten statutes abolishing slavery in various contexts between 1862 and 1865[190] and of the adoption of the Thirteenth Amendment,[191] protection in the exercise or enjoyment of the fundamental rights to life, liberty, and property and equal protection of the laws for the security of these vital human interests.[192]

A fourth type of legislation by which Congress dealt with problems faced by an unborn child was the District of Columbia Divorce Act of

1860.[193] This Act provided that the issue of a second and bigamous marriage

> born or begotten before the commencement of the suit (for divorce), shall be deemed to be the legitimate issue of the parent who, at the time of the marriage, was capable of contracting.

The conferring of the status of legitimacy upon the unborn child was conditioned upon the second marriage having been contracted in good faith with the belief that the former spouse was dead. Section 10 of the Act granted power to the court granting the divorce to direct which parent was to have guardianship of the children of the marriage dissolved under the the authority of the Act. This statute clearly evidences a concern for the welfare of the child in the womb as well as for the born child. A suit for a divorce in the case of a bigamous marriage might be filed at the time that the woman who was party to a second marriage was pregnant. Not only a child who had been born before the filing of that suit but also a child who had been conceived before that event was to be legitimated under the statute. The divorce decree might well be granted before the birth of the child who had been conceived before the filing of the suit leading to that decree. There was good reason for the Congress to be concerned with the legitimacy status of unborn children under the common law. Unless an unborn child was legitimated, it might be barred from receiving a devise under the will of grandparent or other relative providing for the "children" of the parents of that unborn child.[194]

The fact that Congress enacted at least fourteen statutes between 1860 and 1873 concerned with the right to life and other important interests of unborn children must be taken as extremely probative of the fact that Congress, like all of the States during and prior to this period, considered the unborn child as a person to be protected by the legal order. Professor Carl N. Degler, who testified previously before this Subcommittee, does not succeed to any degree in discharging the "heavy burden" that Mr. Justice Black stated in the South-Eastern Underwriters Association[195] case must be discharged by one who attempts to demonstrate that the framers of and states ratifying a constitutional provision did not intend to give full operation to the meaning to the words or concepts of the provision that they had at the time it was adopted. It is completely irrelevant that, as he states in his argument.

> no historian, to my knowledge, has even raised the argument, much less sought to defend the proposition that a fetus was intended to be protected by any clause of the Fourteenth Amendment or that any construction of that amendment could be used to prohibit a state from permitting abortions . . .196

The question of interpretation presented cannot be properly resolved by a counting of the noses of historians or professors of law who have not made or raised arguments concerning the proper meaning of the constitutional provision in question. The question must be addressed by regard for the proper notions of constitutional interpretation and their application to the relevant data bearing upon the particular provision whose meaning is to be determined. Moreover, when Professor Degler asserts that "most historians believe that protection of the rights of former slaves was the primary purpose of the amendment",[197] he evinces two gross misunderstandings. As previously demonstrated, the unborn child was one of the individuals upon whom the bond of slavery rested in this country. Congress specifically recognized this fact and acted by at least eleven statutes prior to the adoptions of the Thirteenth Amendment as well as by that amendment to lift that bond from all individuals, including the unborn children of slaves, upon whom it had rested and to prevent that bond from ever again being visited in any form upon any other human beings. Secondly, the Supreme Court has long since held, upon the basis of overwhelming evidence that the Fourteenth Amendment applies, as its framers clearly intended, to every human being in our society. Senator Allen G. Thurman of Ohio in the course of debates over the civil rights legislation of 1875 expressed this intent particularly well:

> Every human being within the jurisdiction of the State shall be entitled to the equal protection of the laws. . . . We have a constitutional amendment that makes all men equal before the law.
>
> You shall not deny it to the alien, you shall not deny it to the Chinaman; you shall not deny it even to the Indian, though he be not taxed. You shall not deny it to any person within your jurisdiction, be he sane or be he insane, be he old or be he yound, be he innocent or be he criminal, be he learned or be he ignorant. . . . (or) the minor . . . (or) women . . . (or) anybody . . .(insertion supplied). 198

If we look to the context in which Congress acted in enacting the legislation previously reviewed and in submitting the Thirteenth and Fourteenth Amendments, we see that their concern with unborn children and their right to life and other interests was as natural as it was necessary from their point of view. A major part of the

context in which Congress acted involves the understanding by its members of when the life of a person begins. We already know that one of the primary purposes of the Thirteenth Amendment, as well as Section 1 of the Fourteenth Amendment, was to redefine the concept of person so as to cause it thereafter to include all human beings.[199] The framers of these amendments time and again stated their view as to when human life begins. It was the same view that was held by John Locke whose writings were so influential with the original framers of our Constitution. The Lockeian concept of man begins with the unborn child of human beings. In his view, the parents' act of generation or begetting of their child is not one of making that child but rather one of being the mere occasion for bringing into existence that new human life. Locke observed that "this curious structure" and "admirable engine" which is the unborn child's body naturally unfolds and grows and moves according to a foreordained design in its mother's womb where it is nourished out of her own substance over a long time before its birth. While it be difficult to imagine, he stated, that the yet unformed embryo should have within it the rational soul that he deemed essential for it to be a human being immediately following the father's participation in the act of generating it, still it was clear to him that the life of even the unformed human embryo and all subsequent stages of the unborn child depend upon the presence of the rational and living soul from which it mysteriously received its specifically human life. This soul, according to Locke, each human child receives directly from God who is, thus, the sole Author of each human individual. For this reason,, according to Locke, one is a human being not only at birth but also as an unborn child from and after being begotten by its parents.[200]

We see the Lockican concept of man repeated and asserted by all of the leading Republican statesman who were responsible for enacting the legislation previously reviewed and for submitting the Thirteenth and Fourteenth Amendments for ratification. Perhaps no statesman of the twenty year period preceding the adoption of this legislation and the submission of these amendments had more influence upon the Republican statesmen of the 1862-1875 period than Congressman Joshua R. Giddings of Ohio. Most of these statesmen, including Abraham Lincoln, looked to him as their mentor. In two famous speeches he stated

the nature of the contending forces just prior to 1860 and the principles which these statesmen were to act in enacting the above legislation and in submitting these amendments:

> (W)e all acknowledge the existence of a Supreme Being; that he is the Creator, that we are brought into life by His will. . . . Our fathers, recognizing God as the author of human life, proclaimed it a "self-evident" truth that every human being holds from the Creator an inalienable right to live, . . . and enjoy happiness. . . .(T)hese rights are equally self-evident as the existence of our race; . . . they are inherent, inalienable, and common to all men; . . . they constitute the great moral ligament which binds man to his Creator, connects earth with heaven, and unites the human race in one common brotherhood . . . These rights constitute an element of the human soul; they cannot be alienated by the individual; nor can any association of men, or any earthly power, separate the humblest of the human race from them.
>
> (P)atriots hold life to be the gift of God. They regard it sacred; they look upon its invasion as a crime; that as the Creator bestows existence upon those who bear His image, it becomes the duty of individuals, of associations, and of government, to protect each and every human being in the enjoyment of life; that at this point human legislation commences, limited in its appropriate powers to the protection of life, and not to its destruction; that human governments hold no other rightful powers in regard to life than to protect its enjoyment; that the execution of pirates and murderers, and those who invade our country, is allowed only for the purpose of protecting society. 201
>
> Our fathers, in the Declaration of Independence, laid down their doctrines so plain that the wayfaring man cannot err therein. They having asserted the right of all men to life, liberty, and happiness, the framers of the Constitution took up the subject where the patriots of '76 left it, and ordained in the most explicit language that "no person shall be deprived of life, liberty, or property, without due process of law." They intended to secure every individual under Federal jurisdiction in the rights proclaimed in the Declaration of Independence. There was no exception . . . They said all men . . . 202
>
> This relation of man to the Creator is repudiated by a portion of the American people. They deny that we hold any inalienable rights from God. They deny that the right to live, to protect life, and to attain moral elevation and happiness, is derived from Heaven, or is superior to human enactments.
>
> If He has endowed our race with any right whatever, it surely is the right to live. If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, that all men, without respect to men, without respect to complexion or condition, hold from the Creator the right to live, who shall determine what portion of the community shall be slain? And who may perpetrate the murders? 203

Speaking of the impact of slavery upon the slave family, he stated

> The parent is not permitted to teach or govern his child; nor is the child permitted to honor or obey his parent. . . . The master sells him who is called husband, or her who calls herself wife, while he retains the child; or he sells the child, and retains the parent. These separations are but the practical workings of that infidelity which denies to parents and children those inalienable rights which God and nature have bestowed upon them. 204

The views of Giddings were echoed by every leading Republican

statesman who spoke in behalf of the legislation reviewed above and of the submission of the Thirteenth and Fourteenth Amendments. Thus, Congressman John A. Bingham, who supported that legislation and drafted Section 1 of the Fourteenth Amendment, stated:

> (T)he Constitution of the United States, . . . declared that "no person shall be deprived of life, liberty, or property without due process of law (Fifth Amendment). By that great law of ours it is not inquired whether a man is "free" by the laws of England; it is only to be inquired is he a man, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty. . . . Before that great law the only question to be asked of the creature claiming its protection is this: Is he a man? Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal. 205

Similarly, Senator Lyman Trumbull, who reported the Thirteenth Amendment proposal and authored the Civil Rights Act of 1866 as chairman of the Senate Judiciary Committee, stated:

> I do believe in the Declaration of Independence, and so does the Republican party believe in it, that all men were endowed by their Creator with certain inalienable rights. . . . Destroy all human government, wipe out all organized society; take man as he came from the hands of his Maker, and tell me, if you please, what superior authority one has over another? If one has superior authority over another, how did he get it before government was organized?
>
> The object of inserting the words in the Declaration of Independence has been proclaimed a thousand times. It was this: our ancestors were a people fleeing from the tyranny and the despotisms of the Old World; escaping from countries where the idea prevailed that one man had a Divine right to rule over another; and they meant, when they were proceeding to form a government, as the first thing they did, to write it down in that immortal Declaration, that their posterity in all time might see it; that they might look to it as the polar star by which they should ever be guided in their future legislation, and should never forget it -- the great natural right of all men to life, liberty, and happiness.205a

It is impossible by any fair reading of these and the many other statements by Republican statesmen in the period from 1858 through 1875 to interpret them as other than recognizing that human life begins at the creation of the soul by God in each individual human being, an Act which takes place in conjunction with the begetting or conceiving of a human being by his or her parents. Persons are created by God and then they are born. One is a person before one is a citizen. One is a person by creation, a citizen by birth. The definition of a citizen of the United States in the Fourteenth Amendment is the natural product of a view of man as created by God and granted citizenship by political society. The unborn child was protected by the common law and statutes of the states and by the legislation and Thirteenth and Fourteenth Amendments reviewed above because the framers

of this law and members of our political society generally viewed the unborn child as long since a person from the Act of creation by God. Their view was the basis for this law.[205b] It is a view that many still hold. As Reverend Jesse Jackson has stated:

> From my perspective, human life is the highest good, the summum bonum. Human life itself is the highest human good and God is the supreme good because He is the giver of life. That is my philosophy. Everything I do proceeds from that religious and philosophical premise. Life is the highest good and therefore you fight for life, using means consistent with that end.
>
> In the abortion debate one of the crucial questions is when does life begin. Anything growing is living. Therefore human life begins when the sperm and egg join and drop into the fallopian tube and the pulsation of life take place. From that point, life may be described differently (as an egg, embryo, fetus, baby, child, teenager, adult), but the essence is the same. The name has changed but the game remains the same.
>
> Human beings cannot give or create life by themselves, it is really a gift from God. Therefore, one does not have the right to take away (through abortion) that which he does not have the ability to give. 206

Reverend Jackson follows the tradition of John Locke, the fathers of our original Constitution, the Republican statesmen who framed the the federal legislation that protected the lives and other interests of unborn children, and the States that similarly protected unborn children and ratified the Thirteenth and Fourteenth Amendments. Their common view of the beginning of human life is not only a view that many people, including the professionals in the life sciences, judge to be the correct one today but is also one that has been a basic part of our fundamental law since the ratification of the Thirteenth Amendment.

## IV. The Human Life Statute Should Prohibit Abortions

Although Section 1 of S. 158 states that it is addressed to the subject "of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law," the finding and declaration contained in that section is the whole substantive content of the statute. S. 158 does not prohibit conduct that operates to destroy the life of an unborn child by an abortion. It states no substantive rules providing the unborn child with federal protection of its life against an abortion performed by the United States, a State, a political subdivision or agency of either, or a private individual. The bill imposes no legal duty upon a State or a political subdivision or agency of a State to enact legislation protecting the

lives of unborn children against abortion. It provides no guidelines or criteria for a State or a political subdivision to follow in eancting legislation relative to protection of unborn children from abortion, should either elect to do so. The statute creates no cause of action in behalf of either the United States, the unborn child, or other private individual against a State or political subdivision which fails to enact legislation to protect the lives of unborn children against abortion or which performs abortions or allows abortions to be performed or appropriates funds or uses government property for performance of abortions. S. 158, as explained by the lawyers primarily responsible for its theory and content, does nothing more than confer authority or an option upon States and their political subdivisions either to protect or not to protect unborn children against abortion.[207] Indeed, the original draft of the proposed statute explicitly provided the following:

> The several states are and shall remain free to enact legislation to protect the right to life as defined herein . . . to the extent that they in their sole discretion deem appropriate. 208

Thus, a state may, after the enactment of S. 158, choose to enact no legislation at all to protect unborn children from abortion before birth, as my own state has chosen since the decision in Roe v. Wade. Or, since S. 158 has no guidelines nor requirements concerning the kind or degree of protection to be provided by a State to an unborn child against abortion, a State may choose to protect only "viable" unborn children or only "viable" unborn children who have no "fetal abnormality". Or a State may choose to protect unborn children only after the twelfth week of gestation. Another State may enact legislation protecting unborn children only after the thirtieth week of gestation. Still another State may choose not to protect unborn children, whatever their stage of gestation, who were brought into being by "rape or incest" or whose mothers had rubella. Moreover, another State may choose not to protect an unborn child from abortion where both of its parents desire to have it destroyed by that means.

The practical operation of S. 158 is plainly predictable. Even before the Supreme Court's decision in Roe v. Wade in 1973 many States had seriously weakened the substantive rules protecting unborn children contained in their anti-abortion statutes. Some permitted abor-

tion on demand.[209] Others engrafted the "health of the mother" exception onto their anti-abortion statute as well as other exceptions.[210] In still other States the traditional type criminal anti-abortion statutes were only weakly enforced. Since the Court's abortion decision large numbers of our citizens have become accustomed to resorting to abortions as a means of limiting their family size and getting rid of "unwanted children". Moreover, a multi-million dollar abortion industry has become deeply entrenched in our national economy. We can expect that it will be most difficult to get some State legislatures to enact anti-abortion statutes with strong substantive provisions prohibiting abortion and with effective criminal and civil sanctions and procedures for their enforcement. As already indicated some few state-, such as my own state since 1973, may not act at all and thus allow abortions to be performed clear up to the point of birth. Even if many States enact effective anti-abortion statutes and enforce them vigorously, others will enact them with exceptions for the mother's "health", rape and incest, fetal deformity, and so on. In this likely event, the abortion industry will simply move to the States that enact no anti-abortion statutes or enact them with exceptions that permit considerable abortions to be performed. Pregnant women will simply utilize interstate transportation to go from their home "anti-abortion" states to the "abortion" states. Rather than cut down the incidence of the more than 1,5000,000 abortions now being performed annually,[211] S. 158 will most probably operate, if its constitutionality is sustained, to allow some states to rid themselves of their abortion mills and the physician-abortionists and cause other states to become the abortion centers of the nation. If the concept of S. 158 is to be adopted, Congress should seriously consider exercising at the same time its authority under the Commerce Power for prohibiting the use of the agencies engaged in interstate transportation for the purpose of obtaining an abortion prohibited by the type of provision set forth in the alternative Human Life Statute which I have proposed. The Congress has utilized the Commerce Clause a number of times in the past to proscribe the use of agencies of interstate transportation for the transportation of specified goods or for the accomplishment of apecified purposes deemed by Congress to present a public evil. A fairly close analogy to the suggested use of the Commerce Power is the Mann Act

which was enacted in 1910.[212] That Act prohibits the knowing transportation or procuring of transportation in interstate or foreign commerce of any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose. Enactment of a similar statute with regard to use of transportation in interstate commerce for the purpose of obtaining an abortion prohibited by a provision such as that suggested in the alternative Human Life Statute would diminish the probable effect of Congress enacting S. 158.

It would also be my suggestion that the Subcommittee consider adoption of the theory of Congressional power to enact a Human Life Statute proposed by this paper. That theory, as described above, is based upon a direct challenge to the interpretation of the Fourteenth Amendment made by the Supreme Court in Roe v. Wade. The theory underlying the present form of S. 158 has a number of flaws although I recommend retaining it as a secondary theory of Congressional power to enact the statute. Section 2 of the alternative Human Life Statute, which is set forth in an appendix to this paper, would accomplish this joinder of theories of Congressional power as follows:

> Sec. 2. The Congress finds that:
>
> (a) the histories of the thirteenth and fourteenth articles of amendment to the Constitution reveal that their framers viewed the right to life as the paramount and most fundamental right of a person and that a primary purpose of these framers and the several states was to protect all human beings, irrespective of age, health, function, or condition of dependency, and to include as human beings their unborn offspring at every stage of their biological development including fertilization, as persons by the constitutional guarantees of the right to life; and
>
> (b) that scientific and medical evidence indicates that a human being exists at every stage of biological development including fertilization.

The addition of Section 2(a) to S. 158 would prevent the Supreme Court from saying that Section 2(b) is wholly irrelevant to the issue of whether an unborn child is a person protected by the constitutional safeguards for the right to life. It would also make it extremely difficult for the Supreme Court, as an integral tribunal, to avoid reconsidering the correctness of its interpretations of the Fourteenth Amendment in Roe v. Wade. It would likely compel the Court to bring into focus in reconsidering the correctness of these interpretations the Thirteenth Amendment as well which the legislative history of the two amendments shows to be the dominant amendment and the one around

which the central doctrines of the framers were discussed and elaborated. The Subcommittee should, in my judgment, support Section 2 of the alternative Human Life Statute, with a careful brief demonstrating that all of the relevant aspects of the proper notions of constitutional interpretation when applied to both of these amendments and the relevant data concerning the purposes of their framers and the ratifying states and the problem of justice involved demand that these amendments be interpreted to protect the unborn child as a person under their safeguards for the right to life. The paper presented here is an outline of the kind of data that should be presented. There is much more that can be presented.

Finally, I would suggest that the Subcommittee consider whether it would not be wise to set forth a prohibition against both official and private action which is directed toward depriving any unborn person of life. Section 4 of the alternative Human Life Statute proposed here together with Sections 2 and 3 of that statute basically set forth the content of the Human Life Amendment as proposed by the Legal Advisory Committee for the National Right to Life Committee.[213] It is essentially the same in substance as the original Human Life Amendment proposal of the National Right to Life Committee. It was my privilege to sit on this Legal Advisory Committee both in 1973-1974 when the original NRLC Amendment proposal was developed and in 1980-1981 when the proposed revision of this proposal was drafted. Section 4 of the alternative Human Life Statute reads as follows:

> Sec. 4. No unborn person shall be deprived of life by any person: Provided, however, That nothing in this section shall prohibit a law permitting only those medical procedures required to prevent the death of a pregnant woman; but this law must require every reasonable effort be made to preserve the life and health of the unborn person.

Substantively, the operation of this section would be identical with the operation of Section 2 of the Human Life Amendment originally proposed by the National Right to Life Committee and of Section 3 of the revision proposed in this original version by the Committee's Legal Advisory Committee in 1981.[214] It would provide a federal rule protecting unborn children against abortion. It would give effect to any state law in accordance with the proviso that declares that medical procedures to prevent the death of a pregnant woman are not prohibited and requires that every reasonable effort shall be made to preserve

the life and health of the unborn person. The person to whom the prohibition in Section 4 is directed is defined in a definitional section as follows:

> Sec. 7. In this Act:
>
> (a) The term "person", as applied to one other than an unborn person, includes one or more individuals, governments, government agencies, political subdivisions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.
>
> (b) The term "governments" includes the United States, the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Guam.

These definitions mean that all governmental and private action of the type prohibited by Section 4, as supplemented by state law in accordance with the proviso of that section, is covered by the statute. This section accomplishes much of what the present form of S. 158 is designed to accomplish in the way of engendering state action with respect to abortion. It avoids all of the difficulties, however, that S. 158 would inevitably create. Beyond all this, it would put the Federal Government on the battle line against the holocaust presently going on and not leave the battle to be fought by others.

If the Subcommittee were to accept the foregoing suggestions drawn from the alternative Human Life Statute, it would want to consider whether it would be wise to include a section dealing with the enforcement of the prohibition contained in Section 4 of that alternative statute. It is my recommendation that such a section be included. and that it utilize civil as opposed to criminal sanctions. Here, again, a role is left for State Governments to perform. The criminal law of abortion so far as abortions occurring within States has been State law. On the other hand, it is quite likely that the most needed enforcment law will be that which utilizes civil sanctions. As previously stated, the abortion industry is well entrenched after nearly a decade of operation. Criminal sanctions are difficult to enforce and the proof is sometimes difficult to assemble. The Federal Government by use of civil enforcement procedures similar to those utilized in the enforcement of our Federal Antitrust Law and Federal Civil Rights Law will probably be more effective in dealing with the larger abortion operations, particularly those operating on a regional or national

basis than State Governments having only criminal law to deal with these operations. If, however, a State does choose to enact effective civil sanctions for enforcing its anti-abortion law, then the way is clear for there to be the kind of federal-state cooperation in the enforcement of anti-abortion law that has developed in the enforcement of antitrust law. Section 5 of the alternative Human Life Statute would provide for this federal-state enforcement cooperation in the following manner:

> Sec. 5. (a) Whenever any person has engaged or there are reasonable grounds to believe any person is about to engage in any act prohibited by this Act, any unborn person affected thereby through a guardian or next friend, the executor or administrator of a deceased unborn person, the Attorney General of the United States, the chief legal officer of any State, or any person aggrieved thereby may institute an an action for preventive relief, including an application for a temporary or permanent injunction, restraining order or other order. When injury or death is caused an unborn person by a willful act or omission prohibited by this Act, an action may be maintained by any person authorized by this subsection to institute an action for preventive relief for damages sustained by the injured or deceased unborn person or $25,000, whichever is greater, in behalf of the injured unborn person or, where that person's death has been caused by that act, in behalf of the members of the family of the deceased who did not consent to that act. Section 722 of the Revised Statutes (42 U.S.C. 1988), as amended, shall apply to any action brought under this subsection.
>
> (b) It shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General of the United States, to institute proceedings in equity to prevent and restrain violations of this Act.
>
> (c) The several district courts of the United States and appropriate State and local courts of general jurisdiction are hereby invested with concurrent jurisdiction to prevent and restrain violations of this Act by any persons or to award damages for such violations.
>
> (d) The proceedings authorized by this section may be brought in a district court of the United States without respect to the amount in controversy.
>
> (e) An action to enforce the cause of action for damages authorized by this section shall be forever barred unless commenced within four years after the cause of action accrued.

APPENDIX

HUMAN LIFE STATUTE

(alternative to S. 158)

A BILL

To provide protection for the right to life of unborn children.

Be it enacted by the Senate and House of Representatives of the

United States of America in Congress assembled, Thattitle 42 of the United States Code shall be amended at the end thereof by adding the following chapter:

"CHAPTER 101

"Section 1. This Act may be cited as the "Right to Life Act of 1981".

"Sec. 2. The Congress finds that:

(a) the histories of the thirteenth and fourteenth articles of amendment to the Constitution reveal that their framers viewed the right to life as the paramount and most fundamental right of a person and that a primary purpose of these framers and the several states was to protect all human beings, irrespective of age, health, function, or condition of dependency, and to include as human beings their unborn offspring at every stage of their biological development including fertilization, as persons by the constitutional guarantees of the right to life, and

(b) that scientific and medical evidence indicates that a human being exists at every stage of biological development including fertilization.

"Sec. 3. Upon the basis of the findings stated in this Act and in the exercise of the powers of Congress, including its powers under section 2 of the thirteenth article of amendment, section 5 of the fourteenth article of amendment, and section 8 of Article I in relation to the fifth article of amendment to the Constitution, the Con gress hereby declares that for the purpose of enforcing the constitutional guarantees of the right to life, all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development including fertilization, are persons.

"Sec. 4. No unborn person shall be deprived of life by any person: Provided, however, That nothing in this section shall prohibit a law permitting only those medical procedures required to prevent the death of a pregnant woman; but this law must require every reasonable effort be made to preserve the life and health of the unborn person.

"Sec. 5. (a) Whenever any person has engaged or there are reasonable grounds to believe any person is about to engage in any act prohibited by this Act, any unborn person affected thereby through a

guardian or next friend, the executor or administrator of a deceased unborn person, the Attorney General of the United States, the chief legal officer of any State, or any person aggrieved thereby may institute an action for preventive relief, including an application for a temporary or permanent injunction, restraining order or other order. When injury or death is caused an unborn person by a willful act or omission prohibited by this Act, an action may be maintained by any person authorized by this subsection to institute an action for preventive relief for damages sustained by the injured or deceased person or $25,000, whichever is greater, in behalf of the injured unborn person or, where that person's death has been caused by that act, in behalf of the members of the family of the deceased who did not consent to that act. Section 722 of the Revised Statutes (42 U.S.C. 1988), as amended, shall apply to any action brought under this subsection.

(b) It shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General of the United States, to institute proceedings in equity to prevent and restrain violations of this Act.

(c) The several district courts of the United States and appropriate State and local courts of general jurisdiction are hereby invested with concurrent jurisdiction to prevent and restrain violations of this Act by any persons or to award damages for such violations.

(d) The proceedings authorized by this section may be brought in a district court of the United States without respec to the amount in controversy.

(e) An action to enforce the cause of action for damages authorized by this section shall be forever barred unless commenced within four years after the cause of action accrued.

"Sec. 6. Nothing in this Act shall be construed to invalidate or limit any law of a government that grants, guarantees, or protects the same rights as are granted, guaranteed, or protected by this Act, but any law of a government that purports to require or permit any action that would be an act prohibited by this Act shall be to that extent invalid.

"Sec. 7. In this Act:

(a) The term "person", as applied to one other than an unborn person, includes one or more individuals, governments, government agencies, political subdivisions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "governments" includes the United States, the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Guam.

(c) The term "person aggrieved" includes any member of the family of an unborn person who did not consent to an action prohibited by this Act that affects that unborn person and any organization which, under its articles of incorporation or association, is organized to protect the right to life of unborn persons as one of its primary purposes.

(d) The term "family" includes a parent, brother, sister, and grandparent of an unborn person or, if none of these are living at the time the cause of action specified in Section 5 accrues, the government other than the United States of the place in which the prohibited act occurred.

"Sec. 8. If any provision of this Act or the application thereof to any person or circumstance is judicially determined to be invalid, the validity of the remainder of the Act and the application of that provision to other persons and circumstances shall not be affected by that determination."

FOOTNOTES

1. See, Witherspoon, "The New Pro-Life Legislation: Patterns and Recommendations," 7 St. Mary's L. J. 637, 684-85 (1976).

2. See, e.g., Witherspoon, Administrative Implementation of Civil Rights (Austin, University of Texas Press, 1968). I served as legal consultant to Alaska State Legislature: Joint Pipeline Impact Committee (1971-1973) and was the chief draftsman of the Alaska Pipeline Right of Way Leasing Act of 1972. I also served as legal consultant to Alaska State Legislature: Senate Special Committee on Taxation and Revenue (1975-1976) and was a principal draftsman of the Alaska Oil and Gas Reserves Property Tax Act of 1976.

3. 410 U.S. 113 (1973).

4. 410 U.S. at 153, Doe v. Bolton, 410 U.S. 179, 192 (1973)

5. Testimony, June 1, 1981, written statement, p. 5.

6. Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," 82 Yale L.J. 920, 937 (1973).

7. Letter to the Honorable Max Baucus, Senator, United States Senate, dated April 28, 1981.

8. Id. at p. 2, written statement of Professor Robert H. Bork, June 1, 1981, p. 6.

9. Written statements of Professor Noonan, May 21, 1981, of Professor Rosenblum, June 1, 1981, of Professor Uddo, June 1, 1981, and of Professor Robert F. Nagel, (not dated).

10. 384 U.S. 641 (1966).

11. 410 U.S. at 159.

12. Galebach, "A Human Life Statute," VII The Human Life Rev. 5 (1981).

13. Written statements of Professor Tribe, May 21, 1981, of Professor Bork, June 1, 1981, and of Professor Van Alstyne, of May 5, 1981, as set forth in letter to the Honorable Orrin B. Hatch, Senator, United States Senate in advance of scheduled testimony for May 21, 1981.

14. See note 7, supra.

15. Hearings, Subcommittee on Constitutional Amendments, Committee on the Judiciary, U. S. Senate, 94th Cong., 1st Sess., S.J. Res. 6, S.J. Res. 10, 11, S.J. Res. 91 (Mar. 10, Apr. 11, May 9, June 19, and Jul. 8 (1975).

16. Hearings, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, U. S. House of Representatives, 94th Cong., 2nd Sess., Proposed Constitutional Amendments on Abortion, (Feb. 4, 5, Mar. 22, 23, 24, 25 and 26, 1976) Serial No. 46.

17. Parts II through IV of this written statement are taken largely intact from this paper which bears the notation: "Copyright, 1981, Austin, Texas".

18. 60 U.S. (19 How.) 393 (1857).

19. 156 U.S. 1 (1895).

20. 109 U.S. 3 (1883).

21. See Section C of this Part beginning with text at note 66, infra.

22. United States v. Guest, 383 U.S. 745, 762, 783-84 (1966).

23. South Carolina v. Katzenbach, 383 U.S. 301 (1966), Katzenbach v. Morgan, 384 U.S. 641 (1966), Oregon v. Mitchell, 400 U.S. 112 (1970) (with respect to the ban on literacy tests).

24. Noack, Rotunda + Young, Handbook on Constitutional Law 689-92 (1978), L. Tribe, American Constitutional Law s.5-15, 273-75 (1978).

25. See, e.g., Westberry v. Gilman Paper Co., 507 F.2d 206 (5th Cir. 1975) and Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971). Murphy v. Mount Carmel High School, 543 F.2d 1189 (7th Cir. 1976) which reached a contrary result did so upon the basis primarily of an older Supreme Court decision in United States v. Harris, 106 U.S. 629 (1882) which had invalidated a criminal statute basically similar to the civil statute involved in United States v. Guest,

383 U.S. 745 (1966). The basis of the invalidation was that Section 5 of the Fourteenth Amendment did not give Congress the power to reach wholly private conduct. However, the authority of the Harris case must be viewed as substantially nil not only because of its failure to canvass the legislative history behind the amendment but also because the Supreme Court in a later case has explained the decision in that case on grounds that undercut its value today. See, Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). Another case to the contrary is Bellamy v. Mason's Stores, 508 F.2d 504 (4th Cir. 1974). In this case, however, the majority agrees that

> if the Congress should today become concerned about the integration of the public schools in Boston it seems reasonably clear that it coud constitutionally make it a criminal offense for any person to interfere by force and violence with the attendance of children at a public school. It would seem that the Congress could rationally conclude that such a statute would aid and implement the duty of the state under the fourteenth amendment to afford to all school children the equal protection of the laws. 508 F.2d at 507.

But this concession by the Court of Appeals, especially in light of Katzenbach v. Morgan, 384 U.S. 641 (1966) and similar cases, undercuts the merits of the decision it rendering in refusing to apply 42 U.S.C. 1985(c) to the wholly private action in that case.

26. See Section B of this Part.

27. Letter to William C. Jarvis, September 20, 1820, The Writings of Thomas Jefferson (Ford ed. 1899) 160.

28. Letter to Judge Roane, September 6, 1819, as quoted by Representative Philemon Bliss, Cong. Globe, 35th Cong., 2d Sess. (Feb. 7, 1859) App. 76.

29. II Messages and Papers of the Presidents (Richardson ed. 1896) 576, 581-83.

30. 4 Elliot, Debates on the Federal Constitution 549-40 (1836).

31. 60 U.S. (19 How.) 393 (1857).

32. Cong. Globe, 36th Cong., 1st Sess. (May 19, 1860) App. 351.

33. Cong. Globe, 36th Cong., 1st Sess. ( , 1860) 54.

34. I The Collected Works of Abraham Lincoln (Basler ed. 1953) 494, 516, II 255.

35. 6 Richardson, Messages and Papers of the Presidents (1897) 5, 9-10.

36. Cong. Globe, 38th Cong., 2d Sess. (Feb. 23, 1865) 1014.

37. 12 Stat. 376 (1862), 12 Stat. 432 (1862), 12 Stat. 597 (1862), 12 Stat. 664-665 (1863), 13 Stat. 311 (1864), 13 Stat. 30 (1864), 13 Stat. 32 (1864), 13 Stat. 47 (1864), 13 Stat. 85, 88 (1864), 13 Stat. 200 (1865), and 13 Stat. 507 (1865).

38. 12 Stat. 432 (1862).

39. United States Constitution, thirteenth, fourteenth, and fifteenth articles of amendment, sections 2, 5, and 2, respectively.

40. CONG. GLOBE, 36th Cong., 1st Sess., (Apr. 17, 1860) App. 236.

41. CONG. GLOBE, 36th Cong., 1st Sess., (Apr. 17, 1860) App. 236.

42. Id. at 234-36.

43. CONG. GLOBE, 36th Cong., 1st Sess., (Apr. 24, 1860) 1839.

44. CONG. GLOBE, 38th Cong., 1st Sess., (Apr. 8, 1864) 1482.

45. Id. at 1481.

46. Id.

47. CONG. GLOBE, 36th Cong., 1st Sess., ( , 1860) 918-21.

48. For example, Senator Charles Sumner, CONG. GLOBE, 37th Cong., 2d Sess. (Mar. 31, 1862) 1446-49. CONG. GLOBE, 38th Cong., 1st Sess., (Apr. 8, 1864) 1480-82.

49. CONG GLOBE, 42nd Cong., 1st Sess., (Mar. 31, 1871) App. 83.

50. J. Burns, ROOSEVELT: THE LION AND THE FOX 163 (1956)

51. Id. at 166, 175, 179-81, 191-94, 215-25.

52.

53. 295 U.S. 330 (1935).

54. 295 U.S. 495 (1935).

55. 298 U.S. 238 (1936).

56. 297 U.S. 1 (1936).

57. 156 U.S. 1 (1895).

58. 4 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 297 (1938).

59. Leuchtenberg, The Origins of Franklin D. Roosevelt's "Court-Packing" Plan, 1966 SUP. CT. REV. 347.

60. 301 U.S. 1 (1937).

61. 49 Stat. 449 (1935), 29 U.S.C. 151 et seq.

62. 301 U.S. at 36-37.

63. United States v. E.C. Knight Co., 156 U.S. 1 (1895).

64. Hammer v. Dagenhart, 247 U.S. 251 (1918).

65. Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

66. 109 U.S. 3 (1883).

67. 27 L.Ed. at 839.

68. 42 U.S.C. 1973 et seq. (1975).

69. 79 Stat. 438, s. 4, 42 U.S.C. 1973b(e) (1970).

70. 79 Stat. 443, s. 11, 42 U.S.C. 1973i(b) (1975).

71. 79 Stat. 443, s. 12, 42 U.S.C. 1973j(a) (1968).

72. 89 Stat. 400-402, ss. 201-203, 206, 89 Stat. 402, 404, 405, 42 U.S.C. 1973b(f)(1,2) (1975, 42 U.S.C. 1973c (1975).

73. Report of the Senate Judiciary Committee, Voting Rights Act of 1965 Extension, 94th Cong., 1st Sess. (July 22, 1975) 11.

74. 79 Stat. 443, s. 12, 42 U.S.C. 1973j(d) (1975).

75. 79 Stat. 443, s. 12, 42 U.S.C. 1973j(f) (1975).

76. 79 Stat. 402, 404, s. 402, 42 U.S.C. 19731(e) (1975).

77. 383 U.S. 301 (1966)

78. 4 Wheat. 316, 421, 4 L.Ed. 579, 605 (1819).

79. 383 U.S. at 326.

80. 384 U.S. 641 (1966).

81. 383 U.S. 745 (1966).

82. 18 U.S.C. 241.

83. 383 U.S. at 762.

84. 383 U.S. at 782-84.

85. See note 25, supra.

86. See note 24, supra.

87. See, e.g., 82 Stat. 73, 18 U.S.C. 245 (1968).

88. See, Senate Report No. 721, 96th Cong., 2d Sess. (Nov. 2, 1967), 2 U. S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS (1968) 1839-41.

89. 410 U.S. at 153, Doe v. Bolton, 410 U.S. 179, 192 (1973).

90. 116 U.S. 616 at 633-634, 29 L.Ed. 746 at 752.

91. 109 U.S. 20, 27 L.Ed. 835, 842 (1883)

92. CONG. GLOBE, 39th Cong., 1st Sess. (March 2, 1866) 1151.

93. CONG. GLOBE, 39th Cong., 1st Sess. (December 19, 1865; January 19, 1866) 77, 322-323.

94. CONG. GLOBE, 37th Cong., 2d Sess. (April 11, 1862) 1638-1640.

95. Jacobus tenBroek, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951) 219-221.

96. Cong. Globe, 39th Cong., 1st Sess. (May 8, 1866) 2462. Also see similar statements by ongressman Thomas D. Elliot of Massachusetts. Id. (May 9, 1866) 2511; Congressman John M. Broomall of Pennsylvania, Id. 2498; Congressman Thaddeus Stevens also of Pennsylvania, Id. (May 8, 1866) 2459; Senator Luke Poland of Vermont, Id. (June 5, 1866) 2961; Senator Richard Yates of Illinois, Id. (June 8, 1866) 3037; and Senator Jacob M. Howard of Michigan, Id. (May 30, 1866) 2896.

97. 12 Wall. 457, 531, 20 L.Ed. 287 at 306 (1871).

98. 253 U.S. 221 (1920).

99. 322 U.S. 533 at 538-539 (1944).

100. Ibid.

101. 116 U.S. 616, 635 (1886).

102. 391 U.S. 145, 150 at n. 14, 151-156 (1968).

103. 448 U.S. 555, 100 S.Ct. 2814, 2821-9, 65 L.Ed. 2d 973, 982-992 (1980).

104. Cong. Globe, 38 Cong., 1st Sess. (April 8, 1864) 1482.

105. Id. at 1481.

106. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 at 200 (1819).

107. 342 U.S. 165 at 169, 172-173 (1952).

108. Weber v. Aetna Casualty & Surety Co. 406 U.S. 164 at 175 (1972).

109. Senator Charles Sumner of Massachusetts, for example, regularly expressed the view between 1862 and 1866 that the Constitution had from its beginning been drawn to treat all human beings as persons with respect to the fundamental human rights but that since the courts had refused, as in the Dred Scott case, to interpret the Constitution in accordance with the appropriate interpretative principles, it was necessary for Congress to enact legislation and, ultimately, to submit the Thirteenth Amendment to the people all for the purpose of giving effect to the principle enunciated in the Declaration of Independence that all human beings are persons, created equal by God, and entitled to equality before the law. Thus, he stated:

> . . . in the eye of the Constitution, every human being within its sphere . . . from the President to the slave, is a person. Cong. Globe, 37th Cong., 2d Sess (March 31, 1862) 1449.
>
> Let the Constitution be rightly interpreted by a just tribunal, and slavery must cease here at once. Id. at 1447.
>
> Now . . . if a tribunal . . . should undertake to declar that two and two make five, . . . I do not think it would be presumtious of me to call that decision in question. But the Dred Scott decision was as absurd and irrational as such a reversal of the multiplication table besides shocking the moral sense of mankind . . .
>
> But unhappily the courts will not perform the duty of the hour, and we must look elsewhere. An appeal must be made to Congress; and here, as has been fully developed, the powers are ample. By a single brief statute, Congress may sweep slavery out of existence. . . . there are other measures by which this end may be hastened. . . .
>
> But all these will not be enough. The people must be summoned to confirm the whole work. It is for them to put the cap-stone upon the sublime structure. An amendment of the Constitution . . . will give completeness and permanence to emancipation, and bring the Constitution into avowed harmony with the Declaration of Independence. Cong. Globe, 38th Cong., 1st Sess. (April 4, 1864) 1482.

Other Republican Senators and Congressmen generally agreed with the above views of Senator Sumner except for his views that Congress could by enactment of a simple statute accomplish the objective of giving effect even in slave states to the principles of the Declaration of Independence and of the Fifth Amendment that all men are persons and are entitled to equal protection of the laws in the exercise of the basic human rights. Senator Lyman Trumbull, who reported to the Senate the proposal for the Thirteenth Amendment as Chairman of the Committee on the Judiciary, stated that the acts of Congress which had freed the slaves in the Territories and other places subject to the exclusive jurisdiction of Congress as well as the slaves who had fled from rebel slavemasters and the President's Emancipation Proclamation had been only partially operative and effective. He concluded:

> If then we are to get rid of the institution, we must have some more efficient way of doing it than by the proclamations that have been issued or the acts of Congress which have been passed.
>
> Some, however, say that we may pass an act of Congress to abolish slavery altogether . . . I am as anxious to get rid of slavery as any person; but has Congress authority to abolish slavery everywhere . . .? Why, sir, it has been an admitted axiom from the foundation of this Govern-

> ment, among all parties, that Congress had no authority to interfere with slavery in the States where it existed.
>
> . . . the only effectual way of ridding the country of slavery, and so that it cannot be resuscitated, is by an amendment of the Constitution forever prohibiting it within the jurisdiction of the United States. This amendment adopted, not only does slavery cease, but it can never be reestablished by State authority, or in any other way than by again amending the Constitution. Cong. Globe, 38th Cong., 1st Sess. (March 28, 1864) 1313-1314.

The day after ratification of the Thirteenth Amendment, Senator Trumbull stated:

> I desire to give notice that I shall to-morrow, or on some early date thereafter, ask leave to introduce a bill . . . to secure freedom to all persons within the United States, and protect every individual in the full enjoyment of the rights of person and property and furnish him with means for their vindication. In giving this notice I desire to say that it is given in view of the adoption of the constitutional amendment abolishing slavery.
>
> . . . I consider that under the constitutional amendment Congress is bound to see that freedom is in fact secure to every person throughout the land; he must be fully protected in all his rights of person and of property; and any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the Constitution, . . .Cong. Globe, 39th Cong. 1st Sess. (December 19, 1865) 77.

Senator Charles Sumner in his argument for adoption of the resolution for the Thirteenth Amendment specifically emphasized this first and primary purpose of the Amendment to restore the recognition of the personhood of all human beings contained in the Declaration of Independence, the Preamble to the Constitution, and the Fifth Amendment's Due Process Clause. All men, having been created equal by God and endowed by Him with certain inalienable rights, including those to life, liberty, and the pursuit of happiness, were recognized by these great documents to be, as human beings, included within the persons entitled thereby to protection of these rights by the legal order and to equality before the law. Referring to these "essential elements of a 'republican form of government", he asked: "how can any 'person' be held as a slave?" Indeed, he suggested that a more precise form for the Thirteenth Amendment proposal would be: "All persons are equal before the law, so that no person can hold another as a slave . . ." Nevertheless, it was his view that the final form of the Amendment proposal would, as "the great rule of freedom", accomplish the various objects for which he and its other proponents had offered it. Cong. Globe, 39th Cong., 1st Sess. (April 8, 1864) 1480-1483.

Congressman Thaddeus Stevens of Pennsylvania on December 18, 1865, the day the Thirteenth Amendment was declared to have been ratified, stated:

> Our fathers repudiated the whole doctrine of the legal superiority of families or races, and proclaimed the equality of men before the law. Upon that they created a revolution and built the Republic. They were prevented by slavery from perfecting the superstructure whose foundation they had thus broadly laid. For the sake of the Union they consented to wait, but never relinquished the idea of its final completion. The time to which they looked forward with anxiety has come. It is our duty to complete their work. If this Republic is not now made to stand on their great principles, it has no honest foundation, and the Father of all men will still shake it to its center.
>
> . . . This is man's Government; the Government of all men alike; not that all men will have equal power and sway

> within it. Accidental circumstances, natural and acquired endowment and ability, will vary their fortunes. But equal rights to all the privileges of the Government is innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.
>
> . . . We have turned . . . loose four million slaves without a hut to shelter them or a cent in their pockets. . . . This Congress is bound to provide for them until they can take care of themselves. If we do not furnish them with homesteads, and hedge them around with protective laws; if we leave them to the legislation of their late masters, we had better have left them in bondage. . . . If we fail in this great duty now, when we have the power, we shall deserve and receive the execration of history and of all future ages.
>
> . . . It is time that Congress should assert its sovereignty, and assume something of the dignity of a Roman Senate. Cong. Globe, 39th Cong., 1st Sess. (December 18, 1865) 74.

110. See, e.g., the statements of Senator Henry Wilson of Massachusetts upon this object of the amendment, 38th Cong., 1st Sess (March 28, 1864) 1324, and of Congressman Martin R. Thayer of Pennsylvania. In arguing for passage of the first federal civil rights act of 1866 upon the basis of the authority granted to Congress by Section 2 of the Thirteenth Amendment, the latter stated

> It was the purpose of that amendment to relieve those who were slaves from all the oppressive incidents of slavery. It would have been idle on the part of the people of the United States to say that they would abolish slavery, and at the same time to say that they would permit any section of the country to impose upon that class of persons were were liberated by that great act of justice all the concomitants, all the disabilities, and all the tyrannical restrictions which grow out of and were part of their condition of slavery. Cong. Globe, 39th Cong., 1st Sess. (March 2, 1866) 1152.

111. Senator Lyman Trumbull, who reported the proposal for the Thirteenth Amendment to the Senate as Chairman of the Committee on the Judiciary, stated:

> What was the object of the constitutional amendment abolishing slavery. . . . That amendment declared that all persons in the United States should be free. . . . Did we not mean that hereafter slavery should not exist, no matter whether the servitude was claimed as due to an individual or the state. . . . With the destruction of slavery necessarily follows the destruction of the other incidents to slavery, . . . all badges of servitude made in the interest of slavery and as part of slavery.
>
> Now, . . . the policy of the Government is to legislate in the interest of freedom. . . . to the consummation of this great object of securing to every human being within the jurisdiction of the Republic equal rights before the law.
>
> I consider that under the constitutional amendment Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights of person and property, and any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the Constitution.

With respect to the Civil Rights of 1866 which he proposed to be enacted upon the authority of the Thirteenth Amendment and which specified certain rights guaranteed to all inhabitants in the United States in

its original form, Senator Trumbull stated that it applied to "white men as well as black men," and indeed to "all persons," and was designed to secure for them "practical freedom" in these respects. Cong. Globe, 39th Cong., 1st Sess. (December 19, 1865; January 19, 29, 1866; and February 2, 1866) 77, 322-323, 474, 599.

112. Representative William Windom, who served Minnesota in the House and the Senate between 1858 and 1881, discussed the relation of the Civil Rights Act to the Thirteenth Amenment. His view of this fourth object of the amendment is typical of the view held by most of the abolitionists and Republicans. He stated:

> This, I believe, is one of the first efforts made since the formation of the Government to give practical effect to the principles of the Declaration of Independence; one of the first attempts to grasp as a vital reality and embody in the forms of law the great truth that all men are created equal and endowed by the creator with the inalienable rights to life, liberty, and the pursuit of happiness. If there be any reasonable objection to the bill, it is that it does not go far enough. But, so far as it does go, it is, in my opinion, in strict conformity with the spirit and design of the grand old architects who, when they laid the foundations of our republican edifice, made these rights of human nature the chief corner-stone.
>
> A true republic rests upon the absolute equality of rights of the whole people, high and low, rich and poor, white and black.
>
> (This bill) provides safeguards to shield them from wrong and outrage, and to protect them in the enjoyment of that lowest (first and primary) right of human nature, the right to exist. Cong. Globe, 39th Cong., 1st Sess. (March 2, 1866) 1159.

Congressman Joshua R. Giddings of Ohio time and again described the central aspect of slavery at which the Thirteenth Amendment was directed by those of whom he was the principal mentor. This was the denial of the right to life by the slavery institution. Giddings stated:

> In our slaveholding communities enactments have been passed, and are now supported, professing to authorize masters to murder their slaves. For instance, in those States the slave is denied the right of self-defense: the right to protect his life or his person. If he attempt to defend himself against the master, the master is authorized to slay him in any manner he may be able; if he run from the master, after being ordered to stop, the master is authorized to shoot him; if he die under the scourge, the master is not held responsible.
>
> But this power of the master over the life of the slave constitutes the vital element of the institution, without which slavery could not exist. It is exercised wherever slavery is maintained. Every master exercises the privilege of driving his slave, in sickness or in health, just so severely as he thinks will best subserve his own interests. It is on this principle that slaveholders openly declare it profitable to work their slaves so hard as to produce the death of the whole gang on the average of five years upon sugar plantations, and of seven upon cotton plantations; and to supply their places by other victims imported from the slave-breeding States. From official documents, it is estimated that thirty thousand human victims are thus sacrificed annually within the United States and Territories.
>
> This infidelity (to the principles of the Declaration and of the Due Process Clause), within the lasst half century, has consigned more than a million of innocent and unoffending victims to untimely graves. Our fathers, recognizing

> God as the author of human life, proclaimed it a "self-evident" truth that every human being holds from the Creator an inalienable right to live, to sustain and protect life, . . . and enjoy happiness.
>
> These wholesale murders are but the outworkings of that infidelity which denies thatGod has endowed all men with the the inalienable right to live. . . . If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition that all men, without respect to complexion or condition, hold from the Creator the right to live, who shall determine what portion of the community shall be slain? And who may perpetrate the murders? Cong. Globe, 35th Cong., 1st Sess. (February 26, 1858) App. 65-68.

Giddings,
Congressman / , like the Republican Radicals and Abraham Lincoln of whom he was the principal mentor, in emphasizing the right to life at which they aimed their various measures directed against slavery, always connected this basic right with the right of the family and of its members, including children from the time of their creation by God in the womb. He stated

> The right of legal marriage is unknown among the slaves. . . . The master sells him who is called husband, or her who calls herself wife, while he retains the other. He sells the parent, and retains the child; or he sells the child, and retains the parent. These separations are but the practical workings of that infidelity which denies to parents and children those inalienable rights which God and nature have bestowed upon them. Ibid.

Congressman Giddings perceived the family and the right of its members to be protected in their family relationships as essential for attaining to the perfection of the life given each human being by God. He stated that his party holds that

> (A)s God gave life to the human race, He conferred on each a right to that liberty which is necessary to become wise, truthful, just, and pure; to bring himself into harmony with the law of God, and enjoy the happiness resulting therefrom; that these rights are equally self-evident as the existence of our race; that they are inherent, inalienable, and common to all men; that they constitute the great moral ligament which binds man to his Creator, connects earth with heaven, and unites the human race into one common brotherhood, bound by the most sacred obligations to love, revere, and obey our rights . . . These rights constitute an element of the human soul ; they cannot be alienated by the individual; nor can any association of men, or any earthly power, separate the humblest of the human race from them. Ibid.

This perception of Congressman Giddings was reiterated by the major proponents of the Thirteenth Amendment. Senator Henry Wilson of Massachusetts, who played a leading role in its advocacy, thus stated:

> Then sir, when this amendment to the Constitution shall be consummated . . . the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom. Cong. Globe, 38th Cong., 1st Sess. (March 28, 1864) 1324.

113. See statement of Senator Lyman Trumbull of Illinois, Cong. Globe, 39th Cong., 1st Sess. (January 19, 1866) 322, and of Congressman Henry J. Raymond of New York, Id. (April 5, 1866) 1785.

114. See, Jacobus ten Broek, The Antislavery Origins of the Fourteenth Amendment (1951) Chapter IX, "The First Two Congressional Debates", 140-155. Also see the statement by Senator Henry Wilson of Massachusetts, Cong. Globe, 38th Cong., 1st Sess. (March 28, 1864) 1321-1322, in support of the proposed Thirteenth Amendment. For the point of view that the Civil Rights Act of 1866, based upon the authority of this amendment adopted a few months earlier, would confer equality of rights upon persons of Mexican derivation, see the statement of Congressman Michael C. Kerr of Indiana . Cong. Globe, 39th Cong., 1st Sess. (March 8, 1866) 1268.

115. Senator Charles Sumner of Massachusetts observed that the proposed Thirteenth Amendment, "the grrat rule of freedom which we are about to ordain," "will endure

to be read with gratitude when the rising dome of this Capitol, with the Statute of Liberty which surmounts it, has crumbled to dust." Cong. Globe, 39th Cong., 1st Sess. (April 8, 1864) 1482-1483. Congressman William D. Kelley of Pennsylvania urged submission of the amendment saying: "Let us protect our posterity against a recurrence of these fearful evils. . . . Let justice to all be our aim. . . . Let us establish freedom as a permanent institution, and make it universal." Cong. Globe, 38th Cong., 1st Sess. (June 15, 1864) 2985.

116. Storer, Horatio R., M.D., LL.B., Criminal Abortion in America (1860) 92.

117. In re Holthausen's Will, 175 Misc. 1022, 1024, 26 N.Y.S. 2d 140, 143 (1941).

118. The "George and Richard" (1871), L.R., 3 A. & E. 466.

119. See, e.g., Montreal Tramways v. Leveille, 4 Dom. L.R. 337 (Sup. Ct. Canada, 1933), Bonbrest v. Kotz, 65 F.Supp. 138 (D.C. 1946), Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960), and Yandell v. Delgado, 471 S.W.2d 569 (S.Ct. Tex. 1971).

120. Daley v. Meier, 33 Ill.App.2d 218, 178 N.E.2d 691 (1961), Kelley v. Gregor, 125 N.Y.S.2d 696 (S.Ct., App.Div. N.Y. 1953).

121. See text at notes 145-163, infra.

122. Boorstin, Daniel J., The Americans: the Colonial Experience (1958) 202.

123. Blackstone, Commentaries 129-130, 198, 119 (definition of "misprision").

124. See, e.g., John Locke, Two Treatises of Government I, Ch. VI, Sec. 55; Essay on Human Understanding I, Ch. III, Sec. 2.

125. 43 Geo. 3, ch. 58, §s (1803).

126. Anonymous, 170 Eng. Rep. 1310 (N.P. 1811).

127. 7 Will. 4 & 1 Vict., c. 85 (1837).

128. R. v. Wycherley, 173 Eng. Rep. 486 (N.P. 1838).

129. 2 Encyclopedia Britannica 1030 (1967).

130. Quay, "Justifiable Abortion - Medical and Legal Foundations," 49 Georgetown L. J. 395 at 435-437, 478, 489 (1961). This article contains a statutory appendix at 477 covering the American statutes which is generally correct.

131. Mohr, Abortion in Nineteenth-Century America (1978) 14, 41-43.

132. Storer, op. cit. 44, 86.

133. Storer, Horatio R. M.D., LL.B., Why Not? A Book for Every Woman (1866) 30.

134. Mohr, op. cit. Ch. 3, "The Great Upsurge of Abortion, 1840-1880," 46-85; Ch. 4, "The Social Character of Abortion in America, 1840-1880," 86-128.

135. Id. at 46-71.

136. Id. at 76-78.

137. Id. at 48-53.

138 Id. at 122-128, 132.

139. Id. at 132.

140. Quay, op. cit. at 451 (California), 481 (Massachusetts), 483-484 (Michigan), 494 (New Hampshire, 496(New Jersey), 515 (Vermont), 517 (Virginia), and 518 (Wisconsin). New York revised its early law in 1845-1846 so as to eliminate the quickening limitation and to prohibit the woman from obtaining an abortion. Id. at 500.

141. Storer, op. cit. at note 132, 86-90.

142. Id. at 1-2.

143. Id. at 74 (last footnote marked "+"; Mohr, op. cit. 149-152.

144. Mohr, op. cit. at 147-148.

145. Storer, op. cit. at note 133 at 19.

146. American Medical Association Committee on Criminal Abortion, "Report on Criminal Abortion," Transactions of the American Medical Association, XII (May 1859) 75-78.

147. These quotations are taken from the Committee's Study referred to in the Report and published in 1860. See, Storer, op. cit. at note 132, 27, 28.

148. Id. at 28, note "+".

149. Id. at 35. Storer rejected the estimates of writers of his time who placed the rate of abortions at 1 out of every 7 pregnancies as being "uncorroborated by any reliable evidence and . . . without doubt untrue." Id. at 30. Mohr incorrectly quotes Storer as saying that reported early abortions bear the ratio to living births of "1 to 4.04". Storer in fact stated in the cited reference that the ratio was "1 in 40.4".

150. Storer, op. cit. at note 133, 28-29, 79.

151. Transactions of the American Medical Association (May, 1859) Vol. XII, 75.

152. Storer, op. cit. at note 132

153. Id. at 99. This statute was prepared by Dr. Storer with the assistance of a number of attorneys and physicians. This study also proposed a statute directed against advertisement and sale of abortifacients. Id. at 57-58, 96. The study finally proposed establishment by state governments of Foundling Hospitals for the care of prenant women and their children. Id. at 96.

154. Id. at 73-94.

155. Transactions of the American Medical Association (1860) Vol XIII, 56-58.

156. Id. at 41-42.

157. See text at note 159.

158. Storer, op. cit. at note 132, 94, 97-100.

159. A substantially complete collection of the earliest and subsequent state anti-abortion statutes is appended, as earlier stated, to an article by Eugene Quary, op. cit. at note 130, 447 ff. The Maryland, Massachusetts, and Michigan statutes referred to dealt only with advertising or selling abortifacients in a way advocated by Dr. Storer. Also see, Mohr, op. cit. at note 131, 147-227.

160. Dr. L. S. Joynes, M.D., "On Some of the Legal Relations of the Foetus in Utero," Virginia Medical Journal (September, 1856).

161. Texas and Virginia. See, Storer, op. cit. at note 132, 85 at note "§", 74 at note "+".

162. Michigan (1846), Mississippi (1839), Missouri (1835), New Hampshire (1848), Massachusetts (1845). Alabama modified its 1840-41 statute in minor ways in 1866-1867. See, Quay, op. cit. at note 130, 447 ff.

163. Delaware, Kentucky, Maryland, North Carolina, Rhode Island, South Carolina, and Tennessee. North Carolina, however, also protected the unborn at all stages of gestation prior to quickening. See, Quay, op. cit. at note 130, 447 ff.

164. 14 Stat. 13 (1866).

165. The following states with the new type of anti-abortion statute had federal enclaves within them at the time of the passage of the Assimilative Crimes Act of 1866 or had them in effect within one to five years thereafter: Alabama, California, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Maine, Michigan, Nevada, New York, Ohio, Oregon, Pennsylvania, Texas, Vermont, Virginia, and West Virginia. Of course, numerous additional states in which federal enclaves were located also had either earlier statute law or

common law dealing with the protection of unborn children from abortion. See, Prucha, F. P., A Guide to the Military Posts of the United States: 1789-1895 (1964).

166. 17 Stat. 598 (1873).

167. Cong. Globe, 42nd Cong., 3d Sess. (December 2, 1872) 1 (Senate), 10 (House).

168. 17 Stat. 598, 599 (1873).

169. Id.

170. California (1872), Connecticut (1860), Indiana (1881), Minnesota (1873), New Hampshire (1848), New York (1845, 1872), South Carolina (1883), Wisconsin (1858), and Wyoming (1887). Arizona Territory also had such a statute (1887).

171.(1) 12 Stat. 376 (1862): An Act for the Release of Certain Persons held to Service or Labor in the District of Columbia--Section 1 of this act provided in part: "after the passage of this act neither slavery nor involuntary servitude, except for crime, whereof the party shall be duly convicted, shall hereafter exist in said District"; (2) 12 Stat 432 (1862): An Act to secure Freedom to all Persons within the Territories of the United States--In its single section the act provided "That from and after the passage of this act there shall be neither slavery nor involuntary servitude in any of the Territories of the United States now existing, or which may at any time hereafter be formed or acquired by the United States, otherwise than in the punishment of crimes whereof the party shall have been duly convicted"; (3) 12 Stat 633-634 (1862): An Act for the Admission of the State of West Virginia into the Union, and for other purposes--Section 2 of this act conditioned the admission of this State into the Union upon the adoption by its people of a state constitutional amendment abolishing slavery as specified in its Section 1; (4) 12 Stat. 664-665 (1863): An Act to provide a Temporary Government for the Territory of Arizona, and for other purposes--Section 3 of this actprovided "That there shall neither be slavery nor involuntary servitude in the said Territory, otherwise than in the punishment of crimes, whereof the parties ahll have been duly convicted." This act also repealed all acts of Congress or of the Territory of New Mexico regulating the relation of master and slave in this Territory; (5) 12 Stat. 808, 811 (1863): An Act to provide a Temporary Government for the Territory of Idaho--Section 5 of this act provided that "nothing herein contained shall be construed to authorize or permit its existence (that of slavery) therein"; (6) 13 Stat. 30 (1864): An Act to enable the People of Nevada to form a Constitution and State Government, . . .—Section 4 of the act provided that the state constitution provide irrevocably "That there shall be neither slavery nor involuntary servitude in said State, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted"; (7) 13 Stat. 32 (1864): An Act to enable the People of Colorado to form a Constitution and State Government, . . .--Section 4 of this act followed the content of the same section of the act concerning Nevada; (8) 13 Stat. 47 (1864): An Act to enable the People of Nebraska to form a Constitution and State Government, . . .Section 4 of this act was basically the same as Section 4 of the act concerning Nevada; (9) 13 Stat. 85, 88 (1864); (10) 13 Stat. 200 (1865): An Act repealing the Fugitive Slave Acts of 1793 and 1850--This act effectively operated in conjunction with other acts of States, Territories, and of Congress to confer the status of freedom upon fugitive slaves; (11) 13 Stat. 571 (1865): A Resolution to encourage Enlistments and to promote th e Efficiency of the Military Forces of the United States--This resolution provided "that the wife and children, if any he have, of any person that has been, or may be, mustered into the military or naval service of the United States, shall, from and after the passage of this act, be forever free, any law, usage, or custom whatsoever to the contrary notwithstanding . . ." Other statutes enacted under the war power by Congress and which conferred the status of freedom upon slaves also effectively overturned the decision by the Court in Dred Scott: (12) 12 Stat 319 (1861); (13) 12 Stat. 597, 599 (1862); (14) 12 Stat. App. 1268 (1863); (15) 13 Stat. 311 (1864); (16) 12 Stat App. 745, 747 (1864).

172. See text at footnotes 109-115.

173. Stampp, Kenneth M. The Peculiar Institution (1956) 205-206, 245-251, especially at 249.

174. Stampp, op. cit. 97; Genovese, Eugene D., Roll, Jordan, Roll: The World the Slaves Made (1974) 406-407.

175. Cong. Globe, 37th Cong., 2d Sess. (April 11, 1862) 1646: statement by Congressman Owen Lovejoy of Illinois.

176. Cong. Globe, 37th Cong., 3rd Sess. (January 30, 1863) 612-613: statement by Senator John Sherman of Ohio.

177. Cong. Globe, 37th Cong., 2d Sess (April 10, 1862) 420.

178. Cong. Globe, 37th Cong., 2d Sess (July 14, 1862) 333. Draft of bill was submitted by President Lincoln.

179. Cong. Globe, 37th Cong., 3d Sess. (January 6, 1863) 208.

180. Id. at 207-208.

181. Id. at 903.

182. Id. at 351.

183. Id. at 612.

184. Ibid.

185. Id. at 613.

186. Ibid.

187. Id. at 612.

188. Id. at 620.

189. At the next Congress, on February 10, 1864, Senator Lyman Trumbull for the Committee on the Judiciary reported back to the Senate an amendment to Joint Resolution No. 16, call for the amendment of the Constitution which eventually became the Thirteenth Amendment. Cong. Globe, 38 Cong., 1st Sess. (February 10, 1864) 553.

190. See note 171 supra.

191. December 18, 1865, 13 Stat. App. 774-775 (1865).

192. The goal constantly articulated by the framers of this legislation, the Thirteenth Amendment, and the Civil Rights Act of 1866 based upon that amendment was the provision of this protection. See notes 109-115 supra.

193. 12 Stat. 19 (1860).

194. See, e.g., Burris v. Burgett, 16 Del. Ch. 10, 139 A. 454 (1947).

195. 322 U.S. 533 at 538-539 (1944).

196. Degler, Professor Carl N., Testimony before United States Senate Committee on the Judiciary, Subcommittee on the Separation of Powers ( , 1981) xeroxed copy, 1. To the comment in the text it must be added that the discipline of legal interpretation has long since developed its goals, methods, precedents, and general acceptance of these by the Bar, the federal courts, the federal executive branch, and the Congress. This discipline is a complex matter. No historian makes a valid argument with respect to legal interpretation of the Constitution or federal statutes by the use of the historian's discipline, without more, valid as it is in and for its own context. Professor Degler makes no effort to come to terms with the legal discipline or its methods of utilizing "legislative history" and other forms of relevant "legal history."

197. Ibid.

198. Cong. Rec., 43rd Cong., 2d Sess. (February 26, 1875) 1794. Senator Thurman served as Chief Justice of the Supreme Court of Ohio, 1854-1856, and was an outstanding constitutional lawyer. Senator Thurman in the course of the above remarks also stated:

> Do not our children . . . receive the equal protectio n of the laws? . . . I am in favor of giving the white woman of this country as much protection of the laws as I give the colored man, and I am not in favor of giving him any more protection of the laws than I give to my wife, my sister, and my daughter. (The Equal Protection Clause) covers every human being within the jurisdiction of a State.

199. See note 109 supra.

200. See, Witherspoon, Joseph P., "John Locke's Concept of the Child as a Person," Paper presented to Society for Eighteenth Century Studies, South Central Annual Meeting, March 3, 1978, and citations therein. Paper available from author.

201. Cong. Globe, 35th Cong., 1st Sess. (February 26, 1859) App. 65-66.

202. Cong. Globe, 34th Cong., 3d Sess. (December 10, 1856) 78-79.

203. Cong. Globe, 35th Cong., 1st Sess. (February 26, 1859) App. 65-66.

204. Ibid.

205. Cong. Globe, 40th Cong., 1st Sess. (July 9, 1867) 542. In supporting the language subsequently embodied in Section 1 of the Thirteenth Amendment which was embodied in numerous statutes enacted by Congress between 1862 and 1865, Congressman Bingham also stated:

> The provision of our Constitution is, 'no person shall be deprived of life, or liberty, or property without due process of law.' This clear recognition of the rights of all was a new gospel to mankind, something unknown to the men of the thirteenth century, who then demanded and received for themselves the acknowledgment of their rights as freemen. The barons of England demanded the security of law for themselves; the patriots of America proclaimed the security and protection of law for all. . . . That Constitution . . .proclaimed that all men in respect of the rights of life and liberty and property were equal before the law; and that no person, no human being, no member of the family of man shall, by virtue of Federal law or under the sanction of the Federal law or under the sanction of the Federal authority . . . be deprived of his life, or his liberty, or his property, but by the law of the land . . .
>
> (T)he legislation of the First Congress reenacting the law of liberty for all the Territories (in the language subsequently used in the Thirteenth Amendment); the act for the admission of Ohio on condition of perpetual freedom to all law-abiding men within her limits, were but so many acknowledgements of the great truth that 'all men are created equal," not in stature, not in intellectual power, not in wealth, not in social position, not in political privileges, but equal in respect to those rights which are as universal as the material structure of man, as imperishable as his immortal nature, and to protect, not to confer which, all good Governments are instituted among men. . . .
>
> Today we deliberate whether we shall make good, by legislation, this vital principle of the Constitution, here in the capital of the Republic!
>
> I would have the declaration made here now . . . that slavery or involuntary servitude shall never be tolerated here in all the hereafter, except as punishment for crime upon due conviction . . . (which is) a provision that every human being, no matter what his complexion, here . . ., shall be secure in the enjoyment of his inherent rights; that the citizen is more than the State; that the protection of his rights is of more concern than any or all mere State policies. Cong. Globe, 37th Cong., 2d Sess. (April 11, 1862) 1638-1640.

205a Cong. Globe, 36th Cong., 1st Sess. (February 29, 1860) 918.

205b In assessing the copious evidence in support of this proposition, it is well to keep in mind that the framers of the Fourteenth Amendment by and large conceived that it was in its Section 1 a reconsummation of the basic principles underlying and embodied in Section 1 of the Thirteenth Amendment. Both Amendments and the legislation based upon or anticipating them proceeded from a view of man which John Locke had elaborated in his Two Treatises of Government, see note 200 supra. Besides enacting legislation for the purpose of protecting unborn children, the framers of these amendments and this legislation manifested their adherence to this point of view concerning man in many ways:

A. by asserting that each man is "created by God". Before the child is born, the child has been created in the womb by God by infusing it with a soul. Congressman Bingham, author of Section 1 of the Fourteenth Amendment, asserted this view frequently in the period between 1855 and 1873. Thus, he stated

> By His great apostle came to men and nations the new message declaring the true God, to whom the pagan inscribed UNKNOWN upon His altar; that God who made the world, and giveth to ALL life and breath, and had made of one blood all nations of men to dwell on all the face of the earth. . . . What was your declaration at Philadelphia on the 4th of July, 1776, that "ALL MEN are created equal," but a reiteration of the great truth announced by the apostle of the Nazarene. What but this is the sublime principle of your Constitution, the equality of all men before the law. Cong. Globe, 37th Cong., 2nd Sess. (April 11, 1862) 1639.

Similarly, Senator William P. Fessenden of Maine, who served as Chairman on the part of the Senate of the Joint Committee on Reconstruction and was a leading figure in the adoption of the anti-slavery legislation prior to December, 1865, the Thirteenth Amendment, the Fourteenth Amendment, and other important civil rights measures, including measures protecting unborn children, stated:

> These men, for God created these men, though man has used them as goods and chattels--slaves--these men and women and children will, when the President of the United States signs this bill, be translated from the condition in which they had no rights for which this nation has had any respect into that condition in which they are invested with the rights of freemen, upon which none can trespass with impunity; since over the person of the free black as well as the free white man there is thrown the broad shield of the nation's majesty. Cong. Globe, 37th Cong., 2nd Sess. (April 11, 1862) 1642.

B. by asserting that as legislators in enacting this legislation and proposing these amendments, they were discharging a debt they owed to "unborn children", to "posterity", and to "generations to come". Thus in the debate on the Thirteenth Amendment, Congressman Ebon C. Ingersoll of Illinois stated:

> That slavery is an evil no sane, honest man will deny. . . . We owe it to ourselves; we owe it to posterity; we owe it to the slaves themselves to exterminate slavery in the country forever by the adoption of the proposed amendment to the Constitution. Cong. Globe, 38th Cong. 1st Sess. (June 6, 1864) 2989.

Similarly Congressman John H. Broomall of Pennsylvania stated, in replying to an argument that the subject of slavery could not be dealt with even by a constitutional amendment,

> I have always supposed that the framing of the Constitution and formation of our Government were for the express purpose of perpetuating and preserving the liberties of the people. And upon the very threshold of that instrument I find authority for that position. We are told, in the preamble of the Constitution, that
>
> > "We the people of the United States, in order . . . secure the blessings of liberty, to ourselves and our posterity, do ordain and establish this Constitition . . ."
>
> I would not rest in my bed if I believe the next morning, in the event of my death, my children might be sold to pay some creditor, though they might be darker than I and offspring of my crime. Cong. Globe, 38th Cong., 2d Sess (January 11, 1865) 200 (emphasis was made by the author of the statement).

Obviously, Congressman Broomall had reference to his and others' children, both born and unborn, as the "posterity" which the Constitution was brought into existence to protect and who were to be protected, with respect to the right to freedom to enjoy the basic human rights to life, liberty, and property, by the Thirteenth Amendment "charter of freedom".

Congressman Godlove S. Orth of Indiana ranked the purpose of the Constitution relative to securing the blessings of liberty for "posterity" as its primary objective. This purpose of the Constitution imposed, in his judgment, "the duty of Congress . . . to heed its utterance" and to submit the Thirteenth Amendment proposal to the people. Cong. Globe, 38th Cong., 2d Sess. (January 6, 1865) 142.

Congressman Josiah B. Grinnell of Iowa in arguing for submission of the Thirteenth Amendment to the people by Congress, recalled the earlier arguments of its opponents against legislation enacted eventually by Congress which had been drawn with the same language as that in the proposed amendment. These

arguments had been to the effect that unborn children would be endangered in the future by the emancipation of the slaves. Congressman Grinnell stated:

> I have noticed the agonies of gentlemen over the tomb of slavery. I do not forget how they agonized, even to the going down of the sun, against the abolition of slavery in the District (of Columbia in 1862). There were, according to them, untold horrors looming up from that measure; but what has been the result of its passage. . . . It has benefitted a race and enacted justice. Not one of the horrors which filled men's imagination have been visited upon us. . . . You shed ink in great profusion in protest and opened the lachrymal founts over unborn children; yet the born children mock at your fears and you are, gentlemen, in tolerable health today. Cong. Globe, 38th Cong., 2d Sess. (January 10, 1865) 200.

Congressman Grinnell obviously recognizes that the question of whether the welfare of unborn children will be adversely affected by Congressional legislation is an important question to be considered by Congress. In this particular instance, however, he indicated that the interests of unborn children were not adversely affected by the particular legislation but rather advantageously promoted along with those of everybody else.

Congressman Andrew King of Missouri in discussing the proposed amendment stated

> Vast has been the sacrifice of blood and treasure already in this war for the Union; but great though it be, we nevertheless owed it to unborn generations to come, to deliver to them unimpaired the great legacy bequeathed to us through blood and fiery trial by our ancestors.
>
> By these amendments the promised fruits of the abolition of slavery are sought to be realized. If the union of the States is to be maintained thereby; . . . if the cause of human progress is to be promoted; if, in word, all the best interests of our common country are to be promoted by these amendments, I am prepared now as I have ever been prepared, to make any and every sacrifice personal to myself, which shall accomplish objects so great and desirable. (He represented a slave-holding constituency) Cong. Globe, 38th Cong., 2d Sess. (January 10, 1865) 195, 199.

Congressman James S. Rollins of Missouri in discussing the proposed amendment stated

> I propose to vote for it (the resolution proposing the Thirteenth Amendment).
>
> I am a believer in the Declaration of Independence wherein it is asserted that "all men are created equal." I believe that when it says "all men" it means every man who was created in the "image of His Maker" and walks on God's footstool, without regard to race, color, or any other accidental circumstances by which he may be surrounded. Let them go, and let them enjoy all the privileges consistent with sound policy and that freedom which has been vouchsafed to them. Let them go; and sir, there is no man in this House or in this nation who feels a deeper interest in their comfort, in their happiness, in their elevation than I do, and in the comfort and welfare of their children and their children's children in all time to come! Cong. Globe, 38th Cong., 2d Sess. (January 13, 1865) 258, 260.

The statements by Senators were equally emphatic that each individual human being is created by God, created equal to every other human being, and endowed with the inalienable right to life which that individual receives from God. They cast their votes, they said, not only for those presently not enjoying protection of their basic right to freedom to enjoy life, liberty, and happiness, but also for their "posterity", "unborn children", and "generations to come". See the statements of Senator Lyman Trumbull of Illinois, Cong. Globe, 39th Cong., 1st Sess. (April 4, 1866) 1755 and of Senator William Windom of Minnesota, Cong. Globe, 39th Cong., 1st Sess (March 2, 1866) 1159.

C. by specifying that legislation enacted under the authority of the Thirteenth Amendment was directed at protecting children, both born and un-

born. Sometimes the protection that was to be provided adults and children was that available under "the common law", sometimes the protection was that specified in the statute itself, apart from the common law. Of course, the common law provided protection of various kinds for unborn children as indicated previously in the text at footnotes 116-124 supra.

Senator Henry Wilson of Massachusetts early introduced in the 39th Congress, following adoption of the Thirteenth Amendment, a bill to protect the freedom of the new freedmen. He stated

> We must see to it that the man made free by the Constitution of the United States, sanctioned by the voice of the American people, is a freeman indeed; that he can go where he pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights of the good old common law are his, and that ... his cabin, however humble, is protected by the just and equal laws of his country. . . . Let us be as inflexible as destiny itself in the maintenance of the cause of equal, universal, and impartial liberty throughout the whole country. Cong. Globe, 39th Cong., 1st Sess. (December 21, 1865) 111-112.

Shortly after the submission of the Thirteenth Amendment a conference committee of the two houses of Congress reported a bill resolving differences between the two houses with respect to their respective bills for creating a Bureau for the Relief of Freedmen and Refugees. The bill established the office of Commissioner for the Bureau. Its section 4 stated his authority as follows:

> (T)he Commission . . . shall establish regulations . . . for their (the freedmen and refugees') needful and judicious treatment, protecting them in the enjoyment of their rights, promoting their welfare, and securing to them and their posterity the blessings of liberty..

The managers on the part of the Senate were Senators Charles Sumner of Massachusetts and Jacob M. Howard of Michigan, both of whom were major proponents of the Thirteenth and Fourteenth Amendments. The managers on the part of the House were Congressmen Thomas D. Eliot of Massachusetts and William D. Kelley of Pennsylvania. who were the chairman and leading member, respectively, of the Select Committee on Freedmen. Subsequently, the authority stated in section 4 of the bill was conferred upon the Secretary of War in section2 of the bill, the authority to be exercised with respect to "destitute and suffering refugees and freedmen and their wives and children." Obviously, the terms "posterity" and "children" were used interchangeably and the latter, like the former, was understood to have reference to both unborn and born children of the freedmen and refugees. Cong. Globe, 38th Cong.., 2d Sess. (February 2, 1865) 563, App. 141. That the statute was designed to protect pregnant women as well as their unborn children is clear from the statement of Congressman Robert Schenk of Ohio concerning the situation of slave women and children seeking medical care, shelter, and food within United States Army lines. Cong. Globe, 38th Cong., 2nd Sess. (February 9, 1865) 691-692. The authority of Section 2 of the act was expanded under the authority of the Thirteenth Amendment on July 13, 1866. Cong. Globe, 39th Cong., 1st Sess. (July 13, 1866) App. 366-367.

The interpretation of the Freedmen's Bureau Act as applying to unborn children is strengthened by regard for the Joint Resolution enacted in 1865 by Congress which conferred the status of freedom upon the slave wives and children of any person mustered into the military or naval service of the United States. Cong. Globe, 38th Cong., 2nd Sess. (March 3, 1865) App. 160. Senator Jacob M. Howard of Michigan took the position that for determining who is the slave wife or child of a person so mustered into the armed services.

> I know of no other mode of solving this difficulty than this; that that person shall be held to be the wife of the slave who recognizes the slave to be her husband whose husband recognizes the woman to be his wife; adopting the same principle of the common law that applies in other cases, a simple recognition of the relation of husband and wife and of parent and child. I take it that that would be sufficient; . . . Cong. Globe, 38th Cong., 1st Sess (March 18, 1864) 1182.

Since the common law recognized unborn children to have rights under the common law, it seems clear that Senator Howard desired that the benefit of freedom to be conferred upon all children of a slave mustered into the armed forces of the

United States, born and unborn. It would have been absurd that a slave wife should be freed under the resolution but that her unborn child remained slave property so that the slave master could sell the rights to the unborn child or devise the property in that child by will but could not deal similarly with its mother. It is to be remembered at this point that the members of the Congress were fully aware that the institution of slavery applied to unborn children as well as to born children. See the text at footnotes 172-189 supra.

It was regularly emphasized by the framers of the Thirteenth and Fourteenth Amendments that children have inalienable rights, just as adults do, and that these rights, as those of all human beings, begin at their creation by God and are protected by these amendments.

Senator Henry Wilson of Massachusetts stated in the discussion of the proposed Thirteenth Amendment

> (W)hen this amendment to the Constitution shall be consummated . . . the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which make sacred alike the proud homes and lowly cabins of freedom. Cong. Globe, 38th Cong., 1st Sess (March 28, 1864) 1324.

The fundamental right to family relationships referred to in the statement by Senator Wilson was generally understood to include the right to the child to the care for it by its parent. Thus Congressman W. E. Simms of Kentucky stated in relation to a bill dealing with polygamy

> This legal marriage relation establishes personal rights and personal interests which no legislative tribunal under our form of government, nor the parties themselves at their mere will and pleasure, can divest or destroy. The wife owes obedience to the husband and the husband protection to the wife, and both owe protection and care to their children. This relation lies at the very foundation of our whole social system. . . It is the foundation-rock of our civil and religious fabric. . . . This law is to protect this relation; to protect the personal rights of husband, wife, and children, that grow out of it. Cong. Globe, 36th Cong., 1st Sess (April 4, 1860) App. 199.

The Thirteenth Amendment was designed, among other objects, according to Senator James Harlan of Iowa, to stop the operation of slavery which included

> the abolition practically of the parental relation, robbing the offspring of the care and attention of his parents, severing a relation which is universally cited as the emblem of the relation sustained by the Creator to the human family. Cong. Globe, 38th Cong., 1st Sess. (April 6, 1864) 1429.

The Thirteenth Amendment in protecting the fundamental right to freedom of all human beings to exercise and enjoy the rights to life, liberty, and happiness and the Fourteenth Amendment's Section 1 in reconsummating this basic content of the earlier amendment provide protection for the fundamental rights of children upon their creation by God. Thus, Congressman Carman A. Newcomb of Missouri, in discussing in 1868, proposed legislation to deal with the problem of reconstruction in the Southern States, observed

> So far as this argument relates to children (concerning the right to vote), it is easily answered. They have certain rights which are as inalienable as those of adults, and, so far as their participating in the Government as voters is concerned, all agree that a time must be fixed uniformly when they are supposed to have sufficient judgment to exercise, safely to themselves and the State, the duties of citizens and voters, and to perform the duties of citizens in every respect. Cong. Globe, 40th Cong., 2d Sess. (March 21, 1868) App. 303.

His sentiments were echoed by Senator Allen G. Thurman of Ohio in discussing the scope of the term "person" utilized in the Fourteenth Amendment. Referring specifically to the Equal Protection Clause, he stated that it means

> You shall not deny it (equal protection of the laws) to the alien; you shall not deny it to the Chinaman; you shall not deny it even to the Indian, though he be not taxed. You shall not deny it to any person within

> your jurisdiction, be he sane or be he insane, be he old or be he young, be he innocent or be he criminal, be he learned or be he ignorant. Every human being within the jurisdiction of the State shall be entitled to equal protection of the laws. . .
>
> Are they (our mothers and wives and sisters) not equally protected? Do they not receive the protection of the laws? . . . Do not our children under the age of twenty-one years receive the equal protection of the law? Cong. Rec., 43rd Cong., 2d Sess (February 26, 1875) 733.

D. by specifying the elements of the definition of the concept of "person" so as to eliminate anything beyond the mere existence of a human being and to resolve all doubts in construing the concept in behalf of coverage of any being having human characteristics. Thus, Congressman James S. Brown of Wisconsin, in discussing the constitutionality of the Act to Repeal the Fugitive Slave Laws, referred to the use of the term person in various provisions of the Constitution:

> (D)oes the term "person" carry with it anything further than a simple allusion to the existence of the individual. It certainly cannot be strained into any recognition of slavery, since the very recognition of the personality excludes the implied sanction of enslavement, for slavery does not regard its victims as persons but as chattels. Cong. Globe, 38th Cong., 1st Sess. (April 20, 1864) 1753.

Senator Arthur I. Boreman of West Virginia added the complement to definition provided by Congressman Brown to the term "person" used in the Fourteenth Amendment and implied in the Thirteenth Amendment. The term "person" was utilized to resolve all doubts as to what existing human beings were protected by the fundamental guarantees of human rights in the Constitution according to him. He stated

> This, you will see, sir, is not confined to citizens of the United States, but it includes every person that is found within these States, and guaranties to all life, liberty, and property, and equal protection of the laws. . . . It is not restricted to guarantying the right of a "citizen" . . . but it extends to every "person," whether he has come from another State or not, to every person residing anywhere, everywhere, within the United States. So that while, before this amendment, if there was any question whether there were any class of persons in this country over whom the protection of the Constitution of the United States was not extended, there cannot now be any longer any question on that subject. Cong. Globe, 42nd Cong., 1st Sess. (April 13, 1871) 229.

E. by utilizing the term "abortion" as a term for indicating something that was extremely horrendous and to be avoided at all costs. Thus, Senator Jacob Collamer of Vermont in discussing the Senate Rule requiring an oath of each Senator be taken and the change proposed in the rule by Senator Sumner stated:

> (I)f the interests of this Government are to be put into the keeping of men who avow their enmity to its existence, and who boldly plot its destruction, it is utterly impossible that that Government can long exist. If men of that character and men of that conduct can have seats and retain seats here, then there is an end of this Government. If the Constitution is so framed that it is subject to this infirmity incurably, it is an abortion, it a total failure; and if any construction can be given to this Constitution which, in practical application, can produce this effect, it is as much a destruction of this Government as secession is. Cong. Globe, 38th Cong., 1st Sess. (January 20, 1864) 276.

In discussing the Joint Resolution for recognizing the government of the State of Louisiana that had been set up pursuant to a convention held in that state, Senator Sumner similarly stated

> (T)he proposition (for recognizing the government of Louisiana). . . when we consider its origin and character, is in itself very little different from a stupendous hoax. . . . Every moment gives new glimpses of the violence and fraud with which it is associated. . . . where military power and injustice to a whole race have been enlisted in forming the constitution of a State, in defiance of the self-evident truths of the Declaration of Independence. The United States are bound by the Constitution "to guaranty to every State a republican form of government." Now, when called to perform this guarantee it

> is is proposed to recognize an oligarch of the skin. The pretended State government in Louisiana is utterly indefensible whether you look at it origin or its character. To describe it, I must use plain language. It is a mere seven-months' abortion, begotten by the bayonet in criminal communion with the spirit of cast, and born before its time, rickety, unformed, unfinished . . . Cong. Globe, 38th Cong., 2d Sess. (February 27, 1865) 1129.

Similarly Senator John B. Henderson of Missouri in discussing the resolution for submission of the proposed Fourteenth Amendment stated

> These measures (the act establishing the Freedman's Bureau and the Civil Rights Act of 1866) did not pretend to confer upon the negro the suffrage. . . . Their highest aim was to secure what the lawyers call civil rights to every person within the jurisdiction of the Government. The necessity for these or similar measures was imperative. To have failed in this duty would not only have rendered the results of the war perfectly abortive, but would have completely withered the laurels we won in its successful prosecution. 39 Cong., 1st Sess. (June 8, 1866) 3035.

As we have seen, the members of Congress not only understood and used the term "abortion" as a thing to be avoided and prevented, but also acted to protect unborn children in a number of ways on many occasions by enacting legislation, including legislation directed against abortion.

206. Jackson, Rev. Jesse L., "How We Respect Life Is the Over-riding Moral Issue," National Right to Life News (January, 1977).

207. This was the explanation give by Mr. Mike Wallace, Esq. at a meeting in Washington, D.C. on Frebuary 6, 1981 of Congressional leaders and their staff members with representatives of pro-life groups sponsored by the National Right to Life Committee. Mr. Wallace appeared at the request of Mr. Carl Anderson, Esq., then serving as Assistant for National Affairs to Senator Jesse Helms, who, together with Mr. Stephen Galebach, Esq., co-authored or drafted the bill. This explanation was given by way of his concurring with a specific statement to this effect by this witness.

208. This draft was made by Mr. Stephen Galebach, Esq., dated October 24, 1980.

209. Alaska Stat. 11.15.060 (1970); Haw.Rev.Stat. 453-16 (Supp. 1971); N.Y. Penal Code 125.05 (McKinney Supp. 1972-1973); Wash.Rev.Code 9.02.060 to 9.02.080 (Supp. 1972).

210. E.g., Ga. Code 26-1201 to 26-1203 (1972). Fourteen states had adopted some form of the abortion law suggested by the American Law Institute which served as a model for the Georgia provision. See, Roe v. Wade, 410 U.S. 113, 139 n. 37 (1973).

211. For 1979 the estimated figure was 1,540,000. "Abortion in the United States, 1978-1979," Family Planning Perspectives, Vol. 13, No. T January - February 1981) 6, 7.

212. 36 Stat 825-827 (1910), 18 U.S.C. 2421-2424.

213. National Right to Life News, Vol. 8, No. 1 (January 27, 1981)

214. Ibid.

Senator EAST. Would Professor Baker please come forward?

Professor Baker is associate professor of law at Louisiana State University. He received his B.A. degree from the University of Dallas and his J.D. degree from the University of Michigan. He is a former assistant district attorney for Orleans Parish in Louisiana.

Professor Baker, we welcome you this morning.

## STATEMENT OF JOHN BAKER, PROFESSOR, LOUISIANA STATE UNIVERSITY LAW CENTER, BATON ROUGE, LA.

Mr. BAKER. Thank you, Senator. I am pleased to be here.

I might add that I defended the Louisiana abortion statutes in 1974 and 1975 while I was in the D.A.'s office in New Orleans.

I come to talk to you today about the criminal law implications of the bill. I teach primarily in the area of criminal law and procedure. With all due respect to the many distinguished constitutional law professors that you have had here, I think it is about time that somebody talked about the criminal law implications of the bill because while this committee may be very concerned about constitutional issues, I am afraid that the majority of the American public is not as concerned about that as they are concerned about the implications of the bill.

### CONSEQUENCES OF THE BILL

Since in the public debate so many irresponsible charges have been made on both sides about what this bill will and will not do, I would like to talk about the consequences of the bill.

First of all, I will simply summarize what I have written, but in doing so I want to address three major areas. There are really two, but I divided the first one into two. I want to address the assertions made both by the proponents and by the opponents of the bill. I will take the main assertion from each side.

First of all, opponents claim the bill will necessarily make abortion murder. By opponents of the bill I mean those people who are opposed in principle to defining the unborn child as a human being, as opposed to certain prolife groups who are opposed to the bill because they feel it will not completely effect the purposes which they seek to achieve.

It is ironic that at the same time as you have opponents of the bill claiming that the bill will make it murder in all the States if this bill passes, you have prolife critics claiming that the bill will do nothing in the States. In other words, the pro-*Roe* critics are claiming that the bill will do exactly what the prolife critics would like the bill to do but criticize it for not doing. Obviously they both cannot be right.

The bill is framed in such a way that the injunction provisions under section 2 and the removal of the jurisdiction from the lower Federal courts will, as a constitutional procedural matter, keep the result which the opponents of the bill claim will follow from following. In other words, the bill will not result in mandatory murder statutes in the States. To assert that it will is nonsense.

However, even if the Federal courts should turn the bill around in the opposite direction and somehow completely transform this into a requirement on the States, there is backup protection. That backup protection is found in the general principles of criminal law

about which, unfortunately, constitutional discussion is often overlooked.

What are some of those principles? First of all, the bill does not make anything a crime. To be a crime, a statute must define something as criminal. The bill does not do that. Or it must prohibit an act. The bill does not do that. In every crime, a punishment must be provided to be a crime. This is a requirement of constitutional law. There is no punishment provision in this statute. It is not a criminal statute.

However, even if somehow it were construed to apply or forced the States to do something, the likely result, the result based upon principles of criminal law, would not be the necessary mandating of murder statutes.

Now I want to go to a second assertion. This is made by proponents of the bill. That assertion is that the human life bill, S. 158, will return the situation regarding criminal law and abortion to the status quo as it existed prior to *Roe* v. *Wade*. This is not true for several reasons.

First of all, we have to understand what we mean when we say the status quo prior to *Roe*. There seems to be an assumption on the part of both the proponents and the opponents of the bill that prior to *Roe* there was perfect States rights control over the question of abortion.

I think we have to make some very careful distinctions here regarding State control over criminal law. Yes, States primarily do have control over the details of substantive criminal law, namely how you define murder, rape, armed robbery, et cetera, as opposed to, for instance, criminal procedure questions such as search and seizure or confessions. Those procedural questions have been largely constitutionalized.

On the other hand, substantive criminal law questions such as the definitions of crime have not generally been constitutionalized until *Roe* v. *Wade*. In fact, the States largely did treat the unborn child as a person, which I will explain in a few minutes, as a de facto person without ever reaching the constitutional question of whether the unborn child was a 14th amendment person.

### ABORTION PRIOR TO LATE 1960'S

Before the middle to late 1960's, it never occurred to anybody that a State would not prohibit abortion. All you have to do is read the book "Aborting America" by Dr. Bernard Nathanson who records the events that led up to *Roe* v. *Wade*. He shows that public opinion, as well understood into the mid-1960's, was not such that people would have abolished abortion laws altogether.

I submit that we had at that time, until the mid-1960's, a national common law on the question of abortion where the details from State to State may have varied, but all of the States, even those States that liberalized abortion, had not abandoned some sort of restraint on abortion. In fact, this was the argument of the amicus brief supporting the State of Texas when *Roe* v. *Wade* was before the Supreme Court. They argued this as the basis for the view that in fact the unborn child was a person under the 14th amendment.

If the Congress and not the Court is correct on the purpose and intent of the 14th amendment, then the unborn child was and is a

person under the 14th amendment and then the States were not entirely free to do what they chose to do on abortion.

However, you may say that the Supreme Court had never held that the unborn child was a person. But it had never held that the unborn child was not a person either. The question was not determined until *Roe* v. *Wade*. The fact that *Roe* v. *Wade* made one determination is not necessarily persuasive in terms of constitutional theory. Although, admittedly it is controlling in a de facto sense, at least in the absence of congressional action on this or some other bill.

However, a more important reason, it seems to me, of why the human life bill, S. 158, will not return the situation to the status quo prior to *Roe* is because it does not affect the creation or the furthering of the constitutional right to privacy which was guaranteed by *Roe* v. *Wade*. The author of the bill, Steven Galebach, in his article, indicates the bill does not affect that right to privacy.

We need to take a look at that right to privacy for just a minute to realize what *Roe* v. *Wade* did in the context of the criminal law. First of all, I take it that Anglo-American custom has long reflected that we value our privacy. In fact, the private law in more recent times has recognized protection of a right to privacy.

However, creation of a constitutional right to privacy is something very new. That constitutional right to privacy, even if this bill is enacted, will remain. What that constitutional right to privacy does and can do is affect other State criminal statutes.

For instance, after *Roe* v. *Wade*, in the *Karen Quinlan* case the New Jersey Supreme Court, unnecessarily it seems to me, relied on the constitutional right to privacy recognized in *Roe* in upholding a right of the parents, with the doctors' advice, to withdraw treatment from the patient.

Moreover, we are now seeing in this country a move toward "rational suicide." You can well expect that when such cases reach the Court in whatever form, the argument will largely be based upon "the right to privacy." That is, you are free to do away with yourself because you are not affecting anyone else and you have complete control over your body to do anything with it that you wish.

To the extent that we accept that notion, we are contradicting the whole common law tradition that underlies and is the foundation of our law of crimes as it affects persons. This bill does not affect that change, that right of privacy pronouncement in *Roe*.

Now I want to consider whether this bill, insofar as it defines the unborn child as a human being, is a radical departure from the criminal law jurisprudence in this country.

You have heard from others, such as Professors Marshner and Rosenblum, about the common law history on the question of personhood. They discussed those cases which have said that the unborn child was not a human being.

Some interpret the cases in such a way as to say that they represented a positive finding that the unborn child was not a human being.

Others point out that the cases are concerned with the problem of proof. That is to say, whenever we are dealing with a question of

criminal homicide, one of the major elements of proof in the case is: Did the defendant cause the death?

Given the state of medical knowledge and technology prior to the midpart of the 19th century, there was, in effect, no way to prove that when the unborn child was born dead, the death had been caused by an abortionist or some other person. There was simply no way to prove that.

Under our standard of proof beyond a reasonable doubt, it was a very prudential rule of evidence to say that homicide could not be established because of the inadequacies of medical science.

However, we are not in the middle of the 19th century. We now have new medical knowledge. Elsewhere in the law it is well-recognized that when the reason for a particular rule ceases to exist, we change the rule.

For instance, in the private law area on the question of the unborn child, tort law has recognized advances in medical science and technology. As a result, the trend is toward granting recovery for prenatal injuries.

Moreover, if you look at the whole problem of death in criminal law you will see how we have modified the law to account for change in matters of proof.

For instance, the common law had a rule in homicide cases that that death of a victim had to occur within a year and a day of the mortal wound. Otherwise the defendant could not be prosecuted for murder. The rule did not mean that the victim was not a human being after a year and a day. What it meant was that as a practical matter there was no way to attribute the cause of death after a year and a day to the defendant as opposed to intervening circumstances.

Likewise, in the area of heart transplants and other organ transplants where doctors would like to take certain organs and put them in someone else, you have a critical criminal law problem when the available organ comes from a donor who has been shot. Defendants who have been charged with the homicide raise the question: Did they or the doctor cause the death?

Here we have had to deal with questions involving proof of death. In a prior state of medical technology and knowledge, we said that lack of heartbeat would be evidence of death. Now, with greater ability to diagnose these things, we have adopted different tests, primarily related brain function.

Finally, I would like to point to a very significant area in the criminal law where, in effect, the unborn child is already recognized as a human being. Take a situation involving the death of an unborn child that does not involve abortion. For instance, there are a number of cases in this country where an attacker shoots a pregnant woman, and, as a result, the unborn child dies. There have been a number of cases where prosecution has been brought against the attacker for criminal homicide based upon the death of that unborn child.

The distinction made both in the common law and in the recent cases is in terms of whether that child is born alive or is stillborn. For instance, if the child is dead in the womb, attacker is not guilty of homicide. If, however, the child is removed from the womb, alive and then dies, that is criminal homicide. The criminal homicide

will be murder if the defendant also had the intent to kill in that case.

Now theses cases—the leading case is the California case of *Keeler*—were in part relied upon in the Supreme Court of *Roe* v. *Wade* to say that the common law has never recognized the unborn child as a human being. However, when you look at the two different interpretations about the common law cases previously referred to, you see that it is important to test claims about the status of the unborn child against the theory of the criminal law.

Remember that what we are saying in these cases is if the child is dead in the womb, it is not homicide. If the child is born alive and dies, it is homicide. You can see that it is rather strange to say that the defendant who shot a pregnant woman and the unborn child lived long enough to get out of the womb and then die is guilty of homicide but to say he is not guilty of homicide in the other case when the child dies in the womb. It involves a certain contradiction. That is, to say the unborn child is not a human being but to hold a defendant guilty of the homicide when the child is born alive and dies is to say that he produced the human being. He caused it to be a human being and then he is guilty of the death.

Not only is that a violation of commonsense, but it is also a violation of one of the most basic principles of criminal law. That is, for there to be a crime, there must be the joinder of a criminal act and a criminal intent. They must join or concur.

In the example that I have given you, the criminal act, the shooting, joins together with the intent at the point when the bullet enters the woman and wounds the child. That is the joinder point.

To hold that person guilty of homicide means that that entity has to be a human being at that point. If it is not, then we are holding defendants guilty of the killing of a human being when there is no human being there.

This problem must be taken seriously because another constitutional principle provides that we have to prove all of the elements of a crime beyond a reasonable doubt. That means that in such a case the State must prove that that being was in fact a human being.

Since *Roe* v. *Wade,* we have had at least two States, Illinois and Louisiana, which have, in fact, for purposes of their criminal law defined the unborn child as a human being. State courts in both those States have said that that definition did not make abortion or even the instance which I just cited to you criminal homicide.

Nevertheless, and this is a case that has not been widely known because it was not reported, a Federal district court in New Orleans, in ruling on the Louisiana statute, held that consistent with *Roe* v. *Wade,* a State could define the unborn child as a human being for purposes of its criminal law.

In this last example about the death of a human being by a nonphysician, that is, an attacker, I have talked about criminal homicide. I have done that because we have not been dealing with the question of abortion.

The fact that these cases show that the unborn child must be considered de facto a human being does not mean that if this bill is

passed the States need to consider every death of an unborn child as murder under their statutes.

There are several good reasons why the States need not do so. The first one I have already mentioned in terms of the jurisdictional provisions of the bill. However, more importantly, in terms of the criminal law, there are other reasons why such a result need not follow.

First of all, as Mr. Galebach has pointed out in his article, there ought to be protection of the unborn child even if we are not absolutely certain when life begins or whether it is at the moment of conception.

At the same time, the criminal law in a criminal case gives the burden of proof against the State and it allows a presumption of innocence. Under these circumstances and given the proof questions, there is every reason to think the States would continue their practice as it existed prior to *Roe* v. *Wade*. That was punishing abortion as abortion and not punishing it as murder.

Thank you, Senators.

Senator EAST. Thank you, Professor Baker.

I will make this as brief as I can because our time is obviously running out on us here. We can certainly submit written questions to you. We appreciate that opportunity.

In terms of the specifics of S. 158, I gather on the basis of your testimony there is nothing that rules out a statutory approach to dealing with this problem as opposed to exclusively a constitutional amendment approach. Would I be correct in saying that?

Mr. BAKER. Senator, I have not largely testified on that question. I am simply testifying on the criminal law implications of it.

Senator EAST. Right.

Mr. BAKER. To the extent that you are allowing a statutory approach, I think it wise—again I am talking in terms of wisdom—for this reason: It allows experimentation by the States. Admittedly, there are unresolved questions here. It would seem to me wise to experiment and work out these problems rather than worrying completely about them and wondering what a constitutional amendment would do.

For instance, in *Roe* v. *Wade*, the Supreme Court, in footnote 54, made some statements about criminal law that are simply and very easily answered, but nobody answered them to the Supreme Court.

Senator EAST. Thank you.

Senator Baucus?

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Baker, to summarize your view, I understand you to say, in the first place, if this bill were to pass and become law and upheld by the Supreme Court, it would not return the status of this question to what it was prior to *Roe* v. *Wade*?

Mr. BAKER. Not in my opinion.

Senator BAUCUS. Second, you say that the bill would not require States to prosecute women in homicide cases. That is true, too, is it not?

Mr. BAKER. No, it would not require that, Senator.

Senator BAUCUS. That is right. You are saying it would not require that.

Mr. BAKER. That is right, Senator.

Senator BAUCUS. Back to the first point, is it not true that one of the reasons why when this bill becomes law it does not return the status of the situation to what it was prior to *Roe* v. *Wade* is because the bill would have the effect of preventing State action which interfered with the fertilized egg including the distribution of IUD's or the funding of abortions?

Mr. BAKER. I am not exactly sure what your question is, Senator.

Senator BAUCUS. Would the bill prevent States from taking any State action which would promote or pay for abortions?

Mr. BAKER. Would the bill prevent the——

Senator BAUCUS. Would the bill prohibit the States from taking any State action?

Mr. BAKER. Would it limit them from taking State action?

Senator BAUCUS. Would the bill prohibit States from providing funds to State hospitals to provide abortions?

Mr. BAKER. Would the bill do that?

Senator BAUCUS. Yes.

Mr. BAKER. On State funding?

Senator BAUCUS. Yes.

Mr. BAKER. I take it that it would on State funding.

Senator BAUCUS. That situation is different than the state of the law prior to *Roe* v. *Wade*.

Mr. BAKER. No, Senator, I think you completely misunderstood my testimony. I was actually addressing——

Senator BAUCUS. You did not testify on this point. I am asking you another point.

Mr. BAKER. Senator, I think I did. I did not want to direct it immediately to the point that you had previously raised, but I testified on that very point basically in response to what you have been saying all along.

What you have said previously is that the bill will not return it to the status quo prior to *Roe* because it would prohibit funding. What I am saying is that under the interpretation of the 14th amendment many would have given the view of the unborn child, the States would not have had the right to fund abortions prior to *Roe*. In fact, States did not fund abortions prior to *Roe*. It never would have occurred to anyone prior to *Roe*.

Senator BAUCUS. However, there has been public money spent on the distribution of birth control pills or IUD's, for example. Nobody has challenged that.

Mr. BAKER. Senator, the question of contraception is not touched by this bill.

Senator BAUCUS. Let us take public funds that are available for abortions. There are State and city hospitals where public funds are provided for abortion. Is that correct?

Mr. BAKER. As far as I know from reading the newspapers, Senator. I do not know specifically about provisions on funding. I am here to testify on the criminal implications.

Senator BAUCUS. So you are not qualified to answer the question?

Mr. BAKER. Insofar as you direct it to my testimony on criminal implications, Senator, yes.

Senator BAUCUS. I am trying to determine in your personal view whether one of the effects of this bill would be to prohibit States from funding abortions?

Mr. BAKER. To prohibit States from funding abortions? Yes.

Senator BAUCUS. It would?

Mr. BAKER. Yes.

Senator BAUCUS. You are saying that is the law prior to this bill?

Mr. BAKER. I would have argued prior to this bill that that was the state of the law, yes.

Senator BAUCUS. If this bill passes, would States be permitted to ban all private abortions?

Mr. BAKER. Would they be permitted to ban——

Senator BAUCUS. Would States be permitted to pass legislation to prohibit all private abortions even in the case of rape and incest?

Mr. BAKER. The States would be entitled to pass or enforce—many of them are still on the books—their abortion statutes, all but one of which has an exception for the life of the mother.

Senator BAUCUS. The answer is, yes, States would have that power?

Mr. BAKER. Yes to what, Senator?

Senator BAUCUS. To my question.

Mr. BAKER. Senator, I answered in terms that the States could enforce or pass other abortion statutes. Yes, they can.

Senator BAUCUS. If this bill were to become law, would States have the power to ban the private use of IUD's or morning-after pills or any device that was shown to interfere with the development of a fertilized egg?

Mr. BAKER. Shown to interfere with the development of a fertilized egg?

Senator BAUCUS. Yes.

Mr. BAKER. I do not know what you mean by shown to interfere.

Senator BAUCUS. Which would prevent the fertilization of an egg.

Mr. BAKER. Senator, there are already in the laws of most States bills affecting abortifacients. That would represent no change in the law, Senator.

Senator BAUCUS. So the answer is, yes, States would have the power?

Mr. BAKER. Senator, I will answer the question in terms of qualifying the answer in terms of what I have said; namely, there are already on the statutes of most States laws regulating abortifacients. They were enjoined by *Roe* v. *Wade* and the following cases. Presumbably States would go back to enforce those laws if they choose to, or to reconsider those laws, Senator.

Senator BAUCUS. In your judgment, would this bill encourage States to pass homicide statutes that would provide that should a woman——

Mr. BAKER. No, I do not think so, Senator.

Senator BAUCUS. Why would that not be the case?

Mr. BAKER. Because under *Roe* v. *Wade* the States could have passed homicide statutes after viability and none of the States have done so. The only State that punishes fetuscide as first degree murder is the State of California.

Senator BAUCUS. You do not think that States would be encouraged to pass homicide statutes?

Mr. BAKER. No, Senator, I do not.

Senator BAUCUS. Again, why do you not think they would be encouraged to do so?

Mr. BAKER. Based on their practice prior to *Roe*, and based on their practice since *Roe*.

Senator BAUCUS. You do not think that the passage of this bill would be a signal to proceed along those lines?

Mr. BAKER. Senator, as a former prosecutor, I can tell you that in those States where the prosecution would have anything to say with passing the bill, which is in many States, they would not want to try to prove any such case.

Senator BAUCUS. You are saying that most prosecutors would be opposed to any such legislation?

Mr. BAKER. They would be opposed to trying to prosecute murder cases for abortion, yes.

Senator BAUCUS. Thank you.

Senator EAST. Thank you, Professor Baker.

[The prepared statement of Professor Baker follows:]

## Prepared Statement of Professor John S. Baker

My name is John S. Baker, Jr. I am an associate professor of law at Louisiana State University Law Center, teaching primarily in the field of criminal law and procedure.

I am pleased to have been invited to testify here today on the criminal implications of S.158, the Human Life Bill (HLB). In doing so, I am speaking for myself and not in behalf of the institution with which I am affiliated.

Testifying about the criminal law implications of the bill presents a problem different from testifying about the constitutionality of the bill. The bottom line in a discussion of constitutionality is an answer to whether the bill is or is not constitutional. In terms of the criminal law implications of the bill, there is no such ready formulation of a question to be answered. In the context of these hearings, therefore, I will address that assertion from each side most frequently raised in debate over the bill. Opponents of the bill in principle (as opposed to those pro-life opponents who object in terms of the bill's effects) claim that the bill, if enacted, will make abortion murder in all the states. Proponents of the bill claim that the bill will turn the question of abortion back to the status quo as it existed prior to Roe v. Wade[1/], by restoring the question to the authority of the States.

First of all, I propose to give a summary treatment of these two basic concerns and then follow with a longer discussion of criminal law and abortion on which the summary statements are based. The summary of the first question is the shorter of the two, while most of the later discussion is directed toward explaining that position. Conversely, the answer to the second question is largely contained within the summary statement, while the extended discussion serves as a general context in which to understand the summary statement.

Note.—Footnotes appear at end of the statement.

I. SUMMARY

A. Will enactment of the HLB make abortion murder? NO

Criticisms of the bill have been raised not only by those who oppose the idea of defining human life to include the unborn, but also from many who support a constitutional amendment to protect the unborn. Those opposing recognition of the unborn's right to life claim that the bill will require the states to punish abortion as murder. Contradictorily, critics who also favor the unborn's right to life say the bill will merely leave to the states the discretion of protecting the unborn or not. In other words, defenders of Roe claim the bill will do what the pro-life critics might want the bill to do, but say it will not do.

The bill does not create a crime because it neither defines as criminal nor prohibits any act, and it lacks a punishment. Its definition of person is limited to the Fourteenth Amendment's guarantee against state deprivation of life without due process of law, with the intent thereby of leaving to the states the decision whether or not to even criminalize abortion. But even if Congress amends the bill or a Court construes the definition to require states to protect the unborn, the states would not be required to punish abortion as murder. These fears are unfounded.

B. Will the bill restore the status quo as it existed prior to Roe? NO.

According to Senator East, the purpose of the bill is to return the situation regarding abortion to the status quo as it existed prior to Roe. To do so, if that is even possible, assumes we know what the status quo was prior to Roe.

Both supporters and critics of the bill seem to assume that prior to Roe states were free to prohibit or not abortion. We tend to forget that prior to the late sixties, however, the abolition of abortion laws was unthinkable.[2/] While states may have varied in their formulae, all states had a similar prohibition of

abortion until a few states liberalized, but did not abolish, their abortion statutes. Prior to the late sixties, there was a national common law on abortion. Even then pro-life proponents argued that the Fourteenth Amendment protected the unborn, and thus required some type of state prohibition. 3/ That no case had held the unborn to be a Fourteenth Amendment person, a fact noted in Roe, was not necessarily conclusive concerning the intent of the Fourteenth Amendment as no case, prior to Roe, had held the unborn child was not a "person" under the Fourteenth Amendment. As Professor Victor Rosenblum discussed in his testimony, there is good reason to think the Fourteenth Amendment was intended to protect the unborn. 4/ Indeed, S.158 declares that the Fourteenth Amendment was intended to protect all human beings, including the unborn. Given that understanding of the Fourteenth Amendment, then the states were not entirely free. As stated in Roe:

> "If the suggestion of personhood is established, the appellants case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. 5/

If Roe incorrectly interpreted the Fourteenth Amendment, then prior to Roe states were not free to repeal their prohibition of abortion, even though some states did in fact liberalize their abortion statutes.

Thus, the HLB would not return matters to the pre-Roe status quo, but for reasons very different from what opponents of the bill suppose. Contrary to some suggestions of Senator Baucus, the fact that the HLB prohibits state funding of abortion would not represent a change regarding the status quo prior to Roe if states were not then free to do so. In fact, there would have been few, if any, states which funded abortion prior to Roe. Rather, the HLB would not represent a return to the pre-Roe era if it provides states complete discretion to prohibit abortion or not.

Even if one insists that prior to Roe the states were entirely

free to deal with their substantive criminal law, the HLB will not restore that situation. Roe gives rise to a constitutional right to privacy which is not affected by this bill.[6/] While private law actions based on a right to privacy have been recognized by courts for some time, the elevation of the right to constitutional status has been recent and ill-defined in the area of public law, i.e., criminal law.[7/] The right of privacy has taken on a life of its own beyond the controversy over abortion.[8/] For example, the New Jersey Supreme Court invoked Roe's right of privacy when allowing Karen Quinlan's doctors to withdraw all life support on the approval of her family, subject to review by the hospital.[9/]

While there is disagreement on the theoretical nature of the right to privacy,[10/] in criminal matters its application means withdrawing from the area of public concern some act which the body politic considers detrimental to the common good. Since the corpus of criminal law reflects a society's attempt to articulate and defend its minimal view of a good society, the labeling of some prohibited act as within the right to privacy is simply a dressed-up way of denying a state jurisdiction over certain acts which a court deems not to be criminal. Legal scholars have characterized the rise of the right to privacy as the resurrection of the discredited concept of "substantive due process" according to which a court strikes down laws on the basis of content with which the court philosophically disagrees.[11/]

As Archibald Cox has stated, the court's abortion decisions ignore "the paramount sanctity of human life which has always been at the center of western civilization, not merely by guarding 'life' itself, however defined, but by safeguarding the penumbra, whether at the beginning, through some overwhelming disability of mind or body, or at death."[12/] Not only the result, but the rationale of Roe has made theoretical nonsense out of the law on protection of persons. Moreover, even if the right to life for the unborn, the aged, and the handicapped is affirmed by constitutional amend-

ment or achieved as a result of the court upholding this statute, some effects of Roe will remain. The right to privacy rationale will be available to undermine criminal law even where life is concerned, by, for instance, finding a constitutional right to "rational" suicide.

II. DISCUSSION

A. The operative principles of criminal law support the view that the unborn child is a human being.

In Roe v. Wade, the Supreme Court declined to include the unborn child as a "person" within the meaning of the Fourteenth Amendment. Roe stated:

> "[i]n areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent on live birth." 13/

In part the court depended on its understanding of the common law view on "person". As has been shown, and as I will discuss, the court's understanding of the common law is open to serious question.[14/] But what highlights the court's misunderstanding about personhood is the court's creation of a constitutional right of privacy to override what it recognized was at least potential life.

While Roe refused, in theory at least, to accept as absolute the woman's right to control her body, it did accept the core of that notion in its vague version of the constitutional right to privacy. The idea, however, that anyone--male or female--has complete control over his or her own body contradicts the basis of our law on crimes against the person. Even though for obvious reasons, the state may not punish suicide or attempted suicide, that does not mean one has a right to commit suicide. If it did, people would also have the right to consent to aggravated forms of battery, which they do not have.[15/] As Blackstone, the father of American law, phrased it, suicide is "among the highest crimes."[16/]

The Supreme Court has significantly denigrated the status of

the person in criminal law. As has been shown, the court dismissed too casually the status of the unborn child as a person for purposes of private law, a status which continues to expand despite Roe.[17] As anomalous as it may seem to define the unborn as a person for purposes of private law but not criminal law, the anomaly is even greater when we consider the criminal law. For within the criminal law itself, the unborn may be considered a person for certain purposes despite the holding in Roe v. Wade.

Consider the situation of a pregnant woman who is beaten or shot resulting in the death of the fetus. In the absence of legislation, courts have followed the common law distinction in terms of whether the child is stillborn or born alive and then dies.[18] If the child is stillborn, the cases have held this is not homicide. If the child is born and breathes for an instant or establishes independent circulation and then dies, this is homicide.

Based on the common law distinction, courts have reasoned that the fetus is not a person or human being until born alive.[19] The difficulty with the conclusion is that it does not account for holding the defendant guilty of homicide if the child is born alive and then dies. According to the reasoning, the fetus is not a human being at the time it is wounded; it only becomes a human being after it is born. Not only does it seem strange to say that the assailant caused the fetus to become a human being by battering the mother, but it violates the general principles of criminal law.

A basic principle of criminal law is that the defendant's criminal act and criminal intent must concur in producing the criminal consequence.[20] If at the time of striking the pregnant woman the unborn child is not a human being, how can the defendant ever be guilty of criminal homicide? By definition homicide is the killing of a human being. If the fetus does not become a human being until after birth, the defendant has not harmed a human being insofar as he injured the fetus. It is not sufficient to say that the defendant caused the consequence of death which

occurred after the fetus became a human being. If, for instance, a defendant does an act which is not a crime at the time he commits the act, the fact that some of the consequences of the act occur after the law make such an act criminal cannot have a retroactive or ex post facto-like application.[21]

Nevertheless, the common law distinction between the two situations does make sense if one further distinguishes between existence of a human being and proof of the cause of death. As others who have testified here have pointed out, inadequate medical knowledge concerning the basic facts of human fetal development until the nineteenth century affected development of the law.[22] At the time, given the higher probability of the fetus being born dead, it would have been inappropriate to convict a defendant of homicide because of the inability to prove he caused the death. The requirement that the child be born alive and breathe for an instant or establish an independent circulation was a way of proving that the defendant, rather than natural causes, produced the death of the child. It does not represent a denial of the unborn's humanity, but a requirement consistent with the standard of proof beyond a reasonable doubt that the defendant be shown not only to be guilty of some crime (abortion) but that he be guilty of the particular harm charged (death of a human being).

But for the abortion controversy, it is likely that courts acknowledging advances in medical knowledge, as is the trend in wrongful death actions, would have eliminated the common law distinction altogether. In People v. Chavez[23] a California court in the light of modern medical knowledge said the common law by holding:

> "A viable child in the process of being born is a human being born within the meaning of the homicide statutes, whether or not the process is fully completed. It should at least be considered a human being within the meaning of the homicide statutes, whether or not the process has been fully completed." 24/

In Keeler v. Superior Court of Amador County,[25] the leading case, the California Court finally faced the question of killing where

the child was stillborn. In declining to find the child a "human being", the California Supreme Court, over a strong dissent, relied on pro-abortion, revisionist writing of Cyril Means, later prominently cited in Roe v. Wade. The California Court's attitude toward new medical data affecting the beginning of life contrasted with its approaches to a common law rule involving the end of life.

The common law "year and a day" rule provides that the death of a victim must occur within a year and a day of the infliction of a wound in order to constitute a punishable homicide. The rule, which is only evidentiary in nature, represents a practical method of dealing with the difficulties inherent in proving the cause of death after a lengthy period of time. Recently, however, some legislatures have modified or eliminated the rule. As a California Court stated this change "merely modifies an archaic common law impediment", reflecting "that modern medicine not only has made it possible to prolong the life of an intended murder victim but also has made it feasible to establish the cause of death even if the victim dies several years after the injury."[26/]

As with the "year and a day" rule state legislatures remain free to define the unborn child as a "human being" for purposes of the criminal law. Keeler and other cases were not decided on constitutional grounds. California later has included the killing of a fetus in its murder statute.[27/] Also, other cases decided after Roe recognize the right of legislatures to define the unborn child as a human being--as long as the right to abortion is not affected.

In 1976 the Louisiana legislature amended its criminal law definition to provide that "person includes a human being from the moment of fertilization and implantation. . ." The legislature did so in response to State v. Gyles[28/] which had followed Keeler. When the ACLU challenged the article, a federal district judge, who had previously invalidated various Louisiana anti-abortion statutes, upheld the constitutionality of the statute in situations not governed by Roe v. Wade. In an unreported decision[29/] the

court held the statute constitutional except insofar as it applied to abortion permissible under Roe and its progeny. The ACLU filed an appeal challenging the judgment for sustaining the statute in part, but later dismissed the appeal--apparently preferring to leave the decision rest unnoticed. Although a later Louisiana case declined on grounds of statutory interpretion to apply the new definition to homicide, 30/ it remains clear that state legislatures are already constitutionally permitted to define the killing of a fetus as homicide, i.e., the killing of a human being.

State criminal law, therefore, can constitutionally recognize the unborn child as a human being/person. Some few states do explicitly recognize the unborn child as a human being. 31/ Other states implicitly recognize the unborn child as human if they hold a defendant who batters a pregnant woman guilty of homicide for the death of a fetus who is born alive and dies. 32/ Moreover, the Supreme Court has recognized the continued validity of criminal abortion statutes, even during the first three months of pregnancy, when applied to non-physicians--despite the woman's consent. As the Supreme Court stated in Connecticut v. Menillo:

> "Even during the first trimester of pregnancy, therefore, prosecutions for abortions conducted by non-physicians infringe upon no realm of personal privacy secured by the Constitution . . . As far as this Court and the Federal Constitution are concerned, Connecticut's statute remains fully effective against performance of abortions by non-physicians." 33/

States constitutionally may and explicitly or implicitly do treat the unborn child as a human being for purposes of criminal law. The states vary in terms of their protection of the unborn child--in part due to Roe. Although apparently inconsistent, it is true that outside of an abortion performed on a consenting female by a licensed physician, the states are free to adopt a theory of life. Roe only says the states cannot adopt a particular theory of life as a way of overriding the woman's right of privacy. As a result, an unborn child can be a person/

human being except when the mother decides to have an abortion performed by a licensed physician prior to viability.

B. The question of whether the unborn child is a human being cannot be left unresolved.

It is nonsensical to say that the unborn child is a human being except when the mother decides she does not want to bear the child. Either the child is a human being or it is not. Its human beingness cannot depend on who and under what circumstances its life is terminated. It needs no argument to see the inconsistency of saying that the unborn child is a human being if an attacker batters the mother and thereby injures the child; but not a human being if a licensed physician assaults the child with the mother's consent.

It would be more candid and consistent with the structure of criminal law to admit that what Roe does is to provide a constitutional defense to abortion. In other words, Roe means that even if abortion involves the taking of a live, the taking of that life is justified when done by a woman acting through a licensed physician. This is then a new form of homicide that is deemed by the court to be justified.

Roe was not argued or explicitly decided on this basis. The argument, however, of some who have testified against the bill is that whether or not the unborn child is a human being is dispositive.[34/] They justify this position on either or both of two grounds. First, some witnesses have stressed that the definition of "person" in the Fourteenth Amendment is an artificial, legal concept not necessarily related to the reality of whether one is actually a human being or person. Compatible with but distinct from, this approach is simply the assertion that even if the unborn is human and has a constitutional right of life, the right of privacy overrides the right to life when the two come into conflict in the case of abortion--in other words,

justifiable homicide.

The logical consequence of Roe, whether or not appreciated by the Supreme Court at the time, is to justify the taking of innocent human life. The Justices may have sincerely thought they could avoid these consequences because of the doubts they may have been unable to resolve. But it has since become clear that the criminal law must resolve the doubt.

The dilemna is this: without violating Roe, any state that chooses legislatively to modify the common law in order to punish as homicide the killing of an unborn child by a non-physician can do so, as discussed above. For a successful prosecution of criminal homicide, the state must prove beyond a reasonable doubt that the defendant has caused the death of a human being. In such case, then, a jury following the legislative definition is permitted to find beyond a reasonable doubt that this unborn child is a human being.

It will not do to say that outside of the abortion context the federal courts are simply allowing states to indulge their fantasies by labeling the fetus a human being. The consequences of this labeling is the finding of a defendant guilty of criminal homicide. To punish someone for any crime, much less criminal homicide, clearly violates due process under the Fourteenth Amendment unless the state has proven all elements of the crime beyond a reasonable doubt.[35/]

C. A problem of proof.

In the hearings devoted to the scientific question of when life begins, the basic division among the witnesses involved the standard of proof. Witnesses stating that human life begins at conception did so on the basis that that moment is the beginning of a single-cell organism. Dr. Rosenberg, in opposing the bill, agreed that fertilization is the beginning of a new cell's life, but argued that human life involves something more than biologi-

cal life and that one could not prove what these characteristics are and when they occur.

Insofar as the medical opponents of the bill are seeking mathematical or demonstrative certainty of the type characterized by the irrefutable proposition that 2 + 2 = 4, they are correct. Such certainty is rarely if ever possible in matters human. This notion, however, is not simply a philosophic or moral view as Dr. Rosenberg and others have argued. It is the view which underlies the structure of proof in our legal system, especially the criminal justice system.

Our criminal adversary system presumes a defendant innocent until proven guilty beyond a reasonable doubt. This standard of proof does not require proof beyond all doubt, but--as courts often say--proof to a "moral certainty." The fact that the term "moral" is often used does not indicate that the trial of a case is somehow bound up with religion. The reference to moral certainty means a certainty that one would be willing to act on--in this context, by returning a verdict of guilty to the charge or some lesser one.

As Mr. Galebach has stated:

> "The crucial point, however, is that Congress does not need to be certain of an answer before it declares a national policy on when human life begins." 36/

This premise is perfectly consistent with the value Western legal systems have until recently placed on human life. Indeed, that view is reflected in the homicide statutes which punish the reckless taking of a human life. Thus, if a hunter in the woods, seeing something move and being uncertain whether it is animal or human, would shoot and kill what he later learns is a human being, he would be guilty of reckless or wanton and wilful criminal homicide.

B. The finding that an unborn child is a human being will NOT mean that the states must punish abortion as murder.

Opponents of the bill have argued the bill will require the states to punish abortion as murder. This is simply not so for a number of reasons.

According to the reading of the bill given it by Mr. Calebach, the bill's only immediate impact would be to outlaw performance of abortion in state-owned or operated institutions and also state funding of abortion. Because the bill only purports to affect state action under the due process clause, the author of the bill contends it merely makes a declaration without enforcing any particular course of action on the states, justifying this by stating:

> "It is appropriate, therefore, for Congress initially to trust the good faith of the states to implement a Congressional declaration that 'person' and 'life' include the unborn." 37/

While this may seem a reasonable policy to pursue, I prefer to rest my position on something less problematic than the current course of constitutional law.

The general principles of criminal law and current practice offer, in my opinion, a more reliable safeguard against the fears raised by opponents to the bill. First, the same principles which from conception, also argue in favor of giving the defendant the benefit of the doubt when charged with a crime. Secondly, the actions of the states both before and after Roe show these fears to be without foundation.

D.(1) Applying general principles of criminal law to killing the unborn.

Assume arguendo that the Supreme Court, after upholding the statute, uses the bill's finding of fact on the beginning of human life and the Court's own jurisprudence to require the states to provide some protection for the right to life.[38/] The states nevertheless, would not have to treat abortion as murder.

Murder is only one form of homicide, indeed only one form of criminal homicide. Note that thus far, I have generally referred to "homicide", which simply means the killing of a human being. An accidental, non-criminal killing of a human being, for instance in an automobile accident, is a "homicide". Further, among criminal homicides, there are various types, depending on each state's scheme of criminal law. Within the category of criminal homicide, the seriousness (e.g., whether murder or manslaughter) and, therefore, the punishment will depend on the defendant's "mens rea" or guilty mind. In order to prove any of the forms of criminal homicide, the state must prove a harm (the death of a human being) caused by the defendant, while acting with a certain criminal state of mind.

D.(1)(a) Criminalizing the killing of the unborn.

Knowledge of the basic facts of fetal development prompt the attempt to protect the unborn from the moment of conception. Even without absolute certainty concerning the precise moment when life begins, it is not only reasonable but required by Western standards that we protect the conceptus once it is found to be, or likely to be, a human being. Yet, without in anyway denigrating that notion, it is quite consistent to say that anyone charged in killing an unborn child must be shown "beyond a reasonable doubt" to have caused the death of a human being.

At common law, with more primitive knowledge and none of our technology, the reasonable dividing line at one time for distinguishing abortion from homicide was the point of birth. If the child was born alive and breathed or established an independent circulation, one had reliable evidence from which to establish the cause of death. Given our advanced knowledge and technology, as previously discussed, some states have already and others may modify the common law rules to make the killing of an unborn child manslaughter. As to non-physicians the states are able to punish the killing of the unborn as murder, but have shown

no inclination to do so, as discussed below. Nevertheless, the prosecution must still prove beyond a reasonable doubt the defendant caused the death of a human being. For early stages of development, when the child is not recognizable as a human being, it is reasonable to think states would return to punishing this as abortion. This would not imply a lack of equal treatment for the unborn child at the early stages of development. Rather, consistent with our standard of proof beyond a reasonable doubt, a state might conclude that the difficulty of proof requires prosecution of such cases under the heading of abortion. Such would represent a rational distinction for a state to draw.

In Roe, the Supreme Court questioned whether, if a fetus is a Fourteenth Amendment person, the state could provide a penalty significantly less than the maximum penalty for murder.[39/] But such a disparity presents no problem at all. In my state, Louisiana, the disparity between murder (death or life imprisonment) and negligent homicide (0-5 years) is potentially greater than was the disparity between murder and abortion (1-10 years). Yet, I assume no one has any doubt that the victim of a negligent homicide is any less a human being.

D.(1)(b) The mental element.

Many of the difficulties that have been foreseen resulting from a holding that the unborn child is a human being are more apparent than actual. Readily available principles in criminal law should allay certain fears about the consequences of the unborn child being recognized as a Fourteenth Amendment person.

Opponents of HLB and a Human Life Amendment have raised the specter of prosecuting women for miscarriages. Such a suggestion is simply specious.

Crime requires: (1) a criminal act, and (2) a criminal intent or criminal negligence.[40/] Except for a limited class of "strict liability" offenses, such as food and drug laws, the law "adhere[s] to the central thought that wrongdoing must be conscious

to be criminal . . ." [41] For a homicide to be criminal, the killing must fall into one of the following categories: (1) specific-intent-to-kill murder, (2) specific-intent-to-do-bodily-harm murder, (3) depraved-heart murder, (4) felony murder, (5) heat-of-passion voluntary manslaughter, (6) criminal negligence-involuntary manslaughter, (7) unlawful act-involuntary manslaughter, (7) unlawful act-involuntary manslaughter.[42] Even the shooting of another person is not criminal unless it has one of these guilty states of mind. A miscarriage not only lacks anything approaching criminal intent when involuntary; it also lacks the other requirement of all crime--some act or omission that is the equivalent of an act.[43] Moreover, as a practical matter, it will be virtually impossible to know of or prove many deliberately, self-induced early stage abortions.

D.(2) States have shown little inclination to punish abortion as murder.

Prior to 1973 and Roe v. Wade, every state provided some protection to an unborn child in the form of either their abortion statutes or a manslaughter statute (usually entitled "wilful killing of an unborn quick child"). The abortion statutes usually carried a penalty of less than five years imprisonment and fines no greater than $2,000. The vast majority were felony statutes falling under the Title of Offenses to the Family. A very few were listed under Offenses to Persons, but even here the penalty being no more than manslaughter (see, for example Connecticut and Kansas).

After Roe v. Wade, some changes took place in state statutory law. Only two states repealed their abortion laws completely: Ohio and Hawaii, both still providing guidelines to physicians performing abortions and small penalties for not following those guidelines. Of the other forty-eight states, some amended their statutes in attempts, often struck down by federal courts, to regulate abortions as strictly as allowed by Roe. Those

states with traditional abortion laws standing still maintained them against non-physicians. See Connecticut v. Menillo.[44/] Two states, Illinois and Connecticut, have statutorily declared that it is their state policy to protect human life from conception and have implied that if the Roe v. Wade decision is ever reversed or amended, they will re-apply their old abortion statutes.

Although Roe would allow a state to punish abortion of a viable fetus as murder, these states have not attempted to redefine their statutes to take advantage of this option. Since before Roe, thirteen or so states have included the wilful killing of an unborn "quick child" within their criminal homicide statutes. Only California and Louisiana, however, have chosen to provide the criminal sanctions of first degree murder for the killing of an unborn child.[45/] New York has defined homicide as including the killing of an unborn child after the twenty-fourth week of gestation but has distinguished between abortion and other types of criminal homicide.[46/]

States have had, but have not taken, the opportunity to define at least late stage abortions and abortions by non-physicians as murder. S.158 does not requrie, and the behavior of the states does not suggest, any movement to punish abortion as murder.

FOOTNOTES

1/ 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

2/ See Nathanson, Aborting America (1979), p.34.

3/ See Amicus Curiae Brief of Americans United for Life in Record of Roe v. Wade.

4/ V. Rosenblum, Testimony of June 1, 1981, at 15-23.

5/ 410 U.S. at 156-57.

6/ Galebach, "A Human Life Statute" VII Human Life Review 1, 23 (1981).

7/ Prosser, Law of Torts (4th ed., 1971) pp. 802-818.

8/ See Tribe, American Constitutional Law, 886-990 (1978).

9/ Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

10/ Tribe, Constitutional Law at 887.

11/ R. Epstein, "Substantive Due Process by Any Other Name: The Abortion Cases," Supreme Court Review (1973), p. 159.

12/ A. Cox, The Role of the Supreme Court in American Government (1976), 53.

13/ 410 U.S. at 161.

14/ See R. Byrn, "An American Tragedy: The Supreme Court on Abortion", 41 Fordham L.Rev. 807, 817-827 (1973).

15/ See Perkins, Criminal Law (2nd ed., 1969) at 110.

16/ ". . . No man hath a power to destroy life, but by commission from God, the author of it: and as the suicide is guilty of double offense; one spiritual. . . the other temporal, against the King, who hath an interest in the preservation of all his subjects, the law has therefore ranked this among the highest crimes, making it a peculiar species of felony." Blackstone, Commentaries on the Law of England, Vol. 4, 188 (St. George Tucker Ed., 1803).

17/ D. Kader, The Law of Tortious Prenatal Death Since Roe v. Wade, 45 Mo.L.Rev. 639, 652-53 (1980).

18/ See eg. People v. Greer, 79 Ill.2d 103, 402 N.E.2d 203 (1980) and cases listed therein.

19/ Ibid.

20/ Hall, General Principles of Criminal Law, (2nd ed. 1960), 185-190.

21/ See Ibid. at 58-64.

22/ Testimony of W. Marshner and V. Rosenblum, Subcommittee on Separation of Powers, June 1, 1981.

23/ 77 Cal.App.2d 621, 176 P.2d 92 (1947).

24/ 176 P.2d at 94.

25/ 2 Cal.3d 619, 87 Cal.Rptr. 481, 470 P.2 617 (In Bank 1970).

26/ 25 Cal.App.3d 742, 102 Cal.Rptr. 6 (1972).

27/ Cal. Pen. Code §187, "Murder is the unlawful killing of a human being, or a fetus, with malice and forethought . . ." (Amended 1970).

28/ 313 So.2d 799 (La., 1975).

29/ Civil Action 76-2392"F", U.S. District Court, Eastern District of Louisiana, Judgment on September 29, 1976.

30/ State v. Brown, 378 So.2d 916 (1979).

31/ See, Ill. Rev. Stat. 1977, Ch. 38, par. 81-21. La.R.S. 14:2(7) (1950), as amended by 1976 La. Acts No. 256, §1.

32/ See, e.g. State v. Anderson, 135 N.J. Super 423, 343 A.2d 505 (1975) and Clarke v. State, 117 Ala. 1, 23 So. 671 (1898).

33/ 423 U.S. 9, 11, 96 S.Ct. 170, 46 L.Ed.2d 152 (1975).

34/ Testimony of L. Tribe, at 4-5; Subcommittee on Separation of Powers, May 21, 1981.

35/ In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 368 (1970).

36/ Galebach, "A Human Life Statute," VII The Human Life Review 1, 20 (1981).

37/ Ibid. at 25-26.

38/ See Roe v. Wade, 410 U.S. at 156-57, "If the suggestion of personhood is established, the appellants' case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."

39/ 410 U.S. at 157, N. 54.

40/ Perkins, Criminal Law at 743.

41/ Morissette v. U.S., 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

42/ See La Fave and Scott, Criminal Law (1972) 528-602; Perkins, Criminal Law (1969) 34-96.

43/ Perkins, Criminal Law at 546-47, 591-92.

44/ 423 U.S. 9, 96 S.Ct. 170, 46 L.Ed.2d 152 (1975).

45/ In State v. Brown, 378 So.2d 916 (1979), the Louisiana Supreme Court found that the Legislature's intent had not been clearly enough expressed in the amendment to the criminal code.

46/ N.Y. Penal Law §125.00. "Homicide means conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting murder, manslaughter in the first degree, criminally negligent homicide, abortion in the first degree."

N.Y. Penal Law §125.05: "The following definitions are applicable to this article: (1) "Person" when referring to the victim of a homicide, means a human being who has been born and is alive."

Practice Commentaries: "Subdivision merely assures that the ensuing homicide sections which speak of causing the death of a "person" do not include abotional killing of an unborn child."

Senator EAST. If Ms. Carol Bellamy would now please come forward?

Ms. Bellamy is the president of the city council of New York. She received her law degree from New York University and is a former member of the New York State Senate.

Ms. Bellamy, we welcome you this morning. Please proceed.

## STATEMENT OF CAROL BELLAMY, CITY COUNCIL PRESIDENT, NEW YORK CITY COUNCIL

Ms. BELLAMY. Mr. Chairman, Senator Baucus, thank you.

As you pointed out, I am president of the council. That is a citywide position in the city of New York. It is the second highest position, I suppose, inasmuch as were the mayor not able to continue to serve, the president of the council would become the mayor of the city. Our mayor seems to be just getting healthier in the position, but that is where I exist.

I did spend 5 years as a member of the New York State Legislature as a State senator and was elected three successive times.

S. 158, the proposed human life bill, runs counter, I believe, to the democratic traditions of this Nation. It imposes the moral beliefs of some on the rest of our citizens in areas where the Supreme Court has already ruled.

Not only would this bill be an invasion by Congress of the constitutional rights of women, it would also threaten the very essence of our system of law and government. It challenges the authority of the Supreme Court as well as the policymaking autonomy of State and local officials. It chips away at the 200-year-old concept of a separation of powers between Congress and the courts and it undermines basic precepts of federalism.

By seeking to legislate the murky issue of when life begins, this bill extends or attempts to extend to the fetus the due process protection of the 14th amendment. In so doing, the bill directly controverts the ruling in the *Roe* case that the word "person" as used in the 14th amendment "does not include the unborn."

It also contravenes the Supreme Court's recognition in the *McCrae* case that while the Federal Government had no obligation to provide abortions to the medically indigent, the States retained this option. This attempt to circumvent the Constitution and the Supreme Court has already been challenged by no less than 6 former Attorneys General of the United States and 12 constitutional scholars.

However, as a local government official, and that is the capacity in which I appear before you today, albeit a locality of 7 million people, a balanced budget of some $15 billion, I am as much concerned over what appears to be a usurpation of local authority as I am over your stepping on the robes, as it were, of the Justices of the Supreme Court. Let me speak then as a local government official concerned about policy.

This bill, as currently drafted, would bar local decisions to fund abortions and certain methods of contraception and would prohibit the provision of these services at public health facilities.

For the State of New York and the city of New York, the impact of this would be devastating. Three years before the *Roe* decision, in 1970, my State and my city clearly determined that access to

safe and legal abortion was not only a woman's right, but was indeed an essential of the State's health and welfare policy.

More recently, despite the *McCrae* decision, New York State has continued to uphold the rights set forth in *Roe* by locally funding medicaid abortions and making them available in municipal hospitals.

We in the State of New York and the city of New York have chosen to continue funding abortion and family planning services for extraordinarily compelling health and social welfare reasons.

We have 11 years of experience. The evidence of 11 years of legal abortions in New York State is that safe and legal abortions have not denied life but affirmed it by protecting the hundreds of thousands of women who would have otherwise been forced to seek out illegal and unsafe abortions.

As Constance Cook, a former member of the assembly and a member of the Republican Party, said on the floor of the New York Assembly 11 years ago:

> The issue is not abortion or no abortion. The issue is legal or illegal abortion, safe or unsafe, filled with suspicion, fear, and risk, or conducted in a manner that minimizes the tension that invariably surrounds the procedure.

Let me describe what the effect has been in the State of New York. With legal abortions came a sharp decline in New York's statistics on maternal and infant mortality and morbidity. The often tragic complications of septic abortion have, for example, all but disappeared from the admission records of our municipal hospitals.

Our experience in New York has shown that the woman most likely to terminate a pregnancy is either under the age of 15 or over the age of 35. Such women run the highest risk of adverse health consequences from this pregnancy. For older women, prenatal screening in conjunction with legal abortions has minimized the number of children born with serious birth defects, and, conversely, has prevented abortion when no potential defects are identified.

I chair the New York City Task Force on Adolescent Pregnancy. In that capacity, I am particularly concerned about the ramifications of this bill on the troubling issue of teenage pregnancy.

Teenagers account for one-third of all recorded abortions in New York City. That is, I believe, a statistic one can apply generally nationally. In New York City alone last year, this percentage translated into more than 18,000 abortions for women under the age of 19. There were at the same time some 14,000 children born to this age group, children bearing children. The teen birth rate will certainly rise if legal abortion is no longer available.

The mortality rate of teenagers due to complications of pregnancy is 60 percent higher than that of older women. Infants of teen mothers face a mortality rate approximately twice that of those born to women in their twenties. These are some of the compelling health reasons.

Let me talk about equally compelling social welfare and economic reasons. The majority of teen mothers do not finish high school. That severely restricts their employment possibilities. In turn, that increases the likelihood of a vicious cycle of welfare dependency.

A recent survey in my town showed that 90 percent of our young mothers, ages 15 to 17, were unemployed 9 months after delivering

their first child. Seventy-two percent were receiving public assistance by that time.

These are just some of the health, social welfare, and economic problems created by unwanted pregnancies that local officials must deal with every day. Passage of this legislation would tie the hands of the local officials. I urge that in your deliberations over this legislation you confer with your State and your county and your city officials who will have to live with the results of this bill.

What are the clear consequences of this bill? In the opinion of legal witnesses, even those supporting the bill who have testified before you, if this legislation becomes law, local officials will no longer be able to provide and fund some family planning and all abortion services.

Since 1970, New York City has assumed the costs of these services for poor women who are not eligible for medicaid at our 16 municipal hospitals. In 1980 alone, more than 12,000 abortions were performed in our municipal hospitals.

I ask you, is it your intent to prohibit abortions and postconception family planning in local public hospitals at local public expense if we at the local level want to provide these services?

No less troubling are the less obvious consequences of this bill. The legislation threatens the right to obtain nonsubsidized abortions from private institution.

In New York, for example, we license private hospitals and clinics, some of them solely as abortion providers. We also inspect these facilities. Many of them receive public funding. Some have affiliation contracts with our municipal hospitals. The State even licenses private doctors.

Again, the question: Where does State action end and where does it begin? At what point will all private abortions be legally suspect? Do we define a fertilized egg with 14th amendment protections as a person under local homicide statutes? Would a doctor who prescribes an IUD or a morning-after pill be guilty as an accomplice to homicide under current State law?

Unless there is immediate clarification of the language and the intent of this bill, I believe that all abortion and family planning services at the local level will be chaotic and possibly disrupted through the chilling effect of this measure while the courts and legislatures in every State grapple with these ambiguities.

In sum, this poorly drafted bill is unconstitutional, unworkable, and, in my opinion, unwise. It could open the door to future congressional challenges of the Supreme Court on issues that we all thought were long put to rest. It violates acknowledged constitutional rights and it limits local government options to provide vital health and welfare services.

I need not remind you, I am certain, that as lawmakers, and I was a lawmaker, you have the responsibility to legislate for the welfare of the general public, in this case despite contrary personal views and personal preferences. I urge you not to move this legislation forward. I thank you for the opportunity to appear before you.

Senator EAST. Thank you, Ms. Bellamy. I thank you for adhering to our concern for time and conciseness. We deeply appreciate your helping us on that score. In addition, you have made your points very well and given us a lot of food for thought. Again, I wish time

were not always so pressing, but at least you have given us something to work with.

Let me just ask you a point or two and then I will turn to Senator Baucus.

On the points you raised about separation of powers and federalism, you come to slightly different conclusions than I would, which is understandable since reasonable minds can differ over things. To me, the separation of power problem is that the Court has usurped its power. Hence, we are trying to restore the balance in terms of the legislature.

In terms of federalism, of course my contention would be that *Roe* v. *Wade* totally upended the State involvement here and federalized the matter. Hence, this bill, S. 158, whatever strengths and weaknesses it has, would first provide for more State contribution in terms of what States might do and, second, it would make the issue more of a legislative function at the State level.

We have the best of both worlds. We help restore the imbalance in federalism in terms of returning more prerogative to the States. Second, rather than it being so overwhelming a court obligation and function of policy definition, it would become one of the State legislatures.

I am somewhat resistant to the notion that we are somewhere at odds with fundamental notions of separation of power and federalism.

Let me just ask you that question and let you dissent on that observation. Then I had one other question I would like to ask you before turning to Senator Baucus.

Ms. BELLAMY. Federalism is certainly being widely discussed these days in many contexts even beyond the chambers of this particular room. However, I would remind the subcommittee, as I need not do, that even Professor Nagel and Mr. Galebach, as well as Professors Bork and Cox and other testimony you have had that is referred to in the written testimony of the previous speaker, acknowledged that, in fact, certain things would happen automatically.

What you have done or what this measure would do is to prohibit us from exercising our traditional concern for health and welfare. Indeed, what the State legislature may or may not want to do is irrelevant in the context of the automatic actions that would take place.

I think there seems to be no disagreement in the testimony that I have read that certain actions would take place automatically. It is hard for me to understand then how there is discretion which would reside at a State policymaker or a local policymaker level.

Senator EAST. As Professor Baker pointed out, and I have repeated it throughout the hearings, there has been concern about the point that if this bill became law, all of a sudden States would be required to do, or one or two would on their own do, very outlandish and outrageous things.

Just as a matter of constitutional and legal interpretation, I, too, would be resistant to that point. There is no question that it would return a great deal to the States with the proviso of course that their action would have be to consistent with the due process clause of the 14th amendment because the unborn child would now

be a person within the meaning of the 14th amendment. That would be a new dimension. From the standpoint of many, that is a positive development.

However, within that limitation of due process of the 14th amendment which applies to all of us and now the unborn, too, if the bill went through, the State would have many options here provided that if in taking the life of the unborn or interfering with it or whatever, there had to be some compelling overriding interest in so doing.

I guess I come down to this point. We are back to federalism perhaps, as you rightly suggest at the beginning, and you are in a very good position to comment on this since you are involved in State and local government, but I have more confidence in the capacity of State and local government to develop rational policy in this area. It would be, if it were being charged that it was irrational or totally outlandish, subject to Supreme Court review.

Again, I am not suggesting this is the only option in the book. Many people have different ideas on it. I would contend that the bill is fairly modest in what it purports to do to get the Supreme Court to reconsider it decision and to get greater State involvement subject now to the limits of the 14th amendment.

This chamber of horrors that people frequently conjure up—the State legislatures might do this and they might do that and they would be required to do this and required to do that—I simply would say that is not so. It tends to throw up a little bit of a smokescreen—that you would not want to trust State government to do anything, would you?

I guess in our time of centralization, elitism, and bureaucratic control, it sometimes work with the public. They say, "I would not dare trust the State legislatures to do anything with this issue. I would much prefer the bureaucrats do it, or the judges do it, or the Supreme Court, the elitists at the center to do it."

We are all back again to the problem of federalism, but I do not look upon S. 158 as doing great violence to that conception, at least a healthy federalism. I would look at it as helping to do away with an unhealthy balance that has occurred within recent decades through judicial and bureaucratic usurpation of legislative and State functions.

Ms. BELLAMY. Senator, let me assure you that I would be prepared at a moment's notice to place my trust with the State and local government over the Federal Government in any number of matters. However, we seem to be talking to different points unless you are prepared to correct my interpretation.

However, as I understand S. 158, if passed, what you would then tell us in the city of New York is that a doctor in a New York City hospital would not be allowed to perform an abortion in the case of rape or incest or, in fact, presumably prescribe an IUD or a morning-after pill.

Sir, I suggest to you that violates the local autonomy to decide what is in the best interests of our constituents in terms of their health and their welfare. In fact, it has nationalized the decision-making on the health and welfare of the local citizenry. You have removed from us our opportunity to make these decisions, decisions

that we have made, that we have experienced, and that we have chosen to have as our policy.

Senator EAST. I certainly respect your judgment on it. I would respectfully disagree that that would be the impact of this bill, to impose such a heavy straightjacket upon the States.

Again, I am saying it would allow States to take what action they saw as appropriate, consistent with the due process clause of the 14th amendment, which I do not find a particularly extravagant concept of the Constitution. It strikes me as eminently reasonable.

It may end up not being as effective as I think or as appropriate as I think, but in terms of risks one must take in the legislative process, it seems to me like an infinitely modest one, assuming one wants to change the results of *Roe* v. *Wade* and obviously there are many who would not mind trying to do that.

I appreciate your candor and your help.

Senator Baucus?

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Chairman and Ms. Bellamy, I frankly find this prior discussion a little confusing. It has been my fairly clear understanding that this bill, if passed, would prohibit States from funding abortions in cases of either rape or incest or from prescribing IUD's or morning-after pills or other birth control pills which are considered abortifacients.

If I can, Mr. Chairman, I want to clarify whether or not you agree with that statement. I take it you disagree with that statement. I ask it because I recall I asked that same question of Mr. Galebach, one of the authors of this bill. I would like to read into the record our discussion of this same point at an earlier hearing.

It starts out with me speaking. I say:

> Mr. Galebach, I would like to clear up, if we could, your understanding of how this bill would affect State action. My understanding is that the bill, if it is enacted without any additional State of Federal legislation, could prohibit States from funding abortions. Is that your understanding, too?
>
> Mr. GALEBACH. In general, except where States had justification as compelling as, say, to prevent the death of the mother.
>
> Senator BAUCUS. In those cases, too, would the bill also prohibit States from funding abortion clinics and distributing IUDs and morning-after pills in your view?
>
> Mr. GALEBACH. It could very well.
>
> Senator BAUCUS. That is without any additional legislation, this bill, if it passes, would have the effect of prohibiting States from funding abortion clinics and the distribution of IUDs and morning-after pills?
>
> Mr. GALEBACH. There might be some tough legal questions that would come up as to whether States could fund other operations of the clinic, but the State could not fund any device that would terminate a human life after conception.
>
> Senator BAUCUS. Because that would be State action prohibited under the bill?
>
> Mr. GALEBACH. Yes.

I understand Mr. Galebach to be saying that in his judgment the effect of this bill would be to prohibit State action that interfered with the development of the fertilized egg. By State action I mean State funding of abortions or facilities that perform abortions. I am not talking abut legislating with respect to private action. I am talking about State action.

Senator EAST. I do not think Mr. Galebach and I are at odds at all on this. Obviously to get perfect clarification, we would have to have him here in person.

I think we are both saying that as we understand S. 158, and he is one the principal authors of it in terms of drafting the statute, in taking positive action in dealing with abortion, including the surgical technique of taking known life, would be subject to the due process clause requirements of the 14th amendment as they relate to persons, meaning life, liberty, and property shall not be denied—in this case it is life—unless there is some compelling State interest.

Senator BAUCUS. So a State is prohibited from taking that action?

Senator EAST. Which action?

Senator BAUCUS. Action which funded an abortion.

Senator EAST. If you mean a surgical technique for taking known life, they might, for example, be able to take it in case of the life of the mother if a State law so provided.

Senator BAUCUS. If the bill passes, you are agreeing with Mr. Galebach that the effect of the bill would prohibit States from taking State action to fund abortions.

Senator EAST. Unless they could show a compelling State interest for taking the life of the unborn.

Senator BAUCUS. The only compelling interest is the life of the mother?

Senator EAST. That could be an area. There may be other areas. I do not know. It would depend on what the States did and how the Supreme Court might ultimately interpret their action. I do not think the wisdom of Solomon could project.

We are starting here with a problem of confidence in government. I am willing to put confidence in State government, or at least one could begin as an arguable proposition to put confidence in State government. If they acted unreasonably, that could be subject to court review, but they would be limited in their action to the due process clause of the 14th amendment which applies to all persons anyway. In this case, we would just now be applying it to the unborn, which is not a particularly radical idea.

Senator BAUCUS. The point I am trying to establish is under what circumstances would States have more discretion, before or after this bill? It is certainly the testimony of Mr. Galebach that States have more discretion with respect to the funding of abortions under the present law. However, if this bill becomes law, much, if not all, of their discretion with respect to funding abortions is taken away. They do not have that discretion.

Senator EAST. I would agree. They would now be limited. I would agree with this proposition. There is a new dimension added now to S. 158. That is the whole point of it. Any State action now, not necessarily so prior to *Roe* v. *Wade*, that would facilitate, allow, encourage, or pay for an abortion would be judged as a matter of due process of the 14th amendment, whether in taking the life of that now unborn person there was a compelling overriding State interest in doing so. If not, yes, the State would be limited from doing it. That is the whole point of it.

Senator BAUCUS. I am just trying to clarify it without making a value judgment. The point is, if this bill becomes law, States would be prohibited, except in compelling cases, and the compelling case that comes to mind is the life of the mother, from funding abor-

tions or providing money for State or local abortion clinics, or clinics that distribute IUD's or any other abortifacient.

Senator EAST. I do not know what the Supreme Court would hold, but if, for example, the State did pay for abortions on demand for walkins, no questions asked, that would be challenged probably as a denial of due process in terms of the life of the unborn. State action in that area would be challenged under the due process clause.

Senator BAUCUS. Under present law, States may, at their own discretion, decide whether or not they want to provide funds. That is the present law today.

Senator EAST. The problem is that *Roe* v. *Wade* is our law. Since the woman has this unlimited right of privacy, even through the final 3 months if she can find a physician who says her health is in danger, it is a different proposition.

Senator BAUCUS. It is a little more clear now.

Would you like to respond?

Ms. BELLAMY. May I add one additional item from the hearings on June 1 in response to a question from you, Senator Baucus, which reads as follows: Will you agree that if this bill becomes law, States would be prohibited from funding abortion actions?

Again, Mr. Nagel, who testified here along with Mr. Bork and Mr. Cox, indicated that it would, that there was an immediate impact.

I raise my question again. As I read the testimony of both proponents and opponents of this particular measure, the immediate impact would be to preclude my city and my State from continuing to fund abortions even in the case of incest or rape, a policy that we believe is in the best interests of the general welfare, health, and social well-being of our constitutents.

Senator EAST. All I would say is that is not necessarily totally clear. For example, if you did fund it in the case of rape or incest for some overriding State interest as you defined it and understood it, that might be your rationale. That could be challenged in the Court. I do not know what the Court would do with it. Someone might say that is a violation of the right of the unborn under the due process clause of the 14th amendment.

However, all I am saying is there is not any reason to conclude here that State action will not be upheld. It could be reviewed. Again, the new dimension is that the due process clause requires treating people, including the unborn, and their lives reasonably and fairly and not depriving them of it unless there is a compelling State interest in so doing.

I do not know what the Court would rule in that area. I do not know what sort of actions the States would take. It is a gamble that I agree is inherent in S. 158, but I do not think one has to rule out any possibility.

Senator BAUCUS. Following up on that same point, Mr. Chairman, I was reading from the testimony of Mr. Cox and Mr. Nagel. This is Mr. Cox speaking:

> I do not want to put words in his mouth.

He was referring to Mr. Nagel:

but as I read Professor Nagel's testimony, he said that the bill does not effect *Roe* v. *Wade*. The only thing it does is prevent States from funding or otherwise giving aid to those who wish to have abortions.

Mr. Nagel. That is right.

Clearly, Mr. Nagel, too, agrees that that is the effect of this bill.

Senator EAST. You mean the due process limitation.

Senator BAUCUS. That the effect of this bill is to prevent States from funding or otherwise giving aid to those who wish to have abortions, which is contrary to present law.

Senator EAST. I am sure he would add one extra proviso that we all must add: subject to the due process requirement of the 14th amendment. That is, they could take action if it met due process requirements. It would not necessarily totally forbid them from taking action. It is just that whatever action they now took must conform to due process requirements of the 14th amendment.

This is the great over-arching new provision you have, due process, the 14th amendment protecting the unborn now as a person, just as the State of North Carolina cannot take my life unless it has a compelling State interest. It would not take the life of the unborn under S. 158 unless it has a compelling State interest. It would have to justify a surgical technique of going in and killing the fetus and removing it. There would have to be some justification for positive State action to do that, just as there has to be some justification for taking your life or mine. That is the rationale of S. 158.

Senator BAUCUS. I have nothing further.

Senator EAST. I have no further questions. Thank you very much.

Ms. BELLAMY. Thank you.

[The prepared statement of Ms. Carol Bellamy follows:]

PREPARED STATEMENT OF CAROL BELLAMY

I AM CAROL BELLAMY, PRESIDENT OF THE COUNCIL OF THE CITY OF NEW YORK. I COME TO YOU FROM A CITY BUILT BY MEN AND WOMEN FROM EVERY CORNER OF THE EARTH. DESPITE OUR WIDELY DIFFERENT BACKGROUNDS AND DIVERGENT POINTS OF VIEW, WE HAVE DEVELOPED A VITAL TOLERANCE AND RESPECT FOR EACH OTHER. SUCH TOLERANCE IS A CRUCIAL PART OF THE DEMOCRATIC SPIRIT ON WHICH THIS COUNTRY WAS BUILT. AND THE LAWS WE DEVELOP BACK HOME IN NEW YORK AND HERE IN WASHINGTON MUST NEVER FAIL TO ACCOMMODATE OUR DIVERSITY AND AFFIRM THE CONSTITUTIONAL SAFEGUARDS OF INDIVIDUAL RIGHTS.

THE PROPOSED HUMAN LIFE BILL RUNS COUNTER TO OUR DEMOCRATIC TRADITION. IT IMPOSES THE MORAL BELIEFS OF SOME ON THE REST OF OUR CITIZENS, IN AREAS WHERE THE SUPREME COURT HAS ALREADY RULED. NOT ONLY WOULD THIS BILL BE AN INVASION BY — — CONGRESS OF THE CONSTITUTIONAL RIGHTS OF WOMEN, IT WOULD ALSO THREATEN THE VERY ESSENCE OF OUR SYSTEM OF LAW AND GOVERNMENT. IT CHALLENGES THE AUTHORITY OF THE SUPREME COURT, AS WELL AS THE POLICYMAKING AUTONOMY OF STATE AND LOCAL OFFICIALS. IT CHIPS AWAY AT THE 200-YEAR-OLD CONCEPT OF A SEPARATION OF POWERS BETWEEN CONGRESS AND THE COURTS AND UNDERMINES BASIC PRECEPTS OF FEDERALISM.

BY SEEKING TO LEGISLATE THE MURKY ISSUE OF WHEN LIFE BEGINS, THIS BILL, AS I UNDERSTAND IT, WOULD EXTEND TO THE FETUS THE DUE PROCESS PROTECTION OF THE FOURTEENTH AMENDMENT. IN SO DOING, THE BILL WOULD DIRECTLY CONTROVERT THE SUPREME COURT'S HOLDING IN ROE V. WADE THAT THE WORD "PERSON" AS USED IN THE FOURTEENTH AMENDMENT "DOES NOT INCLUDE THE UNBORN."

IT WOULD ALSO CONTRAVENE THE SUPREME COURT'S RECOGNITION IN MCCRAE V. HARRIS THAT WHILE THE FEDERAL GOVERNMENT HAD NO OBLIGATION TO PROVIDE ABORTIONS TO THE MEDICALLY INDIGENT,

THE STATES RETAINED THIS OPTION. THIS ATTEMPT TO CIRCUMVENT THE CONSTITUTION AND SUPREME COURT HAS ALREADY BEEN CHALLENGED BY NO LESS THAN SIX FORMER ATTORNEYS GENERAL OF THE UNITED STATES AND 12 CONSTITUTIONAL SCHOLARS.

BUT AS A LOCAL OFFICIAL I AM AS MUCH CONCERNED OVER WHAT APPEARS TO BE A USURPATION OF LOCAL AUTHORITY AS I AM OVER YOUR STEPPING ON THE ROBES, AS IT WERE, OF THE JUSTICES.

THIS BILL, AS CURRENTLY DRAFTED, WOULD BAR LOCAL DECISIONS TO FUND ABORTIONS AND CERTAIN METHODS OF CONTRACEPTION AND WOULD PROHIBIT THE PROVISION OF THESE SERVICES AT PUBLIC HEALTH FACILITIES. IN NEW YORK STATE, THE IMPACT WOULD BE DEVASTATING.

IN 1970, THREE YEARS BEFORE ROE V. WADE, NEW YORK STATE AND CITY CLEARLY DETERMINED THAT ACCESS TO SAFE AND LEGAL ABORTION IS NOT ONLY A WOMAN'S RIGHT, BUT AN ESSENTIAL ELEMENT OF OUR HEALTH AND WELFARE POLICY. AND MORE RECENTLY, DESPITE THE MCCRAE DECISION ON THE HYDE AMENDMENT, NEW YORK STATE HAS CONTINUED TO UPHOLD THE RIGHTS GUARANTEED IN ROE V. WADE BY LOCALLY FUNDING MEDICAID ABORTIONS, AND MAKING THEM AVAILABLE IN OUR MUNICIPAL HOSPITALS.

WE HAVE CHOSEN TO CONTINUE FUNDING ABORTION AND FAMILY PLANNING SERVICES FOR COMPELLING HEALTH AND SOCIAL WELFARE REASONS.

THE OVERWHELMING EVIDENCE OF ELEVEN YEARS OF EXPERIENCE WITH LEGAL ABORTIONS IN NEW YORK STATE IS THAT SAFE AND LEGAL ABORTIONS HAVE NOT DENIED LIFE, BUT AFFIRMED IT BY PROTECTING THE HUNDREDS OF THOUSANDS OF WOMEN WHO WOULD OTHERWISE BE FORCED TO SEEK OUT ILLEGAL AND UNSAFE ABORTIONS. AS FORMER REPUBLICAN ASSEMBLYWOMAN, CONSTANCE COOK, SAID ON THE FLOOR OF THE NEW YORK ASSEMBLY ELEVEN YEARS AGO, "THE ISSUE IS NOT ABORTION OR NO ABORTION. THE ISSUE IS LEGAL OR ILLEGAL ABORTION...SAFE OR UNSAFE...FILLED WITH SUSPICION, FEAR AND

RISK OR CONDUCTED IN A MANNER THAT MINIMIZES THE TENSION THAT INVARIABLY SURROUNDS THE PROCEDURE."

WITH LEGAL ABORTIONS CAME A SHARP DECLINE IN NEW YORK'S STATISTICS ON MATERNAL AND INFANT MORTALITY AND MORBIDITY. THE OFTEN TRAGIC COMPLICATIONS OF SEPTIC ABORTION HAVE, FOR EXAMPLE, ALL BUT DISAPPEARED FROM THE ADMISSION RECORDS OF OUR MUNICIPAL HOSPITALS. OUR EXPERIENCE IN NEW YORK HAS SHOWN THAT THE WOMAN MOST LIKELY TO TERMINATE A PREGNANCY IS UNDER THE AGE OF 15 OR OVER THE AGE OF 35. SUCH WOMEN RUN THE HIGHEST RISK OF ADVERSE HEALTH CONSEQUENCES FROM PREGNANCY. FOR OLDER WOMEN, PRE-NATAL SCREENING IN CONJUNCTION WITH LEGAL ABORTION HAS MINIMIZED THE NUMBER OF CHILDREN BORN WITH SERIOUS BIRTH DEFECTS AND, CONVERSELY, HAS PREVENTED ABORTION WHEN NO POTENTIAL DEFECTS ARE IDENTIFIED.

AS CHAIR OF THE NEW YORK CITY TASK FORCE ON ADOLESCENT PREGNANCY, I AM PARTICULARLY CONCERNED ABOUT THE RAMIFICATIONS OF THIS BILL ON THE TROUBLING ISSUE OF TEENAGE PREGNANCY. TEENAGERS ACCOUNT FOR ONE-THIRD OF ALL RECORDED ABORTIONS. IN NEW YORK CITY ALONE LAST YEAR THAT PERCENTAGE TRANSLATED INTO MORE THAN 18,000 ABORTIONS FOR WOMEN UNDER THE AGE OF NINETEEN. THERE WERE AT THE SAME TIME SOME 14,000 CHILDREN BORN TO THIS AGE GROUP. THE TEEN BIRTH RATE WILL CERTAINLY RISE IF LEGAL ABORTION IS NO LONGER AVAILABLE.

THE MORTALITY RATE OF TEENAGERS DUE TO COMPLICATIONS OF PREGNANCY IS 60 PERCENT HIGHER THAN THAT OF OLDER WOMEN. INFANTS OF TEEN MOTHERS, FACE A MORTALITY RATE APPROXIMATELY TWICE THAT OF THOSE BORN TO WOMEN IN THEIR TWENTIES.

NOT ONLY ARE THERE COMPELLING HEALTH REASONS FOR PROVIDING UNRESTRICTED ACCESS TO ABORTION AND FAMILY PLANNING, BUT THERE ARE EQUALLY COMPELLING SOCIAL WELFARE AND ECONOMIC CONCERNS. THE MAJORITY OF TEEN MOTHERS DO NOT FINISH HIGH SCHOOL, WHICH SEVERELY RESTRICTS THEIR EMPLOYMENT POSSIBILITIES AND INCREASES THE LIKELIHOOD OF A VICIOUS CYCLE OF WELFARE

DEPENDENCY. A RECENT SURVEY IN NEW YORK CITY SHOWED THAT 90 PERCENT OF OUR YOUNG MOTHERS, AGES 15 TO 17, WERE UNEMPLOYED NINE MONTHS AFTER DELIVERY OF THEIR FIRST CHILD. SEVENTY-TWO PERCENT WERE RECEIVING PUBLIC ASSISTANCE.

THESE ARE THE HEALTH AND SOCIAL WELFARE PROBLEMS CREATED BY UNWANTED PREGNANCIES THAT LOCAL OFFICIALS MUST DEAL WITH EVERY DAY. PASSAGE OF THIS LEGISLATION WOULD TIE OUR HANDS. I URGE THAT IN YOUR DELIBERATIONS OVER THIS LEGISLATION YOU CONFER WITH YOUR STATE AND COUNTY OFFICIALS WHO WILL HAVE TO LIVE WITH THE RESULTS OF THIS BILL.

AND WHAT ARE THE CLEAR CONSEQUENCES OF THIS BILL? IN THE OPINION OF ALL LEGAL WITNESSES, EVEN THOSE SUPPORTING THE BILL, IF THIS LEGISLATION BECOME LAW, LOCAL OFFICIALS WILL NO LONGER BE ABLE TO PROVIDE AND FUND SOME FAMILY PLANNING AND ALL ABORTION SERVICES. SINCE 1970, NEW YORK CITY HAS ASSUMED THE COSTS OF THESE SERVICES FOR POOR WOMEN WHO ARE NOT ELIGIBLE FOR MEDICAID AT ITS 16 MUNICIPAL HOSPITALS. IN 1980 ALONE, MORE THAN 12,000 ABORTIONS WERE PERFORMED IN OUR MUNICIPAL HOSPITALS.

I ASK, IS IT YOUR INTENT TO PROHIBIT ABORTIONS AND POST-CONCEPTION FAMILY PLANNING IN LOCAL PUBLIC HOSPITALS, AT LOCAL PUBLIC EXPENSE, IF WE AT THE LOCAL LEVEL WANT TO PROVIDE THESE SERVICES?

NO LESS TROUBLING ARE THE LESS OBVIOUS CONSEQUENCES OF THIS BILL. THE LEGISLATION THREATENS THE RIGHT TO OBTAIN NON-SUBSIDIZED ABORTIONS FROM PRIVATE INSTITUTIONS. IN NEW YORK, FOR EXAMPLE, WE LICENSE "PRIVATE" HOSPITALS AND CLINICS, SOME OF THEM SOLELY AS ABORTION PROVIDERS. WE ALSO INSPECT THESE FACILITIES. MANY OF THEM RECEIVE PUBLIC FUNDING. SOME HAVE AFFILIATION CONTRACTS WITH MUNICIPAL HOSPITALS. THE STATE EVEN LICENSES PRIVATE DOCTORS. TELL ME, WHERE DOES STATE ACTION BEGIN AND END? AT WHAT POINT WILL ALL PRIVATE ABORTIONS BE LEGALLY SUSPECT? DO WE DEFINE A FERTILIZED

EGG, WITH FOURTEENTH AMENDMENT PROTECTIONS AS A "PERSON" UNDER LOCAL HOMICIDE STATUTES? WOULD A DOCTOR WHO PRESCRIBES AN IUD OR A MORNING-AFTER PILL BE GUILTY AS AN ACCOMPLICE TO HOMICIDE UNDER CURRENT STATE LAWS?

UNLESS THERE IS IMMEDIATE CLARIFICATION OF THE LANGUAGE AND INTENT OF THIS BILL, ALL ABORTION AND FAMILY PLANNING SERVICES AT THE LOCAL LEVEL WILL BE CHAOTIC AND POSSIBLY DISRUPTED, WHILE COURTS AND LEGISLATURES IN EVERY STATE GRAPPLE WITH THESE AMBIGUITIES.

IN SUM, THIS POORLY DRAFTED BILL IS UNCONSTITUTIONAL, UNWORKABLE AND IN MY OPINION, UNWISE. IT COULD OPEN THE DOOR TO FUTURE CONGRESSIONAL CHALLENGES OF THE SUPREME COURT ON ISSUES WE THOUGHT WERE LONG PUT TO REST. IT VIOLATES ACKNOWLEDGED CONSTITUTIONAL RIGHTS AND LIMITS LOCAL GOVERNMENT OPTIONS TO PROVIDE VITAL HEALTH AND WELFARE SERVICES. I NEEDN'T REMIND YOU I'M SURE, THAT AS LAWMAKERS YOU HAVE THE RESPONSIBILITY TO LEGISLATE FOR THE WELFARE OF THE GENERAL PUBLIC, SOMETIMES DESPITE CONTRARY PERSONAL VIEWS AND PREFERENCES. I URGE YOU TO VOTE NO ON THIS LEGISLATION.

THANK YOU.

Senator EAST. We shall stand adjourned.
[Whereupon the subcommittee adjourned at 1:20 p.m.]

# THE HUMAN LIFE BILL

FRIDAY, JUNE 12, 1981

U.S. SENATE,
SUBCOMMITTEE ON THE SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 6226, Dirksen Senate Office Building, Hon. John P. East (chairman of the subcommittee) presiding.

Present: Senator Baucus.

Staff present: Jim McClellan, chief counsel; Grover Rees, Craig Stern, and Jim Sullivan, counsels; and Ken Kay, minority counsel.

## OPENING STATEMENT OF CHAIRMAN JOHN P. EAST

Senator EAST. I would like to convene this hearing, at which time we shall proceed to consider Senate bill 158. We have already conducted a series of hearings on this measure.

Today, we are into the final phase on some statutory, constitutional, legal questions. We will conduct these hearings from 10 to 1, and at that time adjourn.

We anticipate on June 18 that we will complete our hearings, as Senator Baucus and I now see it, unless for some reason we decide there would be some point in having additional hearings.

We anticipate winding up our hearings on this bill, and on the 18th our expected schedule is to have representatives of major interest groups, pro and con on this issue, who have indicated a desire to come and to testify. So, at that point, we can broaden out the discussion beyond the medical, the scientific, the statutory, and the constitutional, into other areas.

We would hope that when we have finished these hearings that we have, at least as much as can be done in public hearings, given this matter extensive treatment and we hope that it is of the quality that it furthers serious debate on this serious subject of national abortion policy.

It is a pleasure, of course, to have my distinguished colleague with us again, Senator Baucus.

I have no other statement to make myself, Senator. I do not know if you do.

Senator BAUCUS. I have no statement, Mr. Chairman.

Senator EAST. All right. We will proceed.

I would like to remind our witnesses, as I always do, that time is of the essence for us. Your written statements will be made a part of the record, so there is no need to read them verbatim. If you wish to read, please read very selectively.

I would greatly encourage, indeed, implore and beg you, to be as concise as you can, consistent with making your point.

This morning, as our first witness we have the Honorable David Wilkinson, the attorney general of the State of Utah. We shall hear then from Mr. Wilkinson. Senator Baucus and I and other panel members, if they come, will then proceed to interrogate him.

We will then turn to a panel of six witnesses who will deal with another phase of this matter, particularly involving the first amendment, although are not confined to that subject.

Mr. Wilkinson is here to talk about the impact of this bill at the State level, at least as he, one attorney general, sees it in the State of Utah.

David Wilkinson is the attorney general, then, of the State of Utah. He received his bachelor of arts degree from Brigham Young University. He studied at Oxford University under a Rhodes scholarship and received a degree in jurisprudence. He received his law degree from the University of California at Berkeley.

Prior to his election as attorney general in 1980, Mr. Wilkinson served as the chief deputy for the Salt Lake County attorney.

Mr. Wilkinson, we welcome you this morning and thank you for coming and taking time from your busy schedule. We would like to hear your statement, please.

## STATEMENT OF DAVID WILKINSON, ATTORNEY GENERAL, STATE OF UTAH

Mr. WILKINSON. Thank you, Mr. Chairman and Senator Baucus.

May I at the outset apologize for my somewhat less than formal attire, but I find that even the business traveler's favorite airline loses baggage.

Lest there be any misunderstanding, may I urge you not to construe my presence here as an endorsement of S. 158 as opposed to the human life amendment.

I do not mean to say by that that I prefer the human life amendment, and I do not need to choose between these two alternatives because my testimony, in essence, will be equally applicable to either the HLA or the HLB. I say that certainly for the vacant chair to the chairman's right.

I might point out that Utah has been on the cutting edge of the controversy over legal restrictions on abortion since the Supreme Court legalized most abortions in 1973.

On at least two occasions since then, Utah abortion statutes or regulations have been declared unconstitutional by Federal courts. More recently, Utah has prevailed in the U.S. Supreme Court on two abortion-related issues:

First, in the case of *D. R.* v. *Mitchell,* the Court upheld Utah's statute restricting medicaid abortion funding in those cases where the life of the mother would be endangered if the pregnancy were not terminated. And, of course, in March of this year, in the most recent U.S. Supreme Court case on abortion, *H. L.* v. *Matheson,* the Court upheld Utah's law which requires a physician to give notice to the parents of a minor before performing an abortion upon her.

Our experience in Utah suggests that our legislature desires to take every step permitted under the Constitution to reduce the number of unnecessary abortions.

THEORY OF S. 158

The great virtue of S. 158 is, of course, that it is permissive rather than mandatory in its effect. It merely allows the States, if they choose, to reevaluate the impact of *Roe* v. *Wade* upon that State.

That case, in my view, proceeded from the premise, probably true at the time, that no definition as to when life begins had been provided. It should also be noted that the Court was exercising a most prudent judicial restraint in finding that it could not supply that definition.

However, it is eminently wise and proper for Congress to provide such a definition upon proper reflection and examination of all the relevant data.

By defining a fetus as a person under the 14th amendment, Congress is merely affirming our long-standing heritage of giving the benefit of the doubt to those who are less able to protect themselves.

As long as there is controversy about the beginning point of life, why not resolve the doubt to the extent possible in favor of the most dependent and defenseless creature involved?

The effect of this definition will be to bring the unborn child within the ambit of the constitutional language which provides that no State shall deprive any person of life, liberty, or property without due process of law, nor shall any State deny any person the equal protection of the law.

These provisions, of course, require an extensive balancing of interests in their application. This is the first major point on which the Supreme Court erred in *Roe* v. *Wade*.

Based on its premise that a fetus was not a human life, or at least on its premise that it could not be said that a fetus was human life, the Court saw no need to balance the fetal life with the mother's rights until the fetus was medically viable, but rather saw the entire issue from the point of view of a mother's privacy and right to choose.

The second major error which the Court indulged in was the notion that a woman, in consultation with a physician, would always consider all the relevant data and factors with emphasis on the medical need for the abortion rather than what reality teaches us is usually the sole consideration—what the woman desires by way of her own convenience.

HISTORY OF UTAH LEGISLATION

The history of abortion legislation and enforcement in Utah has consistently indicated three major policies concerning abortion:

First, the people of Utah respect life, including that of unborn children, and will attempt to restrict the taking of life through abortion.

Second, if States are prohibited from thwarting the taking of human life by abortion, as is presently the case, the people of Utah desire that a woman, before deciding to undergo an abortion, be as fully informed as possible as to the alternatives therefor and consequences thereof.

Abortion legislation in Utah has consistently required that a person considering an abortion be informed of such things as the availability of adoption agencies and their services, the risks and complications of abortion procedures, the development of the unborn child, and the fact that an unborn child is not merely some amorphous mass, the availability of financial assistance during pregnancy, et cetera.

Third, the people of Utah have not been oppressive, harsh, or unduly restrictive, either in legislating or in enforcing legislation against abortion.

The history of abortion laws in Utah shows a pattern of respect for the Constitution of the United States, for the woman considering an abortion, for the medical profession, and for the close family of persons seeking the abortion.

For example, the laws have not allowed conviction of a physician on the testimony of the mother of the aborted child without corroboration. No physician or hospital is required to perform an abortion. An abortion, when performed, must be performed by a competent physician, and the operation must take place in a hospital if after the first trimester of pregnancy. Intimidation or coercion of a person to obtain an abortion is outlawed.

Abortions are allowed not only to protect the life of the mother but to prevent serious and permanent damage to her health. The parents of an unemancipated minor must be notified of the intent to abort and also the husband of a married woman. However, no consent is required from parents or husband.

The history of enforcement of Utah abortion legislation even prior to *Roe* v. *Wade* reveals that very few prosecutions were commenced in Utah under the law. This history also evidences a complete lack of overstepping of constitutional bounds.

### S. 158 WOULD NOT SPAWN HORRORS

Opponents of S. 158 present a parade of Orwellian horrors which supposedly will occur if S. 158 is passed. Past practice of antiabortion law enforcement in Utah belies these horrors.

The continuing presence of constitutional and statutory safeguards such as due process, equal protection, civil rights actions, et cetera, show these paraded horrors to be mere rhetoric which one might term, Mr. Chairman, radical and unprincipled.

Sound exercise of prosecutorial discretion in the past has, and by all indication in the future would, preclude indiscriminate prosecution as harassment.

Recent developments in law and society with regard to due process and equal protection as well as medical advances clearly suggest we have learned much since 1973.

Analogous cases involving the removal of life-support systems from terminally ill, comatose patients offer good examples of individual State courts and legislatures responding to our increased awareness of the need for due process and equal protection in these cases.

These cases generally require adversary judicial hearings, concurrence of family members and physicians, and similar procedures to balance the competing societal interests in such life-and-death situations.

Other beneficial provisions now found in the Utah statutes and, I am sure, in the statutes of other States relative to abortions would undoubtedly remain. The various specters raised by opponents of this legislation simply do not have any basis in fact either before or after *Roe* v. *Wade*.

For example, neither before nor after that decision has there been, to my knowledge, any prosecution in my State for an abortion in connection with the prompt treatment for rape or incest, even though those exceptions do not and have never appeared in past or present Utah statutes.

### SOME ABORTIONS WOULD BE POSSIBLE

Under the proposed legislation, the States finally will be able to balance the interests of fetus and mother in a way not possible under the Supreme Court's mandate for abortion on demand.

The States could still permit abortions in many circumstances. It would simply be necessary to establish due process standards which would take into account the personhood of the fetus.

It is not difficult to contemplate a standard by which the threat to the life of a mother could be balanced against the dependent fetal life within her and under which due process requirements could be satisfied and the abortion allowed.

### EQUAL PROTECTION CLAUSE IS FLEXIBLE

Likewise, the requirement to provide equal protection of the law is not an absolute standard and would not prevent abortion. Rather, the States could classify fetal life and non-fetal human life in such a way that would grant those protections which are reasonable to the fetus, thus avoiding the absurd suggestion that autopsies would be necessary even in the event of 6-week miscarriages.

Under constitutional law, such classifications and distinctions would merely need to be rational and serve a legitimate State purpose. Only in the unlikely event that the Federal courts treated statutory distinctions between fetal life and other human life as a suspect classification for equal protection purposes would we approach the results disingenuously suggested by critics of this bill.

Nevertheless, for the purpose of preventing unnecessary and wanton destruction of fetal life of the kind now possible in our climate of abortion for convenience on demand, States would finally have full power to act.

Thank you very much.

Senator EAST. Thank you, Mr. Wilkinson.

[The prepared statement of Mr. Wilkinson follows:]

PREPARED STATEMENT OF DAVID L. WILKINSON

I AM PLEASED TO APPEAR BEFORE THIS DISTINGUISHED COMMITTEE TO SPEAK TO THE IMPORTANT ISSUES CONCERNING S. 158, THE HUMAN LIFE STATUTE. I MIGHT POINT OUT THAT UTAH HAS BEEN VERY MUCH INVOLVED IN THE CONTROVERSY ABOUT LEGAL RESTRICTIONS ON ABORTION SINCE THE SUPREME COURT LEGALIZED MOST ABORTIONS IN 1973. ON AT LEAST TWO OCCASIONS WE HAVE HAD ABORTION STATUTES OR REGULATIONS DECLARED UNCONSTITUTIONAL BY FEDERAL COURTS SUBSEQUENT TO 1973, AND OTHER PROVISIONS HAVE BEEN CHALLENGED IN THE COURTS. MORE RECENTLY, WE HAVE PREVAILED IN THE UNITED STATES SUPREME COURT ON TWO ABORTION-RELATED ISSUES: (1) IN THE CASE OF D. R. V. MITCHELL, DECIDED IN OCTOBER OF 1980, THE COURT UPHELD UTAH'S STATUTE RESTRICTING MEDICAID ABORTION FUNDING TO THOSE CASES WHERE THE LIFE OF THE MOTHER WOULD BE ENDANGERED IF THE PREGNANCY WERE NOT TERMINATED. (THIS STATUTE HAD BEEN UPHELD BY A U. S. DISTRICT COURT BUT INVALIDATED BY THE TENTH CIRCUIT COURT OF APPEALS, NECESSITATING OUR APPEAL.) (2) IN MARCH OF THIS YEAR, IN THE CASE OF H. L. V. MATHESON, THE COURT UPHELD UTAH'S LAW WHICH REQUIRES A PHYSICIAN TO GIVE NOTICE TO THE PARENTS OF A MINOR BEFORE PERFORMING AN ABORTION UPON HER. OUR EXPERIENCE IN UTAH SUGGESTS THAT THE LEGISLATURE DESIRES TO TAKE EVERY STEP PERMITTED UNDER THE CONSTITUTION TO REDUCE THE NUMBER OF UNNECESSARY ABORTIONS.

I WOULD LIKE TO POINT OUT THAT MY TESTIMONY IN FAVOR OF THIS STATUTORY PROPOSAL DOES NOT SIGNIFY THAT I WOULD BE OPPOSED TO A CONSTITUTIONAL AMENDMENT WITH THE SAME THRUST. MY REMARKS HERE TODAY WOULD BE EQUALLY APPROPRIATE AND APPLICABLE TO THE PROPOSED HUMAN LIFE AMENDMENT TO THE CONSTITUTION.

THE GREAT VIRTUE OF S. 158 IS THAT IT IS PERMISSIVE RATHER THAN MANDATORY IN ITS EFFECT. RATHER THAN IMPOSING A NATIONAL STANDARD, CONTRARY TO ROE V. WADE, IT MERELY ALLOWS THE STATES, IF THEY CHOOSE, TO RE-EVALUTE THE IMPACT OF ROE V. WADE.

ROE V. WADE PROCEEDED FROM THE PREMISE--PROBABLY TRUE AT THE TIME THAT NO DEFINITION OF WHEN LIFE BEGINS HAD BEEN PROVIDED. IT SHOULD ALSO BE NOTED THAT THE COURT WAS EXERCISING A MOST PRUDENT JUDICIAL RESTRAINT IN FINDING THAT IT COULD NOT MAKE THAT DEFINITION. HOWEVER, IT IS EMINENTLY WISE AND PROPER FOR CONGRESS, THE LEGISLATIVE BRANCH, TO PROVIDE SUCH A DEFINITION UPON PROPER REFLECTION AND EXAMINATION OF ALL THE RELEVANT DATA.

BY DEFINING A FETUS AS A PERSON UNDER THE FOURTEENTH AMENDMENT, CONGRESS IS MERELY AFFIRMING OUR LONG-STANDING HERITAGE OF GIVING THE BENEFIT OF THE DOUBT TO THOSE WHO MAY BE LESS ABLE TO PROTECT THEMSELVES. AS LONG AS THERE IS CONTROVERSY ABOUT THE BEGINNING POINT OF LIFE, WHY NOT RESOLVE THE DOUBT, TO THE EXTENT POSSIBLE, IN FAVOR OF THE MOST DEPENDENT AND DEFENSELESS CREATURE INVOLVED?

THE EFFECT OF THIS DEFINITION WILL BE TO BRING THE UNBORN CHILD WITHIN THE AMBIT OF THE CONSTITUTIONAL LANGUAGE WHICH PROVIDES THAT NO STATE SHALL DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW, NOR SHALL ANY STATE DENY ANY PERSON THE EQUAL PROTECTION OF THE LAW. THESE PROVISIONS OF COURSE REQUIRE EXTENSIVE BALANCING OF INTERESTS IN THEIR APPLICATION. THIS IS THE FIRST MAJOR POINT ON WHICH THE SUPREME COURT ERRED IN ROE V. WADE. BASED ON ITS PREMISE OF NO HUMAN LIFE AS A FETUS, THE COURT SAW NO NEED TO BALANCE THE FETAL LIFE WITH THE MOTHER'S RIGHTS UNTIL THE FETUS WAS MEDICALLY VIABLE (APPROXIMATELY THIRD TRIMESTER), BUT RATHER SAW THE ENTIRE ISSUE FROM THE POINT OF VIEW OF A MOTHER'S PRIVACY AND RIGHT TO CHOOSE.

THE SECOND MAJOR ERROR WHICH THE COURT INDULGED WAS THE NOTION THAT A WOMAN IN CONSULTATION WITH A PHYSICIAN WOULD ALWAYS CONSIDER ALL THE RELEVANT FACTORS WITH EMPHASIS ON THE MEDICAL NEED FOR AN ABORTION, RATHER THAN WHAT IN REALITY IS CONSIDERED IN OUR WORLD OF ABORTION ON DEMAND--MERELY WHAT THE WOMAN DESIRES BY WAY OF HER OWN CONVENIENCE.

THE HISTORY OF ABORTION LEGISLATION AND ENFORCEMENT IN UTAH HAS CONSISTENTLY INDICATED THREE MAJOR POLICIES CONCERNING ABORTION: FIRST, THE PEOPLE OF UTAH RESPECT LIFE, INCLUDING THAT OF UNBORN CHILDREN, AND WILL ATTEMPT TO RESTRICT THE TAKING OF LIFE THROUGH ABORTION. SECOND, IF STATES ARE PROHIBITED FROM THWARTING THE TAKING OF HUMAN LIFE BY ABORTION, AS IS PRESENTLY THE CASE, THE PEOPLE OF UTAH DESIRE THAT A PERSON, BEFORE DECIDING TO UNDERGO AN ABORTION, BE AS FULLY INFORMED AS POSSIBLE AS TO THE IMPLICATIONS, ALTERNATIVES, AND CONSEQUENCES THEREOF. ABORTION LEGISLATION IN UTAH HAS CONSISTENTLY REQUIRED THAT A PERSON CONSIDERING AN ABORTION BE INFORMED OF SUCH THINGS AS THE AVAILABILITY OF ADOPTION AGENCIES AND THEIR SERVICES; THE RISKS AND COMPLICATIONS OF ABORTION PROCEDURES; THE DEVELOPMENT OF THE UNBORN CHILD AND THE FACT THAT AN UNBORN CHILD IS NOT MERELY SOME AMORPHOUS MASS; THE AVAILABILITY OF FINANCIAL ASSISTANCE DURING PREGNANCY; ETC.[1]

THIRD, THE PEOPLE OF UTAH HAVE NOT BEEN OPPRESSIVE, HARSH OR UNDULY RESTRICTIVE, EITHER IN LEGISLATING OR IN ENFORCING LEGISLATION AGAINST ABORTION. THE HISTORY OF THE ABORTION LAW IN UTAH SHOWS A PATTERN OF RESPECT FOR THE CONSTITUTION OF THE UNITED STATES, THE PERSON CONSIDERING AN ABORTION, THE MEDICAL PROFESSION, AND THE CLOSE FAMILY OF PERSONS SEEKING THE ABORTION. FOR EXAMPLE, THE LAWS HAVE NOT ALLOWED CONVICTION OF A PHYSICIAN ON THE TESTIMONY OF THE MOTHER OF THE ABORTED CHILD WITHOUT CORROBORATION.[2] NO PHYSICIAN OR HOSPITAL IS REQUIRED TO PERFORM AN ABORTION.[3] A COMPETENT PHYSICIAN IS REQUIRED TO PERFORM THE ABORTION, AND THE OPERATION MUST TAKE PLACE IN A HOSPITAL IF AFTER THE FIRST TRIMESTER OF PREGNANCY.[4]

---

1 UTAH CODE ANN., SECTION 76-6-305 AND SECTION 76-7-305.5 (1953), AS AMENDED.

2 UTAH CODE ANN., SECTION 77-31-14 (1953), AS AMENDED.

3 UTAH CODE ANN., SECTION 76-7-306 (1953), AS AMENDED.

4 UTAH CODE ANN., SECTION 76-7-302 (3) (1953), AS AMENDED.

INTIMIDATION OR COERCION OF A PERSON TO OBTAIN AN ABORTION IS OUTLAWED.[5] ABORTIONS ARE ALLOWED, NOT ONLY TO PROTECT THE LIFE OF THE MOTHER, BUT TO PREVENT SERIOUS AND PERMANENT DAMAGE TO HER HEALTH.[6] THE PARENTS OF AN UNEMANCIPATED MINOR MUST BE NOTIFIED OF THE INTENT TO ABORT; ALSO THE HUSBAND OF A MARRIED WOMAN. HOWEVER, NO CONSENT IS REQUIRED FROM PARENTS OR HUSBAND.[7]

THE ENFORCEMENT HISTORY OF ABORTION LEGISLATION, EVEN PRIOR TO ROE V. WADE, SHOWS VERY FEW PROSECUTIONS UNDER THE LAW AND A COMPLETE LACK OF OVERSTEPPING OF CONSTITUTIONAL BOUNDS BY LAW ENFORCEMENT.[8] OPPONENTS OF LAWS OFTEN PRESENT AN UNREALISTIC PARADE OF ORWELLIAN HORRORS WHICH SURPRISEDLY WILL OCCUR IF LEGISLATION IS PASSED. PAST HISTORY AND PRACTICE OF ANTIABORTION LAW ENFORCEMENT IN UTAH BELIES THESE HORRORS. THE CONTINUING PRESENCE OF CONSTITUTIONAL AND STATUTORY SAFEGUARDS, SUCH AS DUE PROCESS, EQUAL PROTECTION, CIVIL RIGHTS ACTIONS, ETC., ENSURE US THAT SUCH HORRORS ARE MERE FIGMENTS OF IMAGINATION.[9] PROSECUTORIAL DISCRETION IN THE PAST HAS, AND BY ALL INDICATION, IN THE FUTURE WOULD SAFEGUARD INDISCRIMINATE PROSECUTION AS HARASSMENT.

IN SPITE OF WHAT APPEARS TO BE A STRONG PUBLIC POLICY IN THE STATE OF UTAH AGAINST THE LIBERAL AVAILABILITY OF ABORTIONS, IT IS CLEAR THAT EVEN IF THE EFFECTS OF ROE V. WADE WERE ELIMINATED, EITHER BY CONSTITUTIONAL AMENDMENT OR

5 UTAH CODE ANN., SECTION 76-7-312 (1953), AS AMENDED.

6 UTAH CODE ANN., SECTION 76-7-302 (1953), AS AMENDED.

7 UTAH CODE ANN., SECTION 76-7-304 (1953), AS AMENDED. H. L. V. MATHESON, _____ US _____ (1981).

8 FEW PROSECUTIONS KNOWN:

(1) IN OGDEN, A WOMAN RUNNING AN ABORTION "MILL";
(2) IN LOGAN, AGAINST A BARBER DOING THE SAME;
(3) FEW IN SALT LAKE COUNTY, INCLUDING ONE ABORTION "MILL";
(4) CASES IN THE ANNOTATIONS TO THE STATUTES.

THERE IS NO INDICATION OF CONSTITUTIONAL VIOLATIONS.

9 SIMILAR HORRORS WERE PARADED IN THE STANFORD DAILY CASE IN WHICH THE NEWS MEDIA INCORRECTLY PREDICTED RIOT POLICE INDISCRIMINATELY RAVAGING NEWSROOM AFTER NEWSROOM.

STATUTORY ENACTMENT, RECENT DEVELOPMENTS IN LAW AND SOCIETY WITH REGARD TO DUE PROCESS AND EQUAL PROTECTION, AS WELL AS MEDICAL ADVANCES, CLEARLY SUGGEST WE HAVE LEARNED MUCH SINCE 1973. ANALOGOUS CASES INVOLVING THE REMOVAL OF LIFE-SUPPORT SYSTEMS FROM TERMINALLY ILL, COMATOSE PATIENTS OFFER GOOD EXAMPLES OF INDIVIDUAL STATE COURTS AND LEGISLATURES RESPONDING TO OUR INCREASED AWARENESS OF THE NEED FOR DUE PROCESS AND EQUAL PROTECTION IN SUCH CASES. THESE CASES GENERALLY REQUIRE ADVERSARY JUDICIAL HEARINGS, CONCURRENCE OF FAMILY MEMBERS AND PHYSICIANS, AND SIMILAR PROCEDURES TO BALANCE THE COMPETING SOCIETAL INTERESTS IN SUCH LIFE-AND-DEATH SITUATIONS. OTHER BENEFICIAL PROVISIONS NOW FOUND IN THE UTAH STATUTES AND OTHER STATE STATUTES RELATIVE TO ABORTIONS WOULD UNDOUBTEDLY REMAIN.

THE VARIOUS SPECTERS RAISED BY OPPONENTS OF THIS LEGISLATION DO NOT HAVE ANY BASIS IN FACT IN THE ENFORCEMENT OF ABORTION STATUTES BY STATES, EITHER BEFORE OR AFTER ROE V. WADE. FOR EXAMPLE, NEITHER BEFORE NOR AFTER ROE V. WADE HAS THERE BEEN, TO MY KNOWLEDGE, ANY PROSECUTION FOR ABORTION IN CONNECTION WITH THE PROMPT TREATMENT FOR RAPE OR INCEST, EVEN THOUGH THAT EXCEPTION DOES NOT APPEAR IN PAST OR PRESENT STATUTES.

UNDER THE PROPOSED LEGISLATION, THE STATES WILL TRULY BE ABLE TO BALANCE THE INTERESTS OF FETUS AND MOTHER IN A WAY NOT POSSIBLE UNDER THE SUPREME COURT'S MANDATE FOR ABORTION ON DEMAND. THE STATES COULD STILL PERMIT ABORTIONS IN MANY CIRCUMSTANCES--IT WOULD SIMPLY BE NECESSARY TO ESTABLISH DUE PROCESS STANDARDS WHICH WOULD TAKE INTO ACCOUNT THE PERSONHOOD OF THE FETUS. IT IS NOT TOO DIFFICULT TO CONTEMPLATE A STANDARD BY WHICH THE THREAT TO THE LIFE OF A MOTHER COULD BE BALANCED AGAINST THE DEPENDENT FETAL LIFE WITHIN HER AND UNDER WHICH DUE PROCESS REQUIREMENTS COULD BE SATISFIED AND THE ABORTION ALLOWED. LIKEWISE, THE REQUIREMENT TO PROVIDE EQUAL PROTECTION OF THE LAW IS NOT AN ABSOLUTE STANDARD AND WOULD NOT ABSOLUTELY PREVENT ABORTION. RATHER, THE STATES COULD CLASSIFY FETAL LIFE AND NONFETAL HUMAN

LIFE IN SUCH A WAY THAT WOULD GRANT THOSE PROTECTIONS WHICH ARE REASONABLE TO THE FETUS, THUS AVOIDING THE SUGGESTED ABSURDITY OF AUTOPSIES ON SIX-WEEK MISCARRIAGES AND THE LIKE. UNDER CONSTITUTIONAL LAW, SUCH CLASSIFICATIONS AND DISTINCTIONS WOULD MERELY NEED TO BE RATIONAL AND SERVE A LEGITIMATE STATE PURPOSE. ONLY IN THE UNLIKELY EVENT THAT THE FEDERAL COURTS TREATED STATUTORY DISTINCTIONS BETWEEN FETAL LIFE AND OTHER HUMAN LIFE AS A "SUSPECT CLASSIFICATION" FOR EQUAL PROTECTION PURPOSES WOULD WE APPROACH THE ABSURD RESULT SUGGESTED BY CRITICS OF THIS BILL THAT THE FETUS WOULD HAVE TO BE TREATED EXACTLY INDENTICALLY TO AN INDEPENDENT HUMAN BEING FOR ALL PURPOSES. NEVERTHELESS, FOR THE PURPOSE OF PREVENTING UNNECESSARY AND WANTON DESTRUCTION OF FETAL LIFE, OF THE KIND NOW POSSIBLE IN OUR CLIMATE OF ABORTION FOR CONVENIENCE ON DEMAND, STATES WOULD HAVE FULL POWER TO ACT.

Senator EAST. We shall proceed as we have in the past: I will take a 10-minute shot at you, and then we will turn it over to Senator Baucus. I would hope that we could wind this up sometime prior to 11:30 at the latest, in that we have six witnesses on our next panel, so they would be deserving of a bit more than half of our alloted time this morning.

Mr. Wilkinson, as I understand your position on S. 158 in terms of what impact it would have at the State level—and I am just clarifying my own thinking on it to see if we are in agreement or where we might disagree on it—you are saying that if this law were to go into effect and were ultimately to be upheld, what it would do would be to allow States to take actions dealing with abortion.

The principal restriction upon that State action, with S. 158 in operation, would be the usual due process requirements of the 14th amendment which apply to all persons, and S. 158 states that these apply to the unborn. That is, they should be considered persons within the meaning of the 14th amendment.

### IMPORTANCE OF DUE PROCESS CLAUSE

So the controlling constitutional provision, at least as regards S. 158, would be the due process clause of the 14th amendment. Is that the basic thrust of it as you would see it?

Mr. WILKINSON. Yes, Mr. Chairman. And I think it is important to note that the due process clause is important to show the nonsense of the parade of horrors I am sure that this subcommittee has had to hear, because abortions would be allowed even after the implementation through State legislation of S. 158 in necessary cases, but by following due process standards.

Even though you would have human life in the case of the fetus, if the legislature determines that in a particular situation the rights of the mother to her health should prevail, then abortion would be allowed.

Senator EAST. So we are in agreement that the controlling constitutional provision, at least as regards S. 158, would be the due process clause. A State could take action in this area to allow or forbid, but it would then be subject, of course, to the usual due process requirements of the 14th amendment.

I do not wish to put the burden wholly on you, but not only based upon your experience in Utah but based upon your understanding and knowledge of the history of State action in this area, could we make any generalizations as to what we might reasonably anticipate States would do in this area?

I appreciate the great diversity in terms of State action, but, for example, what kinds of abortions do you anticipate would be forbidden, and what kind might be allowed and for what reasons?

WHAT STATES WOULD ENACT

Mr. WILKINSON. I think it would be fair to say that the general rule would be that all abortions would be forbidden, with exceptions, rather than going at it the other way around.

Certainly in balancing—which the Supreme Court in *Roe* v. *Wade* could not do because they could not find there was life—personhood—in a fetus in that case—you could create exceptions rationally.

Certainly the best way to answer your question, Mr. Chairman, is to go back and examine the legislation State by State which existed in 1973. But I think there would be some very significant changes taking place. We just would not go all back to 1973. There have been many advances since then, such as, as I mentioned in my statement, the comatose patient who is allowed to die. Things we have learned through that and other experiences may modify somewhat the legislation which was on the books in 1973.

Senator EAST. As you see S. 158 and its probable effect on States now subject to the due process requirements of the 14th amendment, I gather we would be safe in concluding that abortion on demand, merely as a matter of choice as a form of birth control, without any question would probably be forbidden. Is that true?

Mr. WILKINSON. With no doubt in my mind, that is correct.

Senator EAST. Would you anticipate the State could allow an abortion where a woman had a cancerous uterus and it was essential—there was no choice but to terminate that pregnancy in order to save the life of the mother? Would you anticipate that S. 158 would allow that kind of exception?

Mr. WILKINSON. There is no question—it would, in my opinion.

Senator EAST. It would allow that kind of exception?

Mr. WILKINSON. Yes.

Senator EAST. Again, not wishing you to play Solomon with us here, but just in terms of your own experience, to try to find where we might be in this area—of course, the other areas we often hear a great deal about are the very emotional areas of rape and incest. Again, I am not asking you to play Supreme Court here, and perhaps you might even decline to answer on the assumption my

question is unanswerable. What about a State statute that did allow an abortion in the case of rape, if reported in a certain period of time, or incest? What would be your expectation of S. 158's impact there?

Mr. WILKINSON. That is a more difficult question as, from your phraseology, you are obviously aware. This is just a wild guess. I believe that the States would be allowed to draw classifications which I think would be upheld as being reasonable under the equal protection clause of the 14th amendment, allowing the taking of the fetus in those situations based on the competing interests of the mother.

Senator EAST. What effect would you anticipate—understanding your position on the equal protection clause—of the due process clause of the 14th amendment? Similar in the standard of reasonableness?

Mr. WILKINSON. I do not purport to be a constitutional lawyer of the dimensions of others who have appeared before this subcommittee, but the rough idea of the due process clause in this context is to provide not so much reasonableness but, rather, the standards.

In other words, to take your hypothetical—a woman who has been raped and who becomes pregnant thereby—I think the legislature could, under the equal protection clause, make an exception and allow abortion, but the due process clause would require that that abortion be performed only after following certain safeguards and rather rigorous procedures as to notifying everybody involved—obviously not the rapist—to make sure that medically this is a procedure which does not offend the basic State statute.

### RAPE AND INCEST MARGINAL PROBLEMS

Senator EAST. In your experience in the State of Utah—first noting nationwide that we have about 1.5 million abortions a year—as attorney general, what percentage—maybe again this is an unanswerable question statistically—what would be your thought on the number of women who become impregnated through rape? Would that be a substantial figure?

Mr. WILKINSON. No—very insubstantial.

Senator EAST. What about incest—what would you anticipate?

Mr. WILKINSON. I was going to say less insubstantial—I would say the same.

Senator EAST. Would it be your judgment that beyond the very delicate, obvious, and difficult question of saving the life of the mother—and using the example I gave of the cancerous uterus where, in order to save the life of the mother, there was no choice but to destroy the environment which the child was in, and if it was in an early stage and not viable outside of the womb, obviously, in effect, you have made it impossible for that fetus—that life—to survive—barring the problems of saving the life of the mother, are you suggesting that these other areas of possible exception—rape and incest—would be extremely marginal problems in terms of an overall abortion policy that a State might develop?

Mr. WILKINSON. I think that is a very good way of putting it. You obviously recognize that this is a State option, and some States

may choose to provide exceptions for rape and incest and other States will not. It is certainly right on the margin.

Senator EAST. As you see it, the ultimate effect of S. 158 is, again, to allow States to take action in this area, subject to the due process requirements of the 14th amendment, which would mean as a practical matter that they would have to look at and balance—which they cannot now do with *Roe* v. *Wade*——

Mr. WILKINSON. Unfortunately—yes.

Senator EAST. They would then be in a position to balance the relative rights of the mother and of the unborn in terms of the compelling circumstances of a particular case and develop legislation accordingly. Is that about where we are with S. 158?

Mr. WILKINSON. That is not only about where we are—that is precisely where we are.

Senator EAST. Thank you, Mr. Wilkinson.

Senator Baucus?

Senator BAUCUS. Thank you, Mr. Chairman.

Mr. Wilkinson, in Utah, can the Utah State Legislature overturn a Utah Supreme Court decision when the Utah Supreme Court interprets the Utah constitution?

Mr. WILKINSON. Yes—well, you postulate a Utah Supreme Court decision interpreting the State constitution.

Senator BAUCUS. Can the Utah Legislature, by a simple statute signed by the Governor, overturn that Utah Supreme Court decision?

Mr. WILKINSON. Usually not, and the reason I say "usually not" is that it is not all that simple to say that the Supreme Court decision was interpreting a constitutional provision.

Senator BAUCUS. But where it is clear that it is?

Mr. WILKINSON. Yes, you are right in that it would then require an amendment to the Utah State constitution to do that.

Senator BAUCUS. Can the U.S. Congress overturn U.S. Supreme Court decision when the U.S. Supreme Court interprets the U.S. Constitution?

Mr. WILKINSON. I submit, Senator, in all respect, that the question is not that easy to answer because *Roe* v. *Wade*——

Senator BAUCUS. As a general principle?

Mr. WILKINSON. As a general principle—yes, you are correct.

Senator BAUCUS. I am correct in what?

Mr. WILKINSON. You are correct in the inference of your question.

Senator BAUCUS. Which is?

Mr. WILKINSON. Which is that it requires a constitutional amendment to overturn a U.S. Supreme Court decision on the U.S. Constitution.

Senator BAUCUS. You were going to elaborate?

Mr. WILKINSON. The elaboration, I think, is self-evident in that the premise of *Roe* v. *Wade* is that it is not for the Court to decide when life begins, and that was, I think, a very wise decision for a court to make.

Senator BAUCUS. Did the Court ask Congress for guidance?

Mr. WILKINSON. In that decision expressly?

Senator BAUCUS. Yes.

Mr. WILKINSON. Expressly, no.

Senator BAUCUS. The Court, in *Roe* v. *Wade*, did not ask Congress for guidance?

Mr. WILKINSON. Expressly, it did not—that is correct.

RATIONALE OF ROE *v.* WADE

Senator BAUCUS. Did *Roe* v. *Wade* hold that a fetus is not a person under the 14th amendment?

Mr. WILKINSON. There is a great debate on that. There is a difference between a holding that a fetus is not human life and a holding that since we cannot say when human life begins a fetus is not human life. Scholars differ on that point.

Senator BAUCUS. Without getting into the legal niceties that lawyers too often get into as to what is a holding and what is not a holding, the effect of the decision is that a fetus is not a person within the meaning of the 14th amendment, and the Court did not ask Congress for guidance on that question.

Mr. WILKINSON. I would have to disagree with your statement that the effect of the holding is that a fetus is not human life. I know that you say that——

Senator BAUCUS. Why are we sitting here today engaging in this discussion on a bill if that is not the effect of the holding?

Mr. WILKINSON. You stated a second ago that perhaps we do not need to get into these legal niceties. It is essential that we get into the legal nicety of what the Supreme Court held in *Roe* v. *Wade?*

Senator BAUCUS. But is not the effect of this bill to overturn the effect of *Roe* v. *Wade?*

Mr. WILKINSON. Sure—the effect of the bill.

Senator BAUCUS. Therefore, the effect of the decision that——

Mr. WILKINSON. Yes, that is the effect of the decision, but that is not the rationale of the decision.

Senator BAUCUS. I am trying to establish what the effect of the decision is. So we have established that that is the effect of the decision?

Mr. WILKINSON. That is the effect of the decision.

Senator BAUCUS. OK—and also that the Court did not ask Congress for guidance on this question—you said that twice already.

Mr. WILKINSON. Yes, I did. The U.S. Supreme Court rarely comes out in an opinion and asks Congress for guidance.

Senator BAUCUS. On the contrary, the Supreme Court often states very clearly that it is looking for congressional guidance—that is: "This is an area for Congress." That is stated in many Supreme Court decisions, as I am sure you know.

In this case, the Court did not say: "This is an area for Congress to hold hearings on or to look into and pass laws on."

If that is the case, why shouldn't we apply the general principle that Congress cannot overturn the U.S. Supreme Court where the Court interprets the U.S. Constitution?

Mr. WILKINSON. I think, for the obvious reason, as stated in my prepared testimony, that the rationale of *Roe* v. *Wade* can be interpreted to be based on their decision not to define when human life begins because they were not a competent body to make that decision.

Senator BAUCUS. Just for the sake of clarity, let me read into the record a portion of the opinion—that is, what the effect of the holding is—so that we can nail that down more solidly:

> All this, together with our observation that throughout the major portions of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person" as used in the 14th amendment does not include the unborn.

Mr. WILKINSON. Senator Baucus, as you know, you cannot read a complicated opinion like that, and then read just a sentence or two, as you have done, and say that that represents the holding of the many pages of the opinion.

Senator BAUCUS. I would like you to find me a statement that says the contrary—that "person" as used in the 14th amendment does include the unborn. If you can find that sentence in the opinion, I would like to see it.

Mr. WILKINSON. You have obviously read Mr. Galebach's article.

Senator BAUCUS. Yes, I have.

Mr. WILKINSON. I think he sets it out as well there as it can be stated—that that opinion is open to the interpretation. I am not saying that this is a black-and-white proposition.

Some say that your interpretation of the opinion is correct. Others say—constitutional scholars—that the reason they held that a fetus was not human life is that they could not say when life began—that was for somebody else, certainly not them, to say.

### RAPE OR INCEST AND EQUAL PROTECTION

Senator BAUCUS. I would like to turn to a second point and that is the area that you and Senator East explored. Senator East asked a question: What about those cases where a pregnancy is the result of rape or incest? Are those cases where the State legislature or States could provide abortions or not, assuming this bill passes? Your answer was: 'That is a difficult question.'

It seems to me that is a very easy question, and it is a very clear answer, because under the 14th amendment, the 14th amendment generally states that no State shall deny a person due process of law—life, liberty, or property without due process of law.

If a fetus is a person, I am trying to decide how constitutionally, under the 14th amendment, a State could deprive a fetus of life where pregnancy occurred on the basis of rape or incest. It seems to me that that would be impermissible under the 14th amendment. Under the legal doctrine, can we take life?

Mr. WILKINSON. The point I have been trying to make—and I obviously have not made myself clear—under the equal protection clause, it would be possible——

Senator BAUCUS. I am talking about the due process clause, though, not the equal protection clause.

Mr. WILKINSON. But to answer your question, I must refer to the equal protection clause.

Senator BAUCUS. OK.

Mr. WILKINSON. Under the equal protection clause, if S. 158 passes it would be permissible for a State legislature to pass a law which says that fetal life is, in some circumstances, to be considered different from nonfetal life.

Of course, in the case of fetal life, you have the competing interests of the mother and the fetus—both human lives. In the case of nonfetal life, of course, you have only the life of the born child, and at that point, of course, something like an abortion would not be permitted under any circumstances.

Senator BAUCUS. But that is under present law, because right now a fetus is not a person. If you make a distinction between fetal and nonfetal life, your discussion is valid for the purposes of the present law. But I am assuming that this bill passes, and if this bill passes then a fetus is a person.

Mr. WILKINSON. Yes; I agree with your last sentence.

Senator BAUCUS. So you cannot make the distinction between fetal and nonfetal if a fetus is a person.

TREATING PERSONS DIFFERENTLY

Mr. WILKINSON. If this bill passes or if the human life amendment passes, still you have the ability of the legislatures to differentiate——

Senator BAUCUS. Between persons and persons? You mean some people's lives are protected and other people's lives are not protected?

Mr. WILKINSON. Yes, but——

Senator BAUCUS. That is what you are saying.

Mr. WILKINSON. Your position, Senator Baucus, seems to be that that differentiation would be a suspect classification.

Senator BAUCUS. It sounds suspect to me.

Mr. WILKINSON. I think human experience would lead me to the exact opposite conclusion. I think there is a great difference between a fetal life and a nonfetal life.

Take the example of a fetus in a cancerous uterus. That fetus is life if S. 158 passes.

Senator BAUCUS. If a fetus is a person, under the 14th amendment, how can you make that distinction between a fetus person and a nonfetus person? They are both persons, it seems to me.

Mr. WILKINSON. I have to go back to my course in jurisprudence. I guess the greatest eye-opener of my legal education was to learn that the same word in the law can have 15 different meanings in 15 different contexts.

The word "possession," as used in property law, has many, many different meanings according to the circumstances, and the word "life" would have many different meanings or at least two different meanings.

Senator BAUCUS. Then what is the purpose of this bill? It seems to me that the obvious purpose of this bill is to assure fetuses have more attributes of personhood than they now have and have nearly the same if not the exact same attributes of personhood that born people have. Certainly, that is the direction of this bill, and the more that is the direction of the bill the more the distinction you are trying to make falters. Otherwise, what is the purpose of this bill?

Senator EAST. Could I comment on that?

Senator BAUCUS. I think we are at a very essential point here, Mr. Chairman.

Senator EAST. All right. I would like to respond.

Mr. WILKINSON. I think the purpose of the bill is obvious: The purpose of the bill is to provide a definition of when life begins because the Supreme Court has refused to make that determination—has expressly refused, by one interpretation of *Roe* v. *Wade*, to make that definition.

Senator BAUCUS. Is not the purpose of this bill to give more attributes of personhood to fetuses than they presently have?

Mr. WILKINSON. There is no doubt about it, but if you talk about the bundle of sticks--every lawyer has learned the analogy of the bundle of sticks—nonfetal life has more sticks in its bundle than fetal life; it is as simple as that.

Senator BAUCUS. Today.

Mr. WILKINSON. Pardon?

Senator BAUCUS. Today.

Mr. WILKINSON. Well, today certainly.

Senator BAUCUS. You want more sticks?

Mr. WILKINSON. What I am saying is that today fetal life has no sticks in its bundle.

Senator BAUCUS. OK, I think we have made the point. Thank you very much.

Thank you, Mr. Chairman.

Senator EAST. First of all, I would like to remind the audience—whatever side of this issue you are on, we do not want outbursts. I realize there are strong emotions on this, but I would deeply appreciate your not doing that, and those who persist, I will have to ask the officer to remove from the room. We have had that ground rule, as much as we can, all the way through, and we intend to insist upon it.

On the point that is being made here, I would just like to add this thought, Senator Baucus, and I would appreciate your response to it, Mr. Wilkinson.

FURTHER COMMENTS BY SENATOR EAST

The bill, again, gives the unborn the protection of due process now as a person—there is no question about that. But I would note, Senator Baucus, that the right to life, liberty, and property, under the due process clause of the 14th amendment, like any person's life, is not total and absolute. One thinks, for example, of capital punishment.

All I am saying is that a State could weigh the relative values here under this bill, in terms of the uniqueness of a pregnancy arising out of a rape or incest and make the judgment that the origin of the pregnancy—I am simply being the devil's advocate here in terms of what the State might say—was such a repulsive and revolting act that they would allow for an abortion.

I am not necessarily endorsing the position, but I am simply saying, Senator, that life, under the due process clause of the 14th amendment, which now would protect the fetus, a part of being protected, has never been an absolute right. And it might well be a State would so weigh it in that context.

But what I think we ought to keep our eye on, in my judgment, is the 1.5 million abortions in this country as a form of birth control where there are no extenuating circumstances of that

kind—no overriding, compelling problems where a State might find some thread for intervening and allowing an abortion.

My answer would be: I do not know precisely what the States would do in this area, but it very well may be they could weigh it one way or weigh it the other.

I am not personally troubled with the idea, or deeply anguished over it in terms of American federalism, that the State might look at this issue and might weigh it, and it might come down one way or the other, and that would not be inconsistent with what S. 158 purports to do, nor would it be inconsistent with the normal utilization of the due process clause of the 14th amendment where you are trying to deal with life, liberty, and property.

Balancing, rules of reason—that is the whole purpose of due process. There has to be a compelling State interest before life, liberty, or property is taken, and it might well be in these cases it would be found that the State had found a compelling interest for intervening in the cases of rape or incest, and certainly they would do it, in everyone's judgment that I can think of, where the life of the mother is in danger—for example, the cancerous uterus.

I think we can have the best of both worlds here. We are elevating the unborn to the status now of a person for due process protection, but that right is no more absolute than it is for anyone else under due process requirements today.

Senator BAUCUS. That is correct, but the point is that whenever one has the constitutional right that this bill would provide, that right is absolute unless it runs up against another constitutional right. The only other constitutional right that I can think of is the mother's if her life is in danger.

In the case of rape or incest, I do not think that rises to the level of a constitutional right that is countervailing against the constitutional right of a fetus that you would provide in this bill.

Senator EAST. It would be my contention that the right to life is paramount.

Senator BAUCUS. That is just my point.

Senator EAST. It is paramount, and it is fundamental, but it is not absolute. It can yield where the State finds a compelling interest for intervening—for example, in the case of capital punishment and murder.

Senator BAUCUS. Is rape sufficiently compelling?

Senator EAST. It is a totally different concept, but at least we have made the principle now. At least you have the point that the right is not absolute.

Having made that point, we then have to acknowledge that there are all kinds of situations involving life, liberty, and property where the State can make reasonable exceptions.

Who determines that? First, State action. Second, Supreme Court determination. That is the whole fabric, the warp and woof, of American constitutional law.

There is nothing unique, in my judgment, about what S. 158 purports to do here and what we normally encounter in the whole problem of trying to interpret due process and equal protection.

FURTHER COMMENTS BY MR. WILKINSON

Mr. WILKINSON. May I just add to that, in response to Senator Baucus' suggestion that a person was a person—obviously, a child is treated differently under the law from an adult. My point is that a fetus would be treated differently under the law from a child or an adult.

Senator BAUCUS. Is a child treated differently from an adult with respect to the taking of life?

Mr. WILKINSON. That is the close question. In the case of rape or incest, it is close.

Senator BAUCUS. We are talking about a child—a born child. Is a born child different from an adult for the purpose of taking of life?

Mr. WILKINSON. No.

Senator BAUCUS. Thank you.

Mr. WILKINSON. But both a born child and an adult do not have to weigh their rights against the correlative rights or the competing rights of the mother, and that is what we have in the fetal life situation which is unique.

Your figure of 1.5 million abortions each year reminds me that that is greater than the number of persons in the State of Utah today.

Your analysis of a compelling interest being necessary to override the right of the fetus—I am not positive the Supreme Court would treat it that way. Their analysis—their wording—might be the rights of the mother not to have a child born out of incest or rape versus the right of that fetal life.

Senator EAST. Yes. And it would be my argument on what I am calling the compelling State interest. That would be the rationale for the State's intervening in this case in terms of weighing the relative balance and opting out in this case on the side of the mother—that they would have to have some compelling interest for so doing. But ultimately, as you are suggesting, it would require a Supreme Court determination of the matter.

Mr. WILKINSON. That is precisely what our major argument is, Mr. Chairman—ultimately, it is up to the Supreme Court to decide this issue, and the Congress by statute cannot make the decision.

Senator EAST. Oh, yes, the Congress can, and States frequently do, pass legislation, and ultimately courts make the determination. Otherwise, we might as well close up shop and go home and just leave all these matters to the Supreme Court. I would contend that is the nub of our problem. They are not allowing sufficient policy contribution by the branch best equipped to do it—namely, the legislative branch.

Senator BAUCUS. I have no further questions, Mr. Chairman. I am sure we are going to convince each other of the correctness of each other's theories. [Laughter.]

Senator EAST. Thank you, Senator. I have no further questions.

Thank you, Mr. Wilkinson. We deeply appreciate your coming. Without objection, your prepared text will be inserted in the record.

Senator EAST. If our next six witnesses would please come forward, we would appreciate that. In the order in which they will be speaking, they are: Mr. William Thompson, Rabbi Henry Siegman,

Rabbi Seymour Siegel, Ms. Rosemary Radford Ruether, Rev. Paul Simmons, and finally Mr. Robert Destro.

I would like to welcome our panelists here.

What we would like to do, as we have done in the past, is let each of you summarize your remarks. We shall move from Mr. Thompson to Mr. Destro. Then Senator Baucus and I, and other members of the panel, will proceed to questions.

Again, I would respectfully ask that you summarize your remarks—take what you think are the key elements—so that we will have ample time for discussion and exchange. Your written remarks will be a permanent part of the record. We already have access to them now. Hence, a summary will be most helpful to us, so that we can get on with the discussion.

Our first panelist is Mr. William P. Thompson, who is a church official of the United Presbyterian Church. He received his law degree from the University of Chicago and practiced law in the State of Kansas for 20 years. He is currently president of the World Alliance of Reformed Churches and a member of the central committee of the World Council of Churches.

Mr. Thompson, we welcome you this morning and appreciate your taking the time to come and to help us out.

**STATEMENT OF WILLIAM P. THOMPSON, STATED CLERK, GENERAL ASSEMBLY, UNITED PRESBYTERIAN CHURCH, NEW YORK, N.Y.**

Mr. THOMPSON. Thank you, Mr. Chairman.

I need to correct one of the facts which you mentioned. My term of office as president of the World Alliance of Reformed Churches ended in 1977. I was president of that worldwide confessional body for some 7 years.

I am the stated clerk of the general assembly of the United Presbyterian Church in the United States of America. I was first elected to this office in 1966 and have served continually in the office since that date.

As stated clerk, I am the chief executive officer of the general assembly, which is the highest governing body of the denomination, and I am in charge of the office of the general assembly which is located in New York City.

The general assembly meets annually. It is composed of more than 600 commissioners, half of whom are ordained ministers, the other half ordained laypersons known as ruling elders. These commissioners are elected by 152 presbyteries situated in all 50 States, within whose bounds there are approximately 2.4 million adult members.

I recognize, of course, that within that total membership there are individuals who hold differing and sometimes conflicting views on virtually every issue of importance to our Nation and our world, certainly including the issue on which I am about to testify.

I welcome the opportunity to testify today, and while I appear as an individual because of my deep concern for the safeguarding of rights historically guaranteed by the Constitution, particularly those embodied in the first amendment, as an officer of the general assembly of the United Presbyterian Church my testimony must

necessarily be consistent with and informed by actions taken by successive general assemblies over the past decade.

These actions were approved by substantial majorities within the representative democratic decisionmaking process of this church. The general assembly's statements on social issues are understood to be for the guidance of and not as binding upon the consciences of constituent members, each of whom remains free to address these issues responsibly as a Christian and a citizen.

I recently served as president of the National Council of the Churches of Christ in the United States of America. From the opportunities to observe which are afforded by that post, it is my view that the procedure which I have just described is typical of the procedures used in most Protestant churches in this country when they make decisions about and take positions on social issues facing the Nation.

Such decisions do not reflect the view of a small group of hierarchs. Rather, they are arrived at by a broadly representative process and merit serious attention because of the manner in which they were reached.

The proposed bill which the subcommittee is considering seeks to enact the assumption that human life begins at conception and that a fetus is therefore a person and entitled to due process of law. The adoption of this bill would enforce this view upon many citizens who hold conflicting opinions.

### WIDE DIVERGENCE OF THINKING NOTED

In 1973, in the Supreme Court decision in the cases of *Roe* v. *Wade* and *Doe* v. *Bolton*, Mr. Justice Blackmun noted "the wide divergence of thinking on this most sensitive and difficult question." The press reports of the hearings of this subcommittee confirm that conclusion expressed by Mr. Justice Blackmun.

In a law review article quoted in the concurring opinion of Mr. Justice Douglas, Mr. Justice Clark stated:

> To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity—the known rather than the unknown. When sperm meets egg, life may eventually form, but quite often it does not. The law does not deal in speculation. The phenomenon of life takes time to develop, and until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide, and as we have seen, society does not regard it as such. The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs.

Presbyterians in this land have, from the 17th century when they were not the established church in any Colony, affirmed the concept later embodied in the first amendment that no particular sect or religion should be preferred above another.

The passage of the bill now under consideration would, in my judgment, result in writing into law the most extreme position of one group of religious persons and the denial of views held with equal force by large numbers of other religious persons. This would impose the views of the first upon the latter simply by the vote of majorities in each House of Congress and the approval of the President.

Such an action on the part of Congress would, in my opinion, exceed the authority of the Legislature and hence pose serious constitutional questions.

I am not concerned solely with the approach chosen by the proponents of the present bill. I oppose any law or constitutional amendment that would guarantee the rights of a person to the unborn fetus.

Because of the lack of consensus on the part of the scientific and medical communities as well as among religious communities, the imposition of any particular definition of when human life begins would threaten our time-honored concept of religious pluralism and would signal further erosion of the Bill of Rights.

### CHURCH OBLIGATED TO REVERE HUMAN LIFE

Over the past decade, general assemblies of the United Presbyterian Church have affirmed the Christian obligation to revere human life and its potential and to respect all the rights associated with human life. They have recognized that moral and ethical questions do arise from the natural ability to create life and the moral, physical, economic, and spiritual ability to sustain it.

These questions are social by nature rather than essentially legal, except that the law should provide for the availability of optimal conditions for both physical and mental well-being for all persons and should permit the ultimate exercise of private moral judgments and choice in matters related to the sexual sphere as well as to other areas of the lives of individual citizens.

Consistent with this view, general assemblies have in the past supported efforts to remove laws restricting the exercise of full freedom of personal choice by women in matters concerning the termination of their pregnancies.

Consistent with this position, the Supreme Court's decision of 1973 insures the right of the individuals to make decisions concerning abortion in accordance with their own consciences.

Several general assemblies have therefore concluded that individuals and society itself will be best served by rejecting efforts, whether by legislation or constitutional amendment, to alter those decisions of the Supreme Court.

To substantiate my earlier statements concerning the seriousness with which the United Presbyterian General Assemblies have taken this issue, I direct your attention to significant excerpts from resolutions adopted by several assemblies:

1972—184th General Assembly (1972) "declares that women should have full freedom of personal choice concerning completion or termination of their pregnancies." Reaffirmed statement of 182nd General Assembly. (Minutes, 1972, Part I, p. 266.)

1978—190th General Assembly (1978) reaffirmed "the right of personal choice in regard to termination of pregnancy while exploring the necessity for and the frequency of such choices." (Minutes 1978, Part I, p. 67.)

1979—191st General Assembly (1979) called "for the restoration of public funding for medically safe abortion care and to oppose legislative attempts to prohibit abortions." (Minutes, 1979, Part I, p. 434.)

1980—The 192nd General Assembly (1980) reaffirms the action of the 191st General Assembly (1979) in the adoption of the Resolution on The Abortion Rights Crisis; and it urges all congregations, presbyteries, and synods to take seriously the need for study and dialogue that includes study of the Scriptures, the study paper entitled "Problem Pregnancies: Toward A Responsible Decision," and other relevant resource material. (Minutes, 1980, Part I, p. 68.)

The actions of the general assemblies reflect an earlier action in 1970 by the national meeting of the United Presbyterian Women's Organization, representing about a third of a million women, which approved the same principle later stated by the general assemblies in their actions.

The most recent action occurred during the recent meeting of the 193d general assembly—1981—which met in Houston, Tex., just last month, May 18-28.

One of the 152 presbyteries of the church had sent an overture to the assembly urging it to adopt as its policy a statement in language almost identical with S. 158. The effect of the adoption of that overture by the general assembly would have been to reverse this long history of actions by the general assemblies of the past decade.

The proposal was referred to a committee of commissioners, made up of members of the assembly itself, which considered it in detail and recommended to the plenary body that it not take the requested action. By a decisive vote, the assembly concurred in the recommendation that it take no action.

The United Presbyterian General Assemblies, then, have continued over now more than a decade to affirm these positions because they are concerned with the effect which restrictive legislation regarding abortion has had upon women, children, families, and society at large.

They believe that motherhood should be a choice of free citizens and that women should have a right to bear children when they are prepared in their own view to undertake that responsibility.

## FORCED MOTHERHOOD DECRIED

Surely, forced motherhood cannot be the basis on which a democratic society can function effectively. Over the centuries, only tyrannies have insisted that women must bear children as a duty they owe to the state.

United Presbyterians know that a variety of biblical and theological views on abortion have been held by people throughout history and across diverse religious communions. Significant and contradictory views of sincere religious groups with respect to abortion are certainly present in our country today.

While general assemblies of the United Presbyterian Church support safe and legal abortions, we know that some religious groups and their members believe that abortion contravenes their theological understandings. We regret the confusion and the sometimes heated debate between religious groups which results.

It is important in this connection to note that the Supreme Court decisions of 1973 on abortion do not force any person to violate a religious principle or moral law but allow each woman to decide on the basis of her personal religious or moral belief whether to continue or to terminate a pregnancy. These decisions coerce no one and establish equal freedom of choice for all.

On the other hand, the proposed bill would compel women to bear children against the dictates of their consciences and force particular religious and moral standards on every citizen.

In conclusion then, let me briefly indicate the probable consequences of the enactment of this bill.

First, grave questions would be raised about its constitutionality.

Second, enacting the bill would inevitably result in a return to the hazards and tragedies of illegal abortions which preceded the Supreme Court decision.

Third, the enactment of the bill would severely limit the right of privacy of women citizens and deny to them equal justice under the law by removing their freedom to make decisions in this sensitive area.

Finally, tension and potential conflict between religious groups will escalate if this bill becomes law. Because religious people hold deep and contrary views about their theology and abortion; the harmony of our religious institutions will be further disrupted. The advances of the past half century in the ecumenical movement will be tragically fractured.

I urge the subcommittee to turn back this attempt and all other attempts to weaken or subvert the Supreme Court ruling of 1973 which permits safe, legal abortions and which permits women to exercise responsible freedom in making decisions about their lives.

Even more urgent, perhaps, is my concern lest the Congress enact into law restrictions on religious freedom of citizens, a freedom which was hard won and which we in our generation must continue to cherish and protect.

Thank you, Mr. Chairman.

Senator EAST. Thank you, Mr. Thompson.

[The prepared statement of Mr. Thompson follows:]

## PREPARED STATEMENT OF WILLIAM P. THOMPSON

My name is William P. Thompson. By training I am a lawyer. I was in private practice for twenty years before being elected to the office I now hold - Stated Clerk of the General Assembly of the United Presbyterian Church in the United States of America. I was first elected to this office in 1966 and have served continuously since that date. As Stated Clerk, I am the chief executive officer of the General Assembly, which is the highest governing body of the denomination and I am in charge of the Office of the General Assembly which is located in New York City. The General Assembly meets annually; is composed of more than 600 commissioners, half ordained ministers and half ordained laypersons, known as ruling elders, elected by 152 presbyteries situated in all fifty states, within whose bounds are 2,435,033 adult members. I recognize that within that total membership of this church there are individuals who hold differing and sometimes conflicting views on virtually every issue of importance to our nation and our world, including the issue on which I am about to testify.

I welcome this opportunity. While I appear today as an individual because of my deep concern for the safeguarding of rights historically guaranteed by the Constitution, particularly those embodied in the First Amendment, as an officer of the General Assembly, my testimony is consistent with and informed by actions taken by successive General Assemblies over the past decade. These actions were approved by substantial majorities within the representative democratic decision making process of the United Presbyterian Church. The General Assembly's statements on social issues are understood to be for the guidance of and not as binding upon the consciences of constituent members, each of whom remains free to address these issues responsibly as a Christian and a citizen.

I recently served as President of the National Council of the Churches of Christ in the United States of America. From the opportunities to observe afforded by that post, it appears that the procedure just described is typical of the procedures used in most Protestant churches in this country when they make decisions about and take positions on social issues facing the nation. Such decisions do not reflect the view of a small group of hierarchs. Rather

they are arrived at by a broadly representative process and merit serious attention because of the manner in which they were reached.

The proposed legislation under consideration by this Subcommittee, S-158, would, if adopted, purport to grant by legislative enactment the rights of a "person" or "human being" to an unborn fetus from the moment of conception. One effect of such legislation would be to permit restriction or prohibition of abortion. This would appear to constitute an unwarranted intrusion by government into the private lives of its citizens. Perhaps more important, for present consideration, enactment of this bill would grant the force of law to one particular opinion about when human life begins, with no provision for choice or dissent on the part of individual citizens who hold divergent views. Such preferential treatment appears to contravene First Amendment guarantees. In the history of our nation, enactment into law of the religious opinions held by only one group has been resisted on grounds of public policy or constitutionality.

The proposed bill seeks to enact the assumption that human life begins at conception, and that a fetus is therefore a "person" and entitled to due process of law. The adoption of this bill would enforce this view upon many citizens who hold conflicting opinions. In 1973, in the decision of the Supreme Court of the United States in the cases of Roe vs. Wade, and Doe vs. Bolton, Mr. Justice Blackmun noted "the wide divergence of thinking on this most sensitive and difficult question." In a Law Review article quoted in the concurring opinion of Mr. Justice Douglas, Mr. Justice Clark stated:

> "To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity--the known rather than the unknown. When sperm meets egg, life may eventually form, but quite often it does not. The law does not deal in speculation. The phenomenon of life takes time to develop, and until it is actually present, it cannot be destroyed. Its interruption prior to formation

would hardly be homicide, and as we have seen, society does not regard it as such. The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs."

Presbyterians in this land have, from the seventeenth century when they were not the established church in any colony, affirmed the concept later embodied in the First Amendment that no particular sect or religion should be preferred above another. The passage of the bill now under consideration would result in writing into law the most extreme position of one group of religious persons and the denial of views held with equal force by large numbers of other religious persons. This would impose the views of the first upon the latter simply by the vote of majorities in each house of Congress and the approval of the President. Such an action on the part of Congress would, in my opinion, exceed the authority of the legislature and hence pose serious Constitutional questions.

I am not concerned solely with the approach chosen by the proponents of the present bill. I oppose any law or Constitutional amendment that would guarantee the rights of a person to the unborn fetus. Because of the lack of consensus on the part of the scientific and medical communities, as well as among religious communities, the imposition of any particular definition of when human life begins would threaten our time-honored concept of religious pluralism and would signal further erosion of the Bill of Rights.

Over the past decade General Assemblies of the United Presbyterian Church have affirmed the Christian obligation to revere human life and its potential and to respect all the rights associated with human life. They have recognized that moral and ethical questions do arise from the natural ability to create life, and the moral, physical, economic and spiritual ability to sustain it. These questions are social by nature rather than essentially legal, except that the law should provide for the availability of optimal conditions for both physical and mental well-being for all persons, and should permit the ultimate exercise of private moral judgments and choice in matters related to the sexual sphere, as well as to other areas of the lives of individual citizens. Consistent with this view, General Assemblies have in the past supported efforts

to remove laws restricting the exercise of full freedom of personal choice by women in matters concerning the termination of their pregnancies. Consistent with this position, the Supreme Court's decisions of January 22, 1973 ensure the right of the individuals to make decisions concerning abortion in accordance with their own conscionces. Several General Assemblies have therefore concluded that individuals and society itself will be best served by rejecting efforts whether by leg slation or Constitutional amendment to alter those decisions of the Supreme Court.

To substantiate my earlier statements concerning the seriousness with which the United Presbyterian General Assemblies have taken this issue, I direct your attention to significant excerpts from resolutions adopted by several Assemblies:

1972 — 184th General Assembly (1972) "declares that women should have full freedom of personal choice concerning completion or termination of their pregnancies." Reaffirmed statement of 182nd General Assembly. (Minutes, 1972, Part I, p. 266.)

1978 — 190th General Assembly (1978) reaffirmed "the right of personal choice in regard to termination of pregnancy while exploring the necessity for and the frequency of such choices." (Minutes, 1978, Part I, p. 67.)

1979 — 191st General Assembly (1979) called "for the restoration of public funding for medically safe abortion care and to oppose legislative attempts to prohibit abortions." (Minutes, 1979, Part I, p. 434.)

1980 — The 192nd General assembly (1980) reaffirms the action of the 191st General Assembly (1979) in the adoption of the Resolution on The Abortion Rights Crisis; and it urges all congregations, presbyteries, and synods to take seriously the need for study and dialogue that includes study of the Scriptures, the study paper entitled "Problem Pregnancies: Toward A Responsible Decision," and other relevant resource material. (Minutes, 1980, Part I, p. 68.)

As early as 1970 the National Meeting of the United Presbyterian Women's organization, representing about 350,000 women, had approved a resolution stating that:

1) All abortions should be voluntary and without legal encumbrance so that women and physicians and pastors or other counselors may execise their best judgment.

2.) Abortion by physicians should be subject only to general laws regulating medical licensure and practice, and not to criminal penalties.

3.) Abortion services should be made available to all women regardless of economic status.

The 193rd General Assembly (1981) met in Houston, Texas, just last month, May 18-28. One of the 152 presbyteries of the church had sent an overture to the Assembly urging it to adopt as its policy a statement in language almost identical with S-158. The proposal was referred to a committee of commissioners to the Assembly which considered it in detail and recommended to the plenary body that it not take the requested action. By a decisive vote, the Assembly concurred in the recommendation to take no action.

United Presbyterian General Assemblies have continued to affirm these positions because they are concerned with the effect which restrictive legislation regarding abortions has had upon women, children, families and society at large. They believe that motherhood should be a choice of free citizens and that women have a right to bear children when they are prepared in their own view to undertake the responsibility. Surely forced motherhood cannot be the basis on which a democratic society can function effectively. Over the centuries only tyrannies have insisted that women must bear children as a duty they owe to the state.

United Presbyterians know that a variety of biblical and theological views on abortion have been held by people throughout history and across diverse religious communions. Significant and contradictory views of sincere religious groups with respect to abortion are certainly present in our country today. While the General Assemblies of the United Presbyterian Church support safe and legal abortions, we know that some religious groups and their members believe that abortion contravenes their theological understandings. We regret the confusion and the sometimes heated debate between religious groups which results. It is important to note, however, that the Supreme Court decisions of January 22, 1973 on abortion do not force any person to violate a religious principle or moral law but allow each woman to decide on the basis of her personal religious or moral belief whether to continue or to terminate a pregnancy. These decisions coerce no one and establish equal freedom of choice for all. On the other hand, the proposed bill would compel women to bear children against the dictates of their consciences and force particular religious and moral standards on every citizen.

In conclusion, let me briefly review some of the probable consequences of enactment of this bill:

1) Grave questions will necessarily be raised about the constitutionality of writing into law one set of religious opinions which are patently contrary to the opinions of other religious persons. Rights guaranteed to citizens by the Constitution's Bill of Rights must not be abridged or abrogated if the pluralistic society that we value so highly is to continue to thrive, or even survive.

2) Enacting this bill into law would inevitably result in return to the hazards and tragedies of illegal abortions, high maternal, death rates, unequal treatment of poor women, unplanned large families, and increase in abandoned and abused children, and an increase in public assistance costs. In addition, severe laws would again be permitted with criminal penalties for women who feel they must prevent childbirth. If enacted this legislation would create greater problems than it could possibly solve.

3) It would severely limit the right of privacy of women citizens and deny them equal justice under the law by removing their freedom to make decisions about their own bodies when they are pregnant. This is a most serious erosion of individual freedom.

4) Tension and potential conflict between religious groups will escalate if this bill becomes law. Because religious people hold deep and contrary views about their theology and abortion, the harmony of our religious institutions will be further disrupted. The advances of the past century in the ecumenical movement will be tragically fractured.

I urge the Subcommittee to turn back this attempt--and all other attempts--to weaken or subvert the Supreme Court ruling of 1973 which allows safe, legal abortions and which permits women to exercise responsible freedom in making decisions about their lives. Even more urgent perhaps is my concern lest the Congress enact into law restrictions on the religious freedom of citizens, a freedom which was hard-won and which we in our generation must continue to cherish and protect.

Senator EAST. Our next witness is Rabbi Henry Siegman. He is executive director of the American Jewish Congress. He is a graduate of the new school of social research and has lectured and published on Jewish interreligious and international affairs.

Rabbi Siegman, it is a great pleasure to have you with us this morning.

## STATEMENT OF RABBI HENRY SIEGMAN, EXECUTIVE DIRECTOR, AMERICAN JEWISH CONGRESS, NEW YORK, N.Y.

Rabbi SIEGMAN. Thank you, Mr. Chairman.

I should stress at the outset, Mr. Chairman, that I speak in a personal capacity although, as you indicated, I do serve as executive director of the American Jewish Congress and my views happen to represent the position of the American Jewish Congress.

I had intended limiting my oral presentation to that part of my submission to the subcommittee dealing with the religious questions.

Permit me, however, to make a comment prompted by an exchange that occurred earlier this morning between Senator Baucus and Mr. Wilkinson on the question of whether the Supreme Court decision constituted—because of its inability to determine the question of when life begins—an invitation to the legislature to make that determination.

The bill, S. 158, rests on the premise that the decisions in *Roe* and *Doe* were the result of the Court's institutional inability to define "life," a deficiency which, it is argued, is inapplicable to the Legislature.

This, I suggest to the subcommittee, involves a fundamental misreading of *Roe* and *Doe*, for the Court's determination that a fetus is not a person for purposes of the due process clause of the 14th amendment did not rest on its conclusion that it could not define "life."

This latter observation was made in response to the argument that, without regard to whether a fetus is a person within the meaning of the 14th amendment, the State had an interest in protecting potential life. The Court concluded that by adopting one theory of life the State may not override the rights of the pregnant woman. The Court thus found that the inability to define "life" applies specifically to State legislatures as well as the courts. Clearly, the State legislatures are as equipped as the Congress to make factual findings.

### CONSTITUTIONALITY AND PUBLIC POLICY

The Jewish community, like the rest of the country, is not united on the question of abortion. Although most Jews agree with the decisions in *Roe* and *Doe*, there are some within the Jewish community who disagree with those decisions.

Nevertheless, we know of no Jewish organizations, including those who oppose the right to freely choose an abortion and oppose governmental funding for abortions, which believe that Congress has the power by ordinary legislation to nullify a decision of the U.S. Supreme Court recognizing a constitutionally protected right.

Nor do we know of any Jewish organization which believes that it is within the power of the Congress to strip the Federal courts,

and particularly the Supreme Court, of the authority to determine cases raising constitutional issues.

Apart from these constitutional concerns, we believe that all Jewish organizations would oppose this bill because it embodies poor public policy.

The Bill of Rights was adopted, as Justice Jackson put it so eloquently in 1943, both to protect certain rights from the give and take of the political process and to insure access to the courts to vindicate those rights.

I quote Justice Jackson:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's * * * fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

For Jews, Mr. Chairman—a religious minority—these twin principles are of utmost importance. Over the years, the courts have handed down a series of decisions regarding religious liberty and other fundamental rights which are essential to the well-being of Jews both as a community and as individuals.

Not all of these decisions are popular with a majority of our fellow citizens. It is, however, the genius of our system that these basic rights are not subject to the ordinary principles of majority rule. S. 158, by undermining these two related principles, threatens the constitutional liberties of all Americans.

### JUDAISM AND ABORTION

Classical Jewish sources on the subject of abortion permit a wide range of opinion among rabbinic authorities. Despite these wide divergences, it is possible to identify certain general principles which are broadly accepted:

One, the fetus is not a person, in Jewish tradition, until the moment of birth. The normative view of Jewish law with respect to the fetus is that expressed by Rashi, the great classic commentator on the Talmud Tractate Sanhedrin—and I quote—"Whatever has not come forth into the light of the world is not human life." In no circumstance is abortion a capital offense.

Two, if the fetus, up to the moment of birth and even during the very process of birth, threatens the life of the mother, the life of the mother takes precedence. Further, this is not a matter of choice but of religious imperative.

Three, even the most lenient approach to abortion considers termination of the life of the fetus as morally objectionable if it is done for less than serious cause. What constitutes such serious cause divides Orthodox Jewish opinion, while Conservative and Reform Judaism hold a very lenient view.

Four, the final point of consensus is that if an abortion is performed even in situations where Orthodox tradition would not sanction it, such an abortion does not incur criminal punishment in a Jewish court or sanctions of any kind.

What the above suggests, it seems to me—most particularly what the final point suggests—is that Jewish tradition, while treating abortion as a serious moral issue, for all practical purposes recog-

nized the highly personal dimension of the decision to abort or to carry the fetus to term.

It should also be noted that, given the uncontested Jewish position that abortion is not merely permitted but religiously required in a case where carrying to term may endanger the life of the mother, the proposed legislation infringes on the religious freedom of Jews and therefore poses a very serious free exercise problem.

However, the difficulties posed by this legislation go beyond cases where the mother's life is threatened. Even in Orthodox Jewish tradition, which is the most restrictive of the three branches of Judaism, there is authority extending the original principle of protecting the mother's life to include the mother's health, including her mental well-being.

In the 19th and 20th centuries, there have also been Orthodox rabbinic decisions permitting abortion in cases of rape, in cases where the birth would cause extended suffering to the mother, and to prevent malformed infants—particularly in the thalidomide cases—on the ground of preventing emotional distress to the mother.

Clearly, the development of this lenient school within the Orthodox tradition would have been unthinkable if the Halacha of Jewish religious law considered the fetus a person and abortion homicide.

I suggest that a distinction must be made between the view that the termination of potential life for less than serious reasons is morally objectionable—a view certainly sanctioned in Jewish tradition—and a view that the fetus is full human life.

The latter is a view held primarily, though not exclusively, by the Catholic Church, surely commanding respect, but it is a view that is not shared by Jewish religious tradition nor by other major religious traditions.

To ascribe universality to the Catholic Church's position with respect to the question of when human life begins is to misread history.

The Catholic Church itself did not consistently hold to this view, and its present position is determined not by universal considerations—whatever that term may mean—but by theological considerations unique to the Catholic Church—the concept of ensoulment and the need for baptism as a prerequisite for salvation.

### ABORTION AND THE SANCTITY OF LIFE

I submit to you, Mr. Chairman, and to members of the subcommittee that you must ask yourselves an important and obvious question: Is it conceivable that spokesmen for religious traditions which oppose the proposed legislation are insensitive to the moral seriousness of terminating potential life?

Is it possible that people who stake their lives on the proposition that men and women are the bearers of the divine image—that they are created in the likeness of God—would advocate a view that diminishes, however indirectly, reverence for life?

Why would the bearers of an ancient tradition that declared to the world long before the rise of Islam and long before the rise of Christianity that life is the most precious of God's gifts, why would such a life-regarding and life-revering tradition be less than mili-

tant and passionate in its defense of all forms of life, including that of the unborn? Surely that is a reasonable question that should be asked and must be answered.

The answer, I suggest to you, is that this very commitment to life and its enhancement is precisely what led major religious traditions, and particularly Jewish religious tradition, to the position that we hold.

These traditions reflect the belief that, in the long run, life is diminished, demeaned, and desecrated far more by callousness and insensitivity to the born than to the unborn, however precious their promise. That is why this legislation, if well intentioned, is ill-advised. It is ill-advised on fundamental moral grounds, for what we have here are divergent approaches to the most basic of human and religious values.

In the name of promoting life, the proposed statute is, in fact, in danger of offending grievously the life-affirming impulse of a large segment of our society whose sensitivity to this issue, I assure you, is as acute, as intense, as that of those who come at this issue from different theological premises.

In other words, this legislation takes sides, Mr. Chairman, not between a moral and a permissive approach but between two conflicting moral approaches that are equally grounded in profound religious conviction and in the desire to enhance the sacredness and the dignity of life.

The free exercise problems created by this legislation aside, it seems indefensible for the Congress of the United States to say to the faithful adherents of a large number of religious traditions that their deeply held religious views with respect to the sanctity of life are misguided and wrong. I am sure that is not your intention, but that is the inescapable consequence of the proposed legislation.

I have not presented the Jewish view to this subcommittee in order to suggest to you that it find expression in legislation. Quite to the contrary, given the differences that exist between religious communities on the subject, legislation expressing the Jewish view would be as inappropriate as legislation expressing some other religious view.

Rather, my point is that, given the great diversity of views and given, furthermore, the rootedness of this diversity in differences of theological belief, the proper role of Government in a free society is to allow the different religious traditions to seek to further their beliefs with respect to the appropriateness of abortion and to leave that final decision to the woman, answering to God and to conscience.

Thank you.

Senator EAST. Thank you, Rabbi.

[The prepared statement of Rabbi Siegman follows:]

## PREPARED STATEMENT OF RABBI HENRY SIEGMAN

The American Jewish Congress welcomes this opportunity to express its opposition to S. 158, a bill which defines human life as beginning at conception. The bill attempts to overrule Roe v. Wade, 410 U.S. 113 (1973), Doe v. Bolton, 410 U.S. 179 (1973), and their progeny, and seeks to insure this result by limiting the jurisdiction of the federal courts. We oppose this bill both because we believe that government should not interfere with the freedom of a woman to decide whether to bear children, and more importantly, because Congress, through this bill, usurps the role of the Supreme Court as the final arbiter of the Constitution.

### I. The Bill

S. 158 has two sections. The first provides that the Congress has determined that human life exists from the moment of conception for purposes of enforcing the states' obligation not to deprive persons of life without due process of law. The second section would deprive the federal courts of jurisdiction to determine challenges to the constitutionality of state or local laws regulating abortion, including those which totally prohibit the practice. A severability clause (Section 3) makes the validity of this section independent of the validity of Section 1.

### II. The Jewish Tradition

Classical Jewish sources on the subject of abortion permit a wide range of opinion among contemporary rabbinic authorities. Despite these wide divergences, it is possible to identify certain general principles which are broadly accepted:

1) The fetus is not a "person" in Jewish tradition until the moment of birth. The normative view of Jewish law with respect to the fetus is that expressed by Rashi in the Talmud Tractate Sanhedrin

> Whatever has not come forth into the light of the world (i.e. the mother's birth canal) is not a human life.

In no circumstance is abortion a capital offense.

2) If the fetus up to the moment of birth, and even during the very process of birth, threatens the life of the mother, the life of the mother takes precedence. Further, this is not a matter of choice but of

religious imperative.

3) Even the most lenient approach to abortion considers termination of the life of the fetus as morally objectionable if it is done for less than serious cause. What constitutes such serious cause divides Orthodox Jewish opinion. Conservative and Reform Judaism hold a very lenient view of what constitutes a serious cause and leave the ultimate determination of serious cause to the woman.

4) The final point of consensus is that if an abortion is performed, even in situations where Orthodox tradition would not sanction it, such an abortion would not incur criminal punishment in a Jewish court.

What the above suggests -- and most particularly what the final point suggests -- is that Jewish tradition, while treating abortion as a serious moral issue, for all practical purposes recognized the highly personal dimension of the decision to abort or to carry the fetus to term. It should also be noted that, given the uncontested Jewish position that abortion is not merely permitted, but religiously required, in a case where carrying to term may endanger the life of the mother, the proposed legislation infringes on the religious freedom of Jews.

The difficulties posed by this legislation go beyond cases where the mother's life is threatened. Even in the Orthodox Jewish tradition, which is the most restrictive of the three branches of Judaism, there is authority extending the original principle of protecting the mother's life to include the mother's health, including her mental well being. And, more recently, a rabbinic authority extended the concept to permit an abortion in the case where a sibling would be endangered should the mother's milk dry up during pregnancy.

In the 19th and 20th centuries there have also been Orthodox rabbinic decisions permitting abortion in cases of rape, in cases where the birth would cause extended suffering (i.e. physical pain) to the mother, and to prevent malformed infants (thalydomide babies) on the ground of preventing emotional distress to the mother. Surely, the development of this lenient school within the Orthodox Jewish tradition would be unthinkable if the Halacha (Jewish religious law) considered the fetus a person, and an abortion a homicide.

A distinction must be made between the view that the termination of potential life for less than "serious reasons" is morally objectionable and the view that the fetus is full human life. The latter is a view unique to the Catholic church -- which surely commands respect -- but it is a view that is not shared by Jewish religious tradition, nor by other major religious traditions.

To ascribe "universality" to the Catholic church's position with respect to the question of when human life begins is to misread history. The Catholic Church itself did not consistently hold to this view. And its present position is determined not by "universal" considerations but by theological considerations unique to the Catholic Church -- the concept of ensoulment and the need for baptism as a prerequisite for salvation.

In his decision in which he rejected - correctly, in my view - the argument that restrictions on abortions violate the Establishment Clause, Judge John Dooling in McRae v. Califano, 491 F.Supp. 630, 714-15 (E.D.N.Y. 1980), rev'd on other grounds, 100 S.Ct. 2671 (1980), nevertheless observed that the "differences [in the views of the Catholic Church and of other religious groups with respect to abortion] are identifiably religious, and constitute an integral element of denominational religious difference." Although not unconstitutional, it is clearly bad policy for Congress to establish in law a position that "constitutes an integral element of denominational difference," particularly when contrary views are equally grounded in religious doctrine.

I respectfully submit to the members of this distinguished committee that they must ask themselves an important and obvious question. Is it conceivable that spokesmen for religious traditions which oppose the proposed legislation are insensitive to the moral seriousness of terminating potential life? Is it possible that people who stake their lives on the proposition that men and women are the bearers of the divine image -- that they are created in the likeness of God -- would advocate a view that diminishes, however indirectly, reverence for life. Why would the bearers of an ancient tradition that declared to the world long before the rise of Islam and long before the rise of Christianity that life is the most precious of God's gifts, why would such a life-regarding and life-revering

tradition be less than militant and passionate in its defense of all forms of life, including that of the unborn? Surely, that is a reasonable question that must be asked and must be answered.

The answer, I suggest to you most respectfully, is that this very commitment to life and its enhancement is precisely what le. major religious traditions, and particularly Jewish religious tradition, to the position they hold. These traditions reflect the belief that, in the long run, life is diminished, demeaned and desecrated far more by callousness and insensitivity to the born than the unborn, however precious their promise. That is why this legislation, if well intentioned, is ill advised. It is ill advised on fundamental moral grounds. For what we have here are fundamentally divergent approaches to the most basic of human and religious values. In the name of promoting life, the proposed statute is in fact in danger of offending grievously the life-affirming impulse of a large segment of our society, whose sensitivity to this issue, I assure you, is as acute, as intense, as that of those who come at this issue from different theological premises.

In other words, this legislation takes sides not between a moral and a permissive approach, but between two conflicting moral approaches that are equally grounded in profound religious conviction and in the desire to enhance the sacredness and dignity of life. The free exercise problems created by this legislation aside, it seems to me simply indefensible for the Congress of the United States to say to the faithful adherents of a large number of religious traditions that their deeply held religious views with respect to the sanctity of life are misguided and wrong. I am sure that is not your intention, but that is the inescapable consequence of the proposed legislation.

I have not presented the Jewish view on abortion in order to suggest that it find expression in legislation. Given the differences that exist between religious communities on the subject, legislation expressing the Jewish view would be as inappropriate as legislation expressing the Catholic view. Rather, my point is that given the great diversity of views, and given furthermore the rootedness of this diversity in differences of theological belief, the proper role of government in a free society is to allow the different religious traditions to inculcate their own beliefs

with respect to the appropriateness of abortion, and to leave that final decision to the woman, answering to God and conscience.

III. Despite the Differing Views They Hold on Abortion Jews Oppose this Bill

AJCongress has long supported freedom of choice in reproductive matters. S. 158 would destroy that freedom. For this reason alone, we would urge defeat of this legislation. But there is an even more compelling reason for defeating this bill -- the need to preserve the authority of the Supreme Court, and the lower federal courts, to make binding constitutional adjudications.

The Jewish community, like the rest of the country, is not united on the question of abortion. Undoubtedly most Jews agree with the decisions in Roe v. Wade and Doe v. Bolton insofar as they insulate a woman's decision whether to have an abortion from all but limited governmental control. Others within the Jewish community disagree with those decisions. And even amongst those who welcome the withdrawal of governmental authority from this area, there is substantial disagreement as to when an abortion is morally justifiable in cases where it is not necessary to protect the life or health of the mother.

Nevertheless, we know of no Jewish organization, including those which oppose the right to freely choose an abortion and oppose governmental funding for abortions, which believes that Congress has the power by ordinary legislation to nullify a decision of the United States Supreme Court (or any other court) recognizing a constitutionally protected right. Nor do we know of any Jewish organization which believes that it is within the power of Congress to strip the federal courts, and particularly the Supreme Court, of the authority to determine cases raising constitutional issues. Even apart from these constitutional concerns, we believe that all Jewish organizations would oppose this bill because it embodies poor public policy.

The Bill of Rights was adopted, as Justice Jackson put it so eloquently in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943), both to protect certain rights from the give and take of the political process, and to insure access to the courts to vindicate those rights:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's ... fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

For Jews, a religious minority, these twin principles are of the utmost importance. Over the years, the courts have handed down a series of decisions regarding religious liberty and other fundamental rights which are essential to the well being of Jews both as a community and as individuals. Not all of these decisions are popular with a majority of our fellow citizens. It is, however, the genius of our system that these basic rights are not subject to the ordinary principles of majority rule. S. 158, by undermining these two related principles, threatens the constitutional liberties of all Americans.

IV. Roe, Doe and the Definition of Life

The major feature of this bill is the attempt to define life. The bill rests on the premise that the decisions in Roe v. Wade and Doe v. Bolton were the result of the Court's institutional inability to define life, a deficiency which, it is argued, is inapplicable to the legislature. Thus a supporter of S. 158 has written

> On the beginnings of life, the Court observed, there is a "wide divergence of thinking." The question is "sensitive and difficult." For such questions the judiciary has no suitable evidentiary standards to determine an answer.
>
> To decide when human life begins involves the sort of considerations that are appropriate for Congress but not the courts.

Galebach, A Human Life Statute, VII Human Life Rev. 1 (1981).

This, however, involves a fundamental misreading of Roe v. Wade and Doe v. Bolton, for the Court's determination that a fetus was not a person for purposes of the due process clause of the Fourteenth Amendment did not rest on its conclusion that it could not define life. This latter observation was made in response to the argument that, without regard to whether a fetus is a person within the meaning of the Fourteenth Amendment, the state had an interest in protecting potential life. The Court, after briefly canvassing a wide variety of views on the issue, 410 U.S. at 159-63, including those of physicians who placed the beginning of life at

conception, concluded that "by adopting one theory of life [a state] may not override the rights of the pregnant woman...." Id. at 162. The Court thus found that the inability to define life applies to state legislatures as well as the courts. Id. Surely, the state legislatures are as equipped as the Congress to make factual findings. Minnesota v. Clover Leaf Creamery Co., 101 S.Ct. 715 (1981).

Entirely without regard to the question of when life begins, the Court held that as a matter of constitutional interpretation, the Congress which drafted the Fourteenth Amendment did not intend to include fetuses. (410 U.S. at 158):

> All this [the use of the word person elsewhere in the Constitution] together with the observation, supra, that throughout the major portion of the 19th Century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person" as used in the Fourteenth Amendment does not include the unborn.

Significantly, neither Justice White nor Justice Rehnquist, dissenting in Roe and Doe, challenged either of these conclusions.

## V. Section 5 of the Fourteenth Amendment Does Not Empower Congress to Abridge Constitutional Rights

Perhaps recognizing the weakness of the argument that Congress is not subject to the institutional limitation of the judiciary, proponents of S. 158 argue that Congress may act to expand the substantive scope of the Fourteenth Amendment under its power, granted by Section 5 of that Amendment, to "enforce the Amendment by appropriate legislation." This claim cannot withstand scrutiny.

The Congress, unlike state legislatures, does not possess police power. It has no authority to legislate on a particular subject merely because to do so would advance the public good. Congress may legislate only if the Constitution affirmatively grants it the power to do so. In order to forestall objections to the power of Congress to enact legislation to protect the rights conferred on emancipated slaves, Congress added Section 5 to the Fourteenth Amendment. The scope of that power must still be regarded as unsettled. But it is certain that S. 158 cannot be sustained under that power.

Under Section 5, Congress clearly has broad discretion to enact

legislation designed to remedy violations of the substantive provisions of the Fourteenth Amendment. Fullilove v. Klutznick, 100 S.Ct. 2758 (1980); Oregon v. Mitchell, 400 U.S. 112 (1970); cf. South Carolina v. Katzenbach, 383 U.S. 301 (1960) (15th Amendment). It may enact remedial legislation which would be beyond the authority of the courts to decree under their equitable powers. Oregon v. Mitchell, supra, 400 U.S. at 284 (Stewart, J., concurring in part).

At least some Justices have articulated the view that, in addition, it is within the scope of Section 5 for Congress to define what constitutes a violation of the Fourteenth Amendment. In Katzenbach v. Morgan, 384 U.S. 641, 648 (1966), Justice Brennan, speaking for a majority of the Court, held that Congress' power under Section 5 extended to practices which might themselves not be violative of the Constitution. Yet it bears noting that Justice Brennan in that case found it necessary to postulate the existence of two underlying violations of equal protection which Congress could reasonably have decided to remedy. Moreover, in his opinion, Justice Brennan was careful to note that Congress did not have the power under Section 5 to dilute the substantive protection of the Amendment.

The only other case in which the Court has considered whether Congress may define the substantive content of the Fourteenth Amendment is Oregon v. Mitchell, supra, a case in which the Court split several ways on the applicability of Section 5 to an act of Congress purporting to grant eighteen year olds the vote in state elections. A majority of the Justices held that Congress could not constitutionally do so, although the inability to agree on a rationale leaves the scope of the Section 5 power in doubt.

It thus cannot be said that Congress has the power to define life as beginning with conception under Section 5, if the substantive provisions of the Fourteenth Amendment do not protect fetal life. But even assuming the broadest possible scope of the Section 5 power, it is clear that the Court will not allow Section 5 to be used to dilute the substantive provisions of the Amendment. Oregon v. Mitchell, supra, 400 U.S. at 128-30 (Black, J.); id. at 249 n. 31 (Brennan, J.); Morgan v. Katzenbach, supra.

S. 158 runs afoul of this limitation. The Supreme Court has deter-

minded that woman's right to choose an abortion is Constitutionally protected. The Court, moreover, was not oblivious to the fact that the exercise of the woman's right conflicted with the state's interest in protecting potential life. Roe v. Wade, supra, 410 U.S. at 159. This clash of rights was resolved by the Court by reference to the relative intersts of the mother and the state.

S. 158, however, would require that the mother's constitutionally protected rights be totally overridden. This Section 5 cannot authorize.

VI. Rather than Enhancing the Separation of Powers, S. 158 Undermines the Principle

If this bill passes, constitutional rights would be enforceable only at the whim of a Congressional majority. The Supreme Court's constitutional decisions are not engraved in stone; they may be overruled by the Court itself or by constitutional amendment. Amendments have been proposed to overrule Roe and Doe and, although we oppose them on the merits, they at least have the virtue of complying with the constitutional scheme.

Congress has historically respected the distinct roles assigned the coordinate branches of the federal government. In so doing, it has acted consistently with the doctrine of separation of powers, for as the first Justice Marshall wrote in Marbury v. Madison, 1 Cranch 137, 177 (1803), "It is emphatically the province and duty of the judicial branch to say what the law is." The Supreme Court reaffirmed that the power of other governmental bodies to interpret the constitution authoritatively is limited. Cooper v. Aaron, 358 U.S. 1, 18 (1958), decided at the height of efforts to nullify Brown v. Bd. of Educ., 354 U.S. 1 (1954), held

> [Marbury]declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.

On only one occasion, to the best of our knowledge, has Congress ever directly challenged the Court's reading of the Constitution -- a challenge the Supreme Court met head on -- and rebuffed. United States v. Klein, 80 U.S. (13 Wall.) 128 (1870), was a suit in the Court of Claims for the return of property confiscated from a supporter of the Confederacy. He was entitled to the return of that property if a pardon granted to him

and others by the President was effective under the pardon power, Art. II §2, cl. 1. In a previous case, U.S. v. Padelford, 76 U.S. (9 Wall.) 531(1870), the Supreme Court had determined that it was. Subsequent to Padelford, Congress passed a statute which declared both that these pardons were ineffective and that the courts were without jurisdiction to consider such pardons as evidence of loyalty to the Union.

The Supreme Court refused to be bound by the provisions of this Act on the ground that it violated the separation of powers, U.S.v. Klein, supra, 80 U.S. at 147-48:

> We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.
>
> It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, "the supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."
>
> Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because of its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

We, and others, have elsewhere addressed the question of whether Congress' undoubted power to regulate the jurisdiction of the federal courts allows it to oust the courts of jurisdiction in cases raising particular constitutional claims. We have to conclude that it does not, for reasons which are stated more fully in our testimony on the so-called Helms school prayer amendment.* In sum, Congress cannot use its power to regulate the jurisdiction of the federal courts in order to discriminate against the vindication of Constitutional rights.

The abortion decisions are not the first -- and they will certainly not be the last -- controversial constitutional decisions handed down by the Supreme Court. It is inevitable that those who believe that those

---

* Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee on S. 450 at 308, 316-19.

decisions do not represent the will of the people will seek to have them overturned. But the compact we as a nation have adopted to order our political affairs limits the authority of political majorities in certain respects. The most important of these self-imposed limitations is the protection afforded individual rights by the Constitution. The American system has worked well in balancing protection of individual rights with the equally fundamental principle of majority rule. S. 158 would irrevocably upset that balance.

Issues which appear to be important today often do not appear that way in hindsight. The issues posed by the abortion debate are important now. They will probably remain so. But the abortion issue should not be allowed to destroy an "indispensable element" of a political structure which has worked so well until now.

Senator EAST. Our next panelist is Rabbi Seymour Siegel who is the Ralph Simon Professor of Ethics and Theology at the Jewish Theological Seminary of America. He is a fellow of the Kennedy Institute of Ethics at Georgetown University. He is also president of the American Jewish Forum. For 10 years, Rabbi Siegel was the chairman of the Committee on Jewish Law and Standards of the Rabbinical Assembly.

Rabbi, we welcome you this morning.

**STATEMENT OF RABBI SEYMOUR SIEGEL, RALPH SIMON PROFESSOR OF ETHICS AND THEOLOGY, JEWISH THEOLOGICAL SEMINARY OF AMERICA, WASHINGTON, D.C.**

Rabbi SIEGEL. Thank you very much, Mr. Chairman.

You will notice immediately by the juxtaposition of my testimony to that of my distinguished and beloved colleague that there is a wide divergence of opinion in the Jewish community on matters which concern this legislation and other efforts to limit the frequency of abortions in this country.

Before making my statement, let me observe that Judaism is a nonhierarchical religion, therefore, there is no one supreme authority or any one body who can claim to express the view of Jewish faith.

Rabbis and scholars are the religious authorities. They interpret precedent and principles in the light of their own understanding. The scholarship and strength of their logic win for them acceptance and authority.

Therefore, there can be different interpretations of Jewish teachings which stem from different understandings of sacred texts. My understanding diverges in very important points from that which you have just heard.

Judaism, like other high religions, is prolife. It expresses time and again through precept and precedent the inestimable value of human life.

What about the fetus? The fetus, in Jewish tradition as I understand it, is possessed of life. The Talmud and the rabbinic writings frequently speak of the "ubar b'mey imo," which means the fetus in the womb of its mother praising God, even discussing questions of religious faith, as did Esau and Jacob in the womb of their mother.

These are, of course, poetic images not to be taken literally nor, I suppose, to influence your legislative judgment. However, they do reflect the attitude that the entity growing in the mother's womb has life and therefore value.

A most striking phrase is found in the Zohar, the principal book of Jewish mysticism—and I quote—

> He who causes the fetus to be destroyed in the womb destroys the artifice of the Holy One, blessed be He and His workmanship * * * for these abominations the Spirit of Holiness weeps.

In the realm of Jewish law where one finds normative doctrine in regard to action, the rabbis see responsibilities in two phases: One is the universal law applicable to all men. That is akin to the natural law doctrine in Western thought. It is called in rabbinic literature the Laws of the Sons of Noah, because Noah preceded the formation of any specific religion. Noahide laws specifically enjoin the destroying of fetal life on the basis of Genesis 9:6.

In discussing the laws flowing from the special covenant made with the Children of Israel, which is embodied in Judaism, it is clear, as has been summarized by a distinguished authority whose book was published just last year:

> Judaism regards all forms of human life as sacred, from the formation of germ plasm [on] * * * fetal life is regarded as precious and may not be destroyed wantonly.

In Jewish discussions, the problem of abortion is seen in the context of the "law of the aggressor." This is an aspect of the law of self-defense. When an aggressor pursues an intended victim, the latter has the right to defend himself. If the aggression threatens the very life of the pursued, then it is permitted to kill the pursuer in self-defense.

If the nature of the aggression is not life-threatening, then the measures taken would not morally be justified if they took the life of the "rodef"—that is, the pursuer or the potential aggressor.

Therefore, in cases where the woman is having extreme difficulty in giving birth and her life is being threatened, talmudic law permits abortion. The Talmud states: "For her life has priority over the life of the fetus." Therefore, it is clearly inferred that where there is no threat to the mother's life abortion is not permitted. This is because the pursuer—which is the fetus—does not pose a threat serious enough to kill the life facing that threat—namely, the mother.

### BASIS OF JUDAIC VIEWPOINT

Rashi, the greatest of talmudic exegetes, who was referred to by my distinguished colleague, explains the justification for therapeu-

tic abortion in a different way: "As long as the fetus has not emerged from the womb, 'lav nefesh hu' "—it is not a full human life.

The implication of Rashi's viewpoint is that the fetus, though possessing human characteristics and attributes, is not human to the same degree when it is threatening the life of the mother and her very existence. His viewpoint would not in any way sanction abortions for less than the most serious cause—that is, a threat to the mother's life.

There is a difference of opinion among the many authorities dealing with the question of abortion if the fetus can be sacrificed where the threat of the aggressor—the fetus—is less than the death of the mother—for example, if she is suffering from terminal cancer or is in severe pain.

In the process of deciding, legal authorities interpreting Jewish law are free to choose which authority they will follow. It is clear, however, that those who wish to understand Jewish ethical teaching as protecting the humanness of fetal life have strong support from traditional authority.

The viewpoint of traditional Judaism, as I see it therefore, can be summarized in the following way: The fetus possesses a human dimension. It is human life on the way. As life, it is entitled to benefit from our "bias for life" to be protected from harm and certainly from being killed. It is only when it poses a severe threat to another life, as in the cases cited in the Talmud where the mother is presumed to be threatened in her own existence, that it is morally justified to terminate the life since it is a "rodef" or an aggressor.

### FIRST AMENDMENT CONSIDERATIONS

The argument that the passing of legislation severely restricting access to abortion would be a violation of the free exercise clause of the Constitution seems to me to be totally unjustified.

If we were to posit the notion that legal judgments based on religious principles are unconstitutional unless everybody agrees to them, we would then have to eliminate most of our legal structure.

As Prof. Hadley Arkes wrote in the current issue of the Wilson Quarterly, it is wrong to believe that you cannot legislate morality. The fact of the matter is that the only thing we legislate is morality.

Our laws and court decisions are concretizations of our moral outlook. We believe that ultimately morality has no foundation except in religious belief. Therefore, in effect, we are expressing our faith commitment in all the legislation which we support in these august Halls and on the other side as well.

Furthermore, the history of the United States presents several examples where religious beliefs which are counter to the consensus of our civilization are not justified merely because they are held by various faith communities.

The most obvious example of this is the prohibition against polygamy which was held by a very important religious group to be morally justified and, if I am not incorrect, even mandated.

Religous beliefs may be held, they may be furthered, they may be preached and spread in any circumstance that a person wishes.

Actions are the subject of legislative and judicial decisions. If it is decided that abortions are against the public good, disturb public order, and outrage public morality, then they can be prohibited or limited despite the fact that some religious groups believe that killing the fetus is justified or even mandated.

Therefore, the argument that the abridgment of religious freedom is involved here seems to me to be totally unjustified. I would therefore urge this subcommittee and other bodies of the Congress to protect life and to obey the biblical commandment: Choose life.

Thank you very much.

Senator EAST. Thank you, Rabbi.

[The prepared statement of Rabbi Siegel follows:]

PREPARED STATEMENT OF RABBI SEYMOUR SIEGEL

My name is Seymour Siegel. I am an ordained rabbi. I have served as Professor of Ethics and Theology at the Jewish Theological Seminary of America for the past twenty years. I have written extensively on questions of bioethics.

I wish to express my viewpoint as the Judaic position on 1)the status of the human foetus and 2) the relationship between the issues before this committee and the First Amendment guarantees concerning the prohibition of the establishment of a religion and the non-permissability of the abridgement of the free exercise of religion.

Before making my statement let me observe that Judaism is a non-hierachal religion. There is no one supreme authority or any one body who can claim to express the view of Jewish faith. Rabbis and scholars are the religious authorities. They interpret precedents and principles in the light of their own understanding. The scholarship and strength of their logic win for them acceptance and authority. Therefore, there can be differening interpretations of Jewish teachings which stem from different understandings of sacred texts.

Judaism, like other high religions, is pro-life. It stresses time and again through precept and precedent the inestimable value of human life. The concern for life extends even to non-human life. We are forbidden to cause tsaar galey chayim, suffering of any being which possesses life. Life is seen as a gift of the Creator. This is especially true of human life which is the foundation of those created in God's image. The Torah, a Hebrew term for the teachings of Judaism is a Torat Chayyim, a Torah of life. Judaism has a bias for life.

What is the status of the foetus? They are in Jewish tradition, possessed of life. The Talmud and the rabbinic writings frequently speak of the ubar b'mey imo , the foetus in the womb as praising God, even discussing questions of religious faith. These are, of course, poetic images not to be taken literally--but they do reflect the attitude that entity growing in the mother's womb has life, and therefore value. A most stdriking phrase in found in the Zohar, the principal book of Jewish mysticism, "He who causes the fetus to be destroyed in the womb, destroys the artifice of the Holy One, blessed be He and His workmanship ...for these abmominations the Spirit of Holiness weeps.

It is in Jewish law that one finds normative doctrine in regard to action.

In formulating the principles of Jewish law, the rabbis see the responsibilities in two phases. One is the universal law applicable to all men. This is akin the doctrine of natural law in western thought. It is called the Laws of the Sons of Noah. Noahide laws specifically enjoins the destroying of fetal life (Sanhedrin 57b) on the basis of Genesis 9:6.

In discussing the laws flowing from the special covenant made with the Children of Israel, it is clearas has been summarized by a distinguished authority, Rabbi David Bleich

> Judaism regards all forms of human life as sacred, from the formation of germ plasm in the cell of the sperm until the decomposition of the body after death....fetal life is regarded as precious and may not be destroyed wantonly. (Contemporary Halakhic Problem,Ktav, p.326)

In Jewish discussions, the problem of abortion is seen in the context of the "law of the aggressor" (rodef). This is an aspect of the law of self-defense. When an aggressor "pursues" an intended victim, the latter has the right to defend himself. If the aggression threatens the life of the "pursued", then it is permitted to kill the "pursuer" in self-defense. If the nature of the aggression is not life threatening, then the measures taken would not morally be justified if they took the very life of the rodef. Therefore, in cases where the woman is having extreme difficult in giving birth and her life is being threatened, talmudic law permits abortion. The Talmud states: "for her (the mother's) life has priority over the life of the foetus." (see Maimoonides, HIlkhot Roteach 1:9 and Schulchan Arukh, Yoshen Mishpat 425:2). Therefore, it is clearly inferred that where there is no threat to the mother's life abortion is not permitted (Bleich, op.cit. p.327). This is because the "pursuer" does not pose a threat serious enough to kill the life bearing the threat.. Rashi, the greatest of talmudic exegets explains the justification for therepeutic abortion in a different way: " As long as the foetus has not emerged from the womb, lav nefesh hu . It is not a full human life." The implication of Rashi's viewpoint is that the foetus, though possessing human characteristics and attributes is not "human" to the same degree that themother. His viewpoint would not, in any way, sanction abortions for less than the most serious cause, that is, the threat to themother's life. There is a differace of opinion among the many authorities dealing with the question of abortion if

the foetus can be sacrificed where the threat of the "aggressor" foetus is less than death to the mother: for example, if she is suffering from terminal cancer or is in severe pain. Rabbi Bleich in the source quotes gives the contending opinions. In the process of deciding, legal authoritie interpreting Jewish law, are free to choose which authority they will follow. It is clear, however, that those who wish to understand Jewish ethical teaching as protecting the human-ness of fetal life have strong support from the traditional authorities.

The viewpoint of traditional Judaism, as I see it, therefore can be summarized in the following way:

1. The foetus possesses a human dimension. It is human life on the way.

2. As life it is entitled to benefit from our "bias for life" to be protected from harm and certainly being killed.

3. It is only when it poses a severe threat to another life as in the cases cited in the Talmud, is it morally justified to terminate its life since it is a rodef, an aggressor.

II.

The argument that the passing of legislation severely restricting access to abortion would be a violation of the free exercise clause of the Constitution, seems tome to be unjustified.

If we were to posit the notion that legal judgments based on religious principles are unconstitutional, we would have to eliminate most of our legal structure. As Professor Hadley Arkes wrote in the current issue of the Wilson Quarterly, it is wrong to believe that you cannot legislate morality. The fact of the matter is that it is only morality that we legislate. Our laws and court decisions are concretizations of our moral outlook. We believe that ultimately morality has as its foundation religious belief. Therefore, in effect, we are expressing our faith committments in all the legislation which we support.

Furthermore, the history of the United States presents several examples where religious beliefs which are counter to the consensus of of our civilization are not justified merely because they are held by various faith communities. The most obvious example of this is the prohibition against polygamy in spite of the fact that a large and influential religious grup sanctions it.

Religious beliefs may be held; they may be furthered; they may be preached and spread , whatever they may be. Actions are the subject

of legislative and judicial decisions. If it is decided that abortions are against the public good, disturb public order and outrage public morality, they can be prohibited and limited despite the fact tha some religious groups believe that killing the foetus is justified or even mandated.

It should be the policy of the United States to further life, to enhance it, and protect it. We should allbe cognizant of the bias for life which is part of our civilisation. We should also recognize the fact that our responsibilities are not fulfilled merely by protecting fetal life. We must revere and help life after it is is born as well. That means that special services and facilities must be provided for those who give birth, especially under trying circumstances. Our bias for life should be evident in actions designed to assist our fellow men and women to live their slives and especially to care for those whose life result from the partnership--as the Talmud puts it--of God, man and woman.

We should heed the ancient admonition: Choose life!

Senator EAST. Our next panelist is Ms. Rosemary Radford Ruether. Ms. Ruether is the Georgia Harkness Professor of Applied Theology at the Garrett-Evangelical Theological Seminary. She is a former lecturer in Roman Catholic studies at Harvard Divinity School and professor of theology and church history at Howard University. She is the author of many works, including "Faith and Fratricide" and "The Radical Kingdom."

Ms. Ruether, we welcome you.

**STATEMENT OF ROSEMARY RADFORD RUETHER, GEORGIA HARKNESS PROFESSOR OF APPLIED THEOLOGY, GARRETT-EVANGELICAL THEOLOGICAL SEMINARY, EVANSTON, ILL.**

Ms. RUETHER. Thank you very much, Mr. Chairman.

I speak as an individual, also as a professional theologian, and as a Roman Catholic. The purpose of my testimony is particularly to indicate some of the diversity of opinion that is present in the Roman Catholic tradition and community.

The Roman Catholic community is often assumed to be united in a position that would define life as beginning at conception. In fact, this is not the case. There is a considerable diversity both among moral theologians and among Catholics as individuals and communities on this issue. There is, in fact, very deeply rooted precedents for alternative positions within the Catholic tradition.

The traditional Roman Catholic argument against abortion has centered on the definition of the personal soul as present from the moment of conception and therefore abortion at any stage of fetal development as murder. But this tradition, in fact, has not been consistent even within the Catholic tradition. Until the latter half of the 19th century, Roman Catholic tradition remained divided on the issue of the exact moment of what was called ensoulment of the fetus.

Thomas Aquinas, the normative theologian for Catholic scholasticism, for example, related the existence of the human soul to the presence of the form of the human body in the developing fetus. Because the soul was defined as the form of the body, there can be no question of a human soul until the body has reached a sufficient level of development that it is recognizably human and capable of bearing the distinctively human functions.

AQUINAS' VIEWPOINT

Before that time, Aquinas reasoned that there was something called animation—you might say life but not yet human life—what he called animal and vegetable soul—a level of life but not yet full human life. Following Aristotelian biology, Aquinas placed the moment of ensoulment at 6 to 12 weeks rather than at conception. Therefore, we have here a clear principle by which human life is defined not at conception but at some later developmental level.

One might also indicate that Catholic tradition has specifically defined the distinctively human function as that of intelligence or consciousness, and the biological basis for consciousness in the development of the cortex of the brain is, in fact, the latest thing to develop in the fetus, developing essentially in the last 4 months. Thus, traditional Catholic principles about the connection of the human soul with the human body would seem to lead to a more complex and nuance position, one that would perhaps mandate a general ethical commitment to fetal life at all stages but short of regarding abortion as murder prior to, say, the first 5 months.

The last 3 or 4 months, it might require a more absolute commitment but one that would still allow such principles as the law of secondary effect—when, for example, a mother's life is saved at the expense of the life of the fetus. Thus, Catholic moral teaching has always recognized a person's right to save their own life when it is jeopardized. We must recognize that in the ethics of abortion we are dealing with a conflict of values—the weighing of goods against each other, the weighing of evils against each other. In ethical choices, where there are serious conflicts of goods, there is no possibility of giving a simple yes or no, black or white, answer.

Decisionmaking for or against abortion may involve conflicts of values at a personal and a social level. There are certainly general considerations about population, about the whole social ability to carry levels of population on the planet, because human beings do not just live as individuals, they live as persons in communities, in families, cities, nations, and finally on the globe.

On the personal level, there may be many very serious ethical conflicts that are not simply on the basis of life-threatening situations or even rape or incest but involve the economic and psychic resources of the mother and the family to, in fact, nurture an individual child into human personhood. To bring children into existence to an unwed mother or an overly harassed couple who do not want them is, in fact, to jeopardize their human development at its very beginning.

PLATONIC CONCEPT OF SOUL REJECTED

These considerations recognize that the development of human personhood—or, to use the traditional terminology, the human soul—is not a static entity that can be dropped into a glob of germ plasm at conception.

Such a concept of the soul is essentially platonic, and Catholics have rejected a platonic concept of the soul that exists before the body. Such a concept of the soul as existing in a fertilized egg ignores the developmental, historical nature of human personhood.

The Christian view of the self, together with that Aristotelian view that was incorporated in Catholicism, reflects this platonic view of the soul in favor of a more historical, social, developmental one.

Just as the human soul cannot exist at all, according to this tradition, without the development of those organs of the body that sustain it, so human personhood in its fullness cannot exist without the social milieu to sustain it.

In the production of human life, we must consider not only the physical life of the person but those social resources that make possible the attainment of a life that is truly human.

The factors that weigh in this decision are multiple and have different subjective weight for different persons. There is no possibility of an absolute criterion to be imposed by outside authorities.

Rather, it is a question of a variety of factors jeopardizing the possibility of adequately nurturing a particular potential child into full personhood that tips the scale to the negative for different people at different points, and I would suggest that, in fact, the best person to make that responsible judgment is the mother of the child.

A mother who does not want to have a child is basically a mother who does not feel herself to have physical and psychic resources to nurture it.

To summarize the position I have developed so far, we must say that abortion is not an ethical decision of simple right and wrong on one side or another. Every woman who wants to have an abortion must be presumed to have serious reasons for doing so, and she is the best judge of what those are.

As a decision that involves conflicts between values, it is never a light or neutral decision. It is an ambivalent decision that involves the sacrificing of one good for the sake of another, the incurring of one evil to avoid other evils. In this sense, all abortions are evil and involve us in guilt and regret, and we should not make light of this but accept it in full ethical seriousness.

To terminate a life of a potential human being is therefore a tragedy and the sign of the imperfection of human life, but it is a decision that can be responsibly made when the weight of other evils to be avoided overbalance this regret of a lost potential person.

Having indicated that view as, I think, a responsible alternative Roman Catholic view held by a great many Roman Catholics, I would like to say a word about the recent referendum held in Italy on the abortion law there as an indication of the division of global Catholic opinion.

Prior to the passing of the present abortion law in Italy, there was an extremely bad situation in that country. Not only were Italian women hedged in by a dual rejection of both contraception and abortion by the Roman Catholic Church, but this had been made into law under the Fascist government, making abortion a crime for both physician and woman.

In practice, no one went to jail for abortion; rather, abortion was driven into the back alleys. In 1976, the World Health Organization documented an average of 4,100 illegal abortions a day. This was documented, so they estimated that, in fact, the number was perhaps as much as twice as high. I do not have the figures on maternal deaths, but I assume that they would be considerable in that situation.

PROGRESSIVE ABORTION LAW ADOPTED IN ITALY

In 1978, a progressive abortion law was passed intended to legalize abortion and to eliminate as much as possible the illegal abortion trade. This law represents a significant effort to balance the principles of women's right to self-determination with the affirmation of the social value of maternity.

It is characteristic of the Italian understanding of this law that it was never defended or is never defended in terms of women's right to abortion. Rather, it is said that abortion is neither a right nor a crime. Rather, abortion is an unfortunate social necessity into which women have been forced because of previous circumstances which have denied her full social and reproductive self-determination.

It is therefore this denial of women's self-determination which is the problem. The law is intended to alleviate as much as possible the circumstances that deny women's self-determination and in so doing eliminate as much as possible the necessity for abortions.

It is clear to the authors that women do not want to have abortions; they are forced to need abortions because they have been made pregnant against their will in personal and social circumstances where they could not control their persons and lives or lacked the economic means adequately to care for their child.

The means of enhancing women's self-determination and eliminating the need for abortion, therefore, are twofold in the present Italian policy.

First, through local clinics and first-aid stations, contraceptive information and methods are made available so that Italian women will not be denied the means of reproductive self-determination.

Second, social services are coordinated so the woman who has a personal or social conflict with a pregnancy can find alternatives to abortion, and that is not simply construed as adoption but also things like getting her a job or her husband a job.

Finally, abortion itself is made free and legal in a way that guarantees the woman's right to be the final decisionmaker within the first 90 days. This is seen as a last resort in a situation where women's self-determination has not yet been adequately achieved.

The law stipulates that the woman who has had an abortion must be given means and information on contraception by the attending medical personnel to avoid another unwanted pregnancy.

Therapeutic abortions are also allowed in the second trimester, but here only with the recommendation of a physician and with the stipulation that the fetus' life must be saved if it is possible. There is much more detail on that law which I will not read, but it is in the written testimony.

Two different groups proposed referendum to amend the existing abortion law. One was the Radical Party upholding a libertarian principle that abortion should be completely liberalized, but it would also eliminate the present payment for abortion to poor women. The second challenge came from the prolife forces of the Roman Catholic Church.

This group proposed two referenda. The first would have restored the Fascist law that made all abortion a crime. This proposal was thrown out of the Italian Supreme Court as unconstitutional. The second proposal would allow only for therapeutic abortion in the case of the threat to the life of the mother.

## PRESENT ABORTION LAW UPHELD

On May 17, the Italian voters overwhelmingly upheld the present law against these two referenda. The majority vote was consistent all over Italy—over 2 to 1—including in the southern provinces that are traditionally seen as conservative.

The vote was regarded as a strong defeat for the official hierarchical position and a further indication of separation of church law and civil law in Italian life. However, I think it is a misinterpretation to interpret the vote merely as a rejection of moral principles by the Italian electorate, but, rather the prevalence of an alternative ethic which was regarded as convincing.

The Italian abortion law was written and promulgated by Catholic legislators—in fact, I would say it follows very closely the guidelines of Thomas Aquinas that indicated—who intended to make it a model of a conscientious ethic that would combine the values of self-determination of women with the respect for maternity.

It was endorsed by many Catholic communities, moral theologians, and religious media. It was upheld basically because it had moral and ethical credibility for the majority of Italian lay people. It was not seen as either antilife or antimaternity.

The Italians have no illusion that banning abortion will cause abortion to miraculously disappear. Rather, they understand that banning abortion merely criminalizes it, causing abortion to go on under unsafe condition and therefore killing mothers.

Thus, free and legal abortion was understood as helping to reduce those circumstances that cause women to seek abortion. By enhancing women's social and reproductive self-determination, fewer and fewer women will have to seek the bad solution of abortion.

I would like to draw three brief conclusions from these two testimonies.

First, Americans must clarify in matters of abortion the difference between optimum moral principles and what should be translated into law. There are many things that are morally bad but should not be made illegal.

Americans have already had a precedent for the negative results of an effort to translate the strict principles of a minority group

into a law imposed on everyone. This was the Temperance Amendment of 1919, passed after almost 80 years of temperance agitation by an evangelical Protestant minority. The result was a legal disaster.

The majority of Americans did not agree with this temperance position. The result was widespread flouting of the law and a new stage of organized crime.

Second, Americans need to be clear that the issue is, in fact, not prolife versus prochoice; the issue is legal, safe abortion versus illegal, unsafe abortion.

Legal abortion does not force anyone to approve of abortion or to have one. Those who believe that all abortion from conception is murder are perfectly free to continue to affirm those principles as their personal morality. But this is different from imposing that personal morality on others who have different ethical and religious viewpoints.

On the other hand, banning abortion does not stop abortion, it merely makes it illegal and kills many mothers in the process. This is clearly evident in the Italian experience. It was also the case when abortion was illegal in the United States.

Abortion can be reduced as a social necessity not by criminalizing it but by enhancing women's social and reproductive self-determination in order to eliminate it as a remedy for situations which cause women involuntary pregnancies.

Those who are really interested in eliminating abortions should mobilize church, medical, and community services to enhance women's reproductive self-determination. When women can avoid involuntary pregancy, they will not need abortion.

Finally, it should be said that the thesis that human life begins at conception is not one that necessarily follows from religious or theological principles. There are strong reasons for considering alternative positions that allow a conscientious choice of abortion, particularly in the first 5 months on the basis of carefully considered religious and theological principles and well-established moral values.

Thank you.

Senator EAST. Thank you, Ms. Ruether.

[The prepared statement of Ms. Ruether follows:]

## PREPARED STATEMENT OF PROFESSOR ROSEMARY RADFORD RUETHER

Ethics, Religion and Abortion

Question #1: Ethics Law and the Beginnings of Human Personhood

The traditional Roman Catholic argument against abortion has centered around the definition of the personal soul as fully present from the moment of conception and therefore the definition of abortion at any stage of fetal development as murder. However, this tradition has not been consistent even within the Catholic tradition. Until the middle of the 19th century Catholic tradition remained divided on the issue of the exact moment of ensoulment of the fetus. Thomas Aquinas, the normative theologian for Catholic scholasticism, for example, related the existence of the human soul to the presence of the form of the human body in the developing fetus. Since the soul is the form of the body, there can be no question of a human soul until the body has reached a sufficient level of development that it is recognizably human. Before that time there is animation, i.e., a vegetable and animal soul, but not a human soul. Following Aristotelian biology Aquinas placed the moment of human ensoulment at six to twelve weeks rather than at conception. In practice, "quickening" (about three months) was regarded as the point where the fetus must be regarded as a human and hence deliberate miscarriage regarded as murder.

However, the legal codes of Western countries have not defined abortion as murder unless the fetus was actually delivered live and then died afterwards from acts of deliberate injury or neglect. The criminality of abortion has varied at various times, but the lawmakers clearly stopped short of ever defining the unborn fetus itself as a human person. Too many mishaps could terminate fetal life for the law to pursue every such event as murder. Legally, the law makes tacitly clear that the only criterion that can be drawn for the definition of legal personhood is birth; that is to say, viable existence outside the womb. Before the baby has a viable, organically autonomous life outside the womb, the law does not presume it to be a human person. This I would argue is the only reasonable place to draw the line between a person and a pre-personal developing being as far as legal codes are concerned. Any extension of that definition of

legal personhood to fetal life at any stage would create incalculable legal problems; for example, a woman who falls and miscarries would be guilty of manslaughter, property inheritance, etc.

However, the legal line for defining the human person does not necessarily coincide with nor should it coincide with all possible ethical considerations about our need to safeguard and preserve fetal life. If the developing fetus is less than a person, it is more than a mere "tissue". How do we define the exact extent and limits of ethical commitment to a being that is a person in potentia? How do we catch in static definitions that is essentially a continuous process, a development from a miscroscopic fertilized egg to a fully developed baby ready to live outside the womb?

Some anti-abortionists have sought to telescope this process and insist that even in the first months the fetus already has tiny eyelashes and fingernails. But this is to greatly underestimate the complexity of the process involved in gestation. The development of the brain and central nervous system take place in the last four months. This is the fundamental foundation of the ability to function in what Catholic tradition itself defines as the distinctively human way; namely, the ability to respond and reflect intelligently. Since this is precisely how Aquinas and the Catholic tradition defines the human soul, as distinct from the non-human "soul" or animation of plants and animals, Thomas Aquinas himself might well have had to place the point of human ensoulment in the last trimester if he had been acquainted with modern embryology. For, according to his own principles, the human or rational soul can be regarded as existing only when the physical basis for it; namely, the cortex of the brain, has been sufficiently developed. Thus traditional Catholic principles about the connection of the human soul with the human body would seem to lead to a much more complex and nuanced position, one that would perhaps mandate a general ethical commitment to fetal life at all stages, but short of regarding abortion as murder prior to, say, the first five months. In the last three to four months it might require an absolute commitment, but one which would still allow such principles as the law of secondary effect, when, for example, the mother's life is saved at the expense of the life of

the fetus. Catholic moral teachings have always recognized a person's right to save their own life when it is jeopardized.

First of all, we must recognize that, in the ethics of abortion, we are dealing with a conflict of values; the weighing of goods against each other, or the weighing of evils against each other. In ethical choices where there are serious conflicts of goods, there is no possibility of giving a simple yes or no, black and white answer.

Decision-making for or against an abortion may involve conflicts of values on the personal and/or the social level. On the social level, we must recognize contemporary social constraints. General considerations of over-population, the growing scarcity of physical and social resources to sustain an exponential human population growth, creates a general ethical disposition in favor of limiting births per family to the level of replacement but not addition to present population. This consideration becomes more immediate for persons in small and crowded countries. Human beings do not just live as individuals. They live as persons in community, in families, cities, nations and, finally, globally.

Escalation of population by individuals that reaches the level of crowding the resources of whole communities and, finally, the globe threatens the life of all human beings to have adequate resources to develop. Without these minimum resources to physically and socially sustain us, no one can live a human life in the proper sense of the word. Thus, in an overcrowded planet, the population issue itself must be regarded as an ethical factor in reproductive decisions.

On the personal level, this pressure may be more acute. A mother or a couple may already have more children than they have the physical resources to sustain. Aside from questions of material resources, one must consider psychic resources. No one's psychic resources are infinitely expandable. Some people may be able to nurture a large brood. Some may know that their resources will break if they have a third or fourth. Some people might be honest enough to recognize that they do not have the temperament to raise even a single child. Aside from physical birth itself, loving nurture is the most important foundation of human life. To bring

children into existence to an unwed mother or an overly-harassed couple who do not want them is to jeopardize their development at its beginning.

These considerations recognize that the development of human personhood or, to use the traditional terminology, the human "soul," is not a static entity that can be dropped into the glob of germ plasm at conception. Such a concept of the soul is basically platonic. It ignores the developmental, historical nature of human personhood. The Christian view of the self, as well as that Aristotelian view traditionally adopted by Catholicism, rejects this platonic view of the soul in favor of a more developmental one. Just as the human soul cannot exist at all, according to this tradition, without the development of those organs of the body that sustain it, so human personhood in its fullness cannot exist without the social milieu to sustain it. In the production of human life, we must consider not only the physical life of the person, but also those social resources that make possible the attainment of the life that is truly human.

The factors that weigh in this decision are multiple and have different subjective weight for different persons. So there is no possibility of an absolute criteria to be imposed by outside authorities. Rather it is a question of a variety of factors, jeopardizing the possibility of adequately nurturing a particular potential child into adulthood, that tips the scales to the negative for different people at different points. Probably the best single criterion for determining whether a child should be born is simply the clear and sustained determination of the mother herself not to complete the pregnancy. A mother who does not want to have a child is basically a mother who does not feel herself to have the physical and psychic resources to nurture it.

To summarize the position I have developed so far. We must say that abortion is not an ethical decision of simple right and wrong on one side or another. Every woman who wants to have an abortion must be presumed to have serious reasons for doing so. She is the best judge of what these are. As a decision that involves conflict between values, it is never a light or neutral decision. It is essentially an ambivalent decision that involves the sacrifice of one good for the sake of another or, to put it

the other way, the incurring of one evil to avoid other evils. In this sense all abortions are evil and involve us in guilt and regret. We should not make light of this, but accept it with full ethical seriousness. To terminate the life of a potential human being is an evil and tragedy, the sign of the imperfection of human life. But it is a decision that can be responsibly made when the weight of other evils to be avoided overbalance this regret at a lost potential person.

In the early stages of pregnancy, the option for abortion may still be regarded as open, although always as a decision that involves serious loss of human potential. But as the pregnancy progresses the option must be regarded as increasingly closed off in favor of the right to life. If possible the decision should be made within the first trimester. By the end of the second trimester the capacity for human development is sufficiently actualized, that it must be regarded ethically and medically as a human person. Any termination of pregnancy after this point can only be for strictly medical reasons in which equal efforts are made to ensure the survival of child as well as mother.

These ethical guidelines accord fairly well with current medical practice. This shows that current medical practice already assumes a developmental perspective on the fetus in which there is a growing disposition in favor of right to life as it moves from first to second trimester which becomes complete in the third trimester. This shows that medical practice is in no way disposed to open abortion to abuses of infanticide, but would prefer clear but reasonable ethical and legal guidelines. We would hope that pro-life and pro-choice forces might eventually find common ground in this intermediate position. This might provide a way to connect pro-choice and pro-life positions with each other and also to relate ethical guidelines with medical and legal standards.

Question #2: The Italian Abortion Law and Referendum

On May 17, 1981 Italian voters, by an overwhelming majority of over two to one rejected a referendum, strongly backed by the Roman Catholic hierarchy and by Pope John Paul II, to repeal the present abortion law in Italy in favor of a much stronger law that would only

allow abortion if the mother's life was in jeopardy. Since this vote by the Italian electorate has been both under-reported and misreported in the United States, I wish to review some pertinent aspects of the circumstances that led up to the present law, the character of the present law and why the Italian voters rejected the Church-backed referendum. I will then ask what implications this event might have for policies on abortion in the United States.

Prior to the passing of the present law, Italy had an extremely bad situation on abortion. Not only were Italian women hedged in by the dual rejection of contraception and abortion by the Roman Catholic Church, but this was translated into law under the fascist government, making all abortion a crime for both physician and woman. In practice no one went to jail for abortion. Rather, abortion was driven into the back alleys. Rich women had good services available to them with a quick trip to Switzerland. Poor women had to rely on the hooks and knitting needles of the illegal abortionist. In 1976 the World Health Organization documented an average of 4,100 illegal abortions a day, and estimated that the actual number was in excess of 8,000 a day (some 3 million a year). The number of deaths of women from this was also very high.

In 1975 the government authorized maternity clinics to assist women in social and contraceptive needs relative to maternity. In 1978 a progressive abortion law was passed intended to legalize abortion and to eliminate, as much as possible, the illegal abortion trade. This law was shaped by feminist senators such as Giglia Tedesco, (a Catholic and a Senator from Arezzo on the Communist ticket). It represents a significant effort to balance the principles of women's right to self-determination with an affirmation of the social value of maternity. It is characteristic of the Italian feminist understanding of this law that it is never defended in terms of women's "right" to abortion. It is said that abortion is neither a "right," nor is it a crime. Rather, abortion is an unfortunate necessity into which women have been forced because of previous circumstances which have denied her full social and reproductive self-determination. It is this denial of women's self-determination which is

the crime. The law is intended to alleviate as much as possible the circumstances that deny women's self-determination. In so doing it will also eliminate as much as possible the necessity for abortion.

It is clear to its authors that women do not want to have an abortion. Rather, they have been forced to need an abortion because they have been made pregnant against their will in personal and social circumstances where they could not control their persons and lives or lack the economic means adequately to care for their child. The Italian law is written from a socialist perspective where it is assumed that the enhancement of women's self-determination and hence the elimination of the need for abortion is a social and political obligation of the community, not just a private or individual matter. Just as the circumstances that have denied women self-determination are social and systemic, and not just individual.

The means of enhancing women's self-determination and eliminating the need for abortion are two-fold in the present Italian policy. First, through local clinics and first-aid stations, contraceptive information and methods should be made available so that Italian women will not be denied the means of reproductive self-determination. Secondly, all the social services should be coordinated so that the woman who has a personal or social conflict with a pregnancy can find alternatives to abortion. Finally, abortion itself is made free and legal in a way that guarantees the woman's right to be the final decisionmaker (within the first 90 days). This is seen as a last resort in a situation where woman's self-determination has not yet been adequately achieved. The law stipulates that the woman who has had an abortion must be given contraceptive information and means by the attending medical personnel to avoid another unwanted pregnancy.

The provisions of the 1978 Italian abortion law seem complicated and even harassing for the woman to an American perspective. It is clear that abortion is not to be an impulsive decision. The decision must be thought through by the woman and its reasons defended before others provided to consult with her. The law seeks to balance not only the values of maternity with those of woman's right to decide, but also social with

private decision making. The goal is not to promote abortion but to eliminate it as a social necessity.

The Italian abortion law has the following basic provisions. Money is appropriated by the central government and divided among the regional governments to make medical and social counselors available in local hosptials, clinics and first-aid stations. There the woman who wishes to interrupt her pregnancy goes and presents her reasons for abortion to a board of advisors authorized for that purpose. She can also apply to a private physician of her choice. Appropriate reasons include not only dangers to physical but also to her psychic health, economic, social or family conditions, forced pregnancy against her will or danger of malformation in the infant; in short, the whole range of possible reasons why a woman might want an abortion. If the counselor or physician finds her reasons urgent, he or she can issue immediately a certificate and she can present it at the clinic and get an abortion. If she is not covered by social insurance, all expenses for this must be covered by the state. This is intended to prevent discrimination between rich and poor women.

In addition to considering the urgency of her need, the counselors are also mandated to provide her with full information and help on alternatives to abortion. This includes not only the possibility of adoption (there is a great demand for adoption and few Italian children available for adoption). But it also includes trying to help the woman solve or alleviate social or economic problems that may be forcing her to decide for an abortion. If, for example, unemployment of herself or her spouse is the primary consideration and otherwise she would prefer to have the child, then the counselors should help her solve this economic problem and thus avoid the abortion.

If, however, the woman is determined that abortion is her preferred solution to the conflict in which she finds herself, she remains the final decisionmaker. If the advisors fail to concur with her decision, they issue a document that indicates that she has applied to them for the abortion, her reasons for it and the state of her pregnancy. In seven days she can present this document to a clinic and receive an abortion

in the same way as the woman who has been given the certificate, except that she has a time period in which she has to reflect further on her decision. The woman can bring the father of the foetus into the consultation, but only if she herself agrees to his presence. The privacy of the woman is guaranteed. Neither the advisory board or the medical personnel involved can reveal the name of the woman applying for or obtaining an abortion. The law, in fact, makes it a crime for her name to be passed on or reported in any way. It also guarantees government regulation and inspection of the abortion facilities, as well as stiff sentences for anyone who aborts a woman against her will. Sanctions are also levied against a woman getting an illegal abortion outside these official regulations, but it is relatively mild (a $100 fine). The intention is to place all abortion in government regulated facilities, rather than to sanction women who turn to other alternatives.

Final self-determination is given to the adult pregnant woman up to 90 days. The minor under 18 years of age has a more complicated procedure. She has the same rights to abortion except that she must have the signature of a parent or guardian. If she cannot get such a signature, she can apply to a judge for permission. After the 90-day period, the Italian law regards the foetus as having a different status. At this point there is still the possibility of abortion, but only for therapeutic purposes in situations of conflict between maternity and the physical and psychic life of the mother. After 90 days there must be an approval of a physician indicating medical need for abortion. If there is any chance of a live birth, the efforts must be made to guarantee the survival of the foetus.

Two different groups proposed referenda to amend the existing abortion law. One came from the Radical party, which upholds extreme libertarian values, has proposed complete liberalization of abortion. All public regulation and public funding would be eliminated. Abortion would be only a private decision of the woman. Although this would eliminate the irksome consulting procedures that presently hamper the woman seeking abortion, it would also put abortion into the private marketplace. Physicians could charge what the traffic would bear, and poor women would again have to

resort to the unsanitary procedures of the backalleys and "aunties." The situation would be returned substantially to where it was before 1978, except that the threat of criminal prosecution would be removed.

The second challenge comes from the pro-life forces of the Roman Catholic Church (not co-extensive with the Christian Democratic party). This group has proposed two referenda. The first one would have restored the fascist law in which all abortion was a crime. This proposal was thrown out of the Italian Supreme Court as unconstitutional. The second proposal would allow only for therapeutic abortion in the case of threat to the life of the mother. This is the referendum presently supported by the pro-life group and the Catholic Church, itself an interesting concession to the principle of limited abortion.

On May 17, the Italian voters overwhelmingly upheld the present law against these two referenda. The majority vote was consistent all over Italy, except for one rural province in Northern Italy which is traditionally very conservative. Southern Italian women, generally regarded as religious and traditional, gave as heavy a vote for the present abortion law as urban dwellers in the North. The vote was widely regarded as a strong defeat for the Church, and a further indication of the separation of Church law and civil law in Italian life. However, I believe that it is incorrect to interpret the law simply as an expression of secularization, if what one means by that is that the Italian voters are not interested in ethical principles and Christian values. Rather we must see here a divergence between the ethical principles endorsed by the Italian hierarchy and Vatican and those ethical principles that increasingly have won the allegiance of Italians, including practicing Catholics and even priests and moral theologians.

The Italian abortion law was written and promulgated by Catholic legislators who intended to make it a model of a conscientious ethic that would combine the values of self-determination of women with respect for maternity. It was endorsed by many Catholic Basic Christian Communities, moral theologians and religious media. The present law was upheld basically because it has moral and ethical credibility for the majority of Italian lay people. It is not seen by them as either anti-life or anti-maternity. The

Italians have no illusions that banning abortion will cause abortion to miraculously disappear. Rather, they understand clearly that banning abortion merely criminalizes it, causes abortion to go on under unsafe conditions and kills mothers.

Making abortion legal does not cause anyone to have an abortion. It simply makes abortion medically safe. Only in that context can society then begin to get at the causes of abortion and provide alternatives that can help alleviate those situations that cause women to need to choose to have an abortion. Thus free and legal abortion is, in fact, understood as helping to reduce those circumstances that cause women to seek abortion. By enhancing women's social and reproductive self-determination, less and less women will have to seek the bad solution of abortion.

Question #3: Implications of the Italian Experience for Americans

1. First Americans must clarify, in the matter of abortion, the difference between optimun moral principles and what should be translated into law. There are many things that are morally bad and yet should not be made illegal. Smoking and drinking have long been recognized to be bad for our health, yet it is inadvisable to translate such guidelines of health into law. Americans already have a precedent for the negative results of an effort to translate the strict moral principles of a minority group into a law imposed on everyone. This was the Temperance Amendment passed in 1919, after almost 80 years of temperance agitation by an evangelical Protestant minority. The result was a legal disaster. The majority of Americans did not agree with this temperance position. The result was wide-spread flouting of the law which became the basis of a new stage of organized crime. The liquor interests boomed.

A law that defines human life at conception would be a similar effort to impose a minority morality upon most Americans who do not agree with this position. Recent polls show that only 10% of Americans reject all abortion from conception. The other 90% of Americans would allow abortion under some circumstances. To impose such a minority position on everyone would create an enormous traffic in illegal abortion, aided and abetted by many Americans acting from conscientious principles. There would also be an enormous outbreak

of litigation surrounding illegal abortion, maternal death, manslaughter charges against those who might cause a miscarriage and the like. The situation would be a legal nightmare. There is no question that such a law, if it was ever allowed to pass, would eventually have to be repealed.

2. Secondly, Americans need to be clear that the issue is not pro-life versus pro-abortion. The issue is legal, safe abortions versus illegal, unsafe abortions. Legal abortions does not force anyone who does not approve of abortions to have one. Those who believe that all abortion from conception is murder are perfectly free to continue to affirm those principles as their personal morality. But this is different from imposing that personal morality one others who have different ethical and religious viewpoints.

On the other hand, banning abortion in no way stops abortion. It merely makes it illegal and kills many mothers because of the unsafe conditions that prevail when abortion is clandestine. This is clearly evident from the Italian experience. It was also the case when abortion was illegal in the United States. Abortion can be reduced as a social necessity, not by criminalizing it, but by enhancing women's social and reproductive self-determination, in order to eliminate it as a remedy for situations which cause women involuntary pregnancies. Those who are really interested in eliminating abortion should mobilize Church, medical and community services to enhance women's reproductive self-determination. When women can avoid involuntary pregnancies, they will no longer need abortion.

3. Finally, it should be said that the thesis that human life begins at conception is not one that necessarily follows from religious or theological principles. On the contrary, there are strong reasons for considering alternative positions that allow a conscientious choice of abortion, particularly in the first five months, on the basis of carefully considered religious and theological principles and based on well established moral values.

Senator EAST. Our next panelist is Rev. Paul D. Simmons. He is associate professor of Christian ethics at the Southern Baptist Theological Seminary. He received his Ph. D. from Southern Baptist Seminary and completed his postdoctoral studies at Princeton University.

We appreciate your coming, Reverend Simmons. If you will, please give us your statement.

## STATEMENT OF REV. PAUL D. SIMMONS, ASSOCIATE PROFESSOR OF CHRISTIAN ETHICS, SOUTHERN BAPTIST THEOLOGICAL SEMINARY, LOUISVILLE, KY.

Reverend SIMMONS. Chairman East, Senator Baucus, and others, I do need to make it clear at first that I do speak as an individual who happens to be a Southern Baptist, and the point of view that I represent represents neither the official position of the seminary at which I teach nor the Southern Baptist Convention itself.

Southern Baptists have traditionally staked a great deal of importance upon individual liberties and freedom of conscience, and that is what is being exercised here today.

I do represent a point of view that has wide support among Southern Baptists, but it certainly is by no means the only point of view. It does happen that I am one of those theologians and ministers who have dealt with this issue probably more prominently and extensively than others, and thus I represent that perspective as well.

While Baptists will disagree on the proper understanding of the moral dimensions of pregnancy termination and the proper role of law in regulating the choice about abortions, there is near unanimity on the principle of religious liberty itself and on the responsibility of individuals to make choices in the light of their personal relationship to God as they understand him in Jesus Christ.

### STORIES PRESENTED TO ILLUSTRATE ISSUES

I have a number of concerns about the bill as presently written. Some of those have been articulated already. But I want to enter some stories, that have happened to me on the way to this forum, which illustrate the importance of the issues that we are discussing.

One comes from talking with a woman who is the wife of a retiring professor from our seminary. She is in her late 60's now and attends one of the churches in the inner city of Louisville, Ky.

She had recently been talking with a family which has a 10-year-old daughter who was impregnanted by her grandfather. Embarrassed and frightened, the child did not report what had been going on to anyone until she obviously was showing from the pregnancy.

At that point, the parents came to the concerned pastor of this church who, along with a Baptist social worker, counseled the parents and the child, and they decided upon a pregnancy termination.

Here is one of those tough choices that have to be made, but they decided in the light of their own religious understandings, the data they could gather concerning the need of this child for pregnancy termination, and its impact upon her life and future, to have that pregnancy terminated.

Another incident happened to me this past Saturday when I received a call from a woman that I had never met but who got my name from another Baptist in the South. She called me and said that she was very concerned about S. 158 because of her deep commitment to religious liberty.

As she explained it to me, she is now in her 60's, she was reared in Alabama, she is a devoutly religious individual who comes from the Scottish Presbyterian tradition, and she indicated that her

concern about this bill related not only to some of its definitions of human life and person which she felt broached the issue of religious liberty but also its attitude toward women which is not only implicit but explicit.

She related her experience in Nazi Germany during World War II days, and she said that the way that the Nazis treated women was indelibly marked in her mind and she was forever on the alert about ways in which the legislative process might interfere with the decisions and freedoms of women and their own rights.

She is acting as an individual, but at her own expense and because of her own profound religious commitments, she is trying to call people literally all over these States that she knows to gather people's interest and to encourage them to study this bill and to respond to this subcommittee and to their own legislators so that they might appropriately respond.

A third thing happened yesterday quite by coincidence. I was on the seminary campus reading my mail and overheard a seminary student talking about a recent tragedy.

A seminary couple has one child who is severely mentally retarded. At the age of 4, it is only now beginning to learn to crawl. A second pregnancy, entered after extreme agony on the part of this couple as to whether or not they even ought to try to have another child, was terminated in the 12th week of gestation because, again, of radical deformity. The child was dead in utero but was finally delivered very quickly while the woman was alone in her apartment.

A few years ago, this student was in my class in Christian ethics during the discussion of the moral grounds or permissibility of abortion itself in which he adamantly opposed, on his own understanding of biblical understandings and perspectives, any moral justification for pregnancy termination regardless of the circumstances.

Now he is saying, out of his own experience, out of the tragic loss of this child by spontaneous abortion, he and his wife together have gone through a very traumatic but nonetheless profound spiritual pilgrimage in which they now believe that if they should become pregnant again they would feel compelled, under God, to seek the best guidance they could get regarding the genetic formation of the child and whether or not, in fact, they should have another child. They have not settled the question as yet as to whether or not even to try to have another child.

Here is a couple then, out of their own experience, who are going through a tremendous spritual pilgrimage that has confronted them with the moral dimensions of the questions pertaining to pregnancy termination.

Those stories set for me the agendas which are before us in confronting this bill. As one who tries to teach Christian ethics, I am a theologian, or at least try to be. I am committed to the tradition of religious liberty, and I am informed also by the perspectives of the Bible which, I gather, are shared by others at this table.

## CONCERN OVER LANGUAGE OF S. 158

I am also concerned about language itself, and as I have read S. 158, the first thing that struck me was the terrible imprecision of language that is here being used.

I cannot but help think that professors of semantics in the universities of our country are literally doing flips about the way in which language is used so carelessly in this bill.

## HUMAN LIFE OR PERSONHOOD?

The bill begins by talking about a definition of "human life." It proposes that it shall be defined as existing from the moment of conception, and then it moves to the language of personhood. May I submit that on the grounds of linguistic and semantic differentials those concepts cannot be easily interchanged?

Most persons can agree that we are dealing with human life in the zygote. All that does is specify that it is human—that it, that it does not belong to some other species in the animal world, and it is also alive—it is organic, not inorganic.

We cannot reduce, however, the very complex entity that we think of as "person" to the concepts of human life. We can attribute human life even to sperm and egg prior to fertilization or union. We can also say with reasonable certainty that cancerous tissue in a human body is human life. Few of us, however, are inclined to attribute either personhood or the constitutional protections of life, liberty, and the pursuit of happiness to either of these instances of human life.

I would therefore ask those who scrutinize the bill to be more precise in the use of language.

## PERSONHOOD AS A RELIGIOUS CONCEPT

A second concern pertains to the suggestion made in the bill itself that the scientific community has settled the issue beyond reasonable doubt as to the beginning of human life at the time of conception. Aside from knowing that scientists disagree among themselves on that quite extensively, the question of personhood is beyond the province of scientific proofs.

Certainly, a knowledge of the process of fertilization or even of the stages of development during gestation do not add up to evidence for personhood.

The notion of person is a philosophical or religious concept and cannot be defined in terms of biological data. What is revealed in this language is the religious or philosophical bias of those who make the claim that a fertilized ovum is, in fact, a human being or person. This is, to me, the most serious problem with the bill as presently written.

The definition of "person" as contained therein is contrary to my biblical and theological understandings, and thus I register my strong objections to this effort to impose one religious notion upon those of us who do not subscribe to this belief.

What the bill attempts to do, in my opinion, is to disguise a religious bias in legal garb and give it the credibility of scientific standing. That effort, however, will not stand the scrutiny of those

of us concerned both with theological perspectives and the rights of religious liberty.

BIBLICAL PORTRAIT OF PERSON

My own perspectives are shaped by the Bible, about which, of course, concerned Christians and Jews will disagree. I would argue that, while the Bible does not give careful explanations of when one becomes a person, it nevertheless gives graphic images of personhood which are focused in the creation of Adam and Eve as male and female who are created in the image of God.

The notion of imago dei, which is the closest biblical equivalent to the notion of personhood about which we are debating, has no biological equivalent. It is a religious understanding.

The biblical portrait of "person" is that of a complex many-sided creature who reflects Godlike abilities. A person is introspective, retrospective, and prospective. He has direct access to God and the responsibility to know and do the will of God according to their understanding.

This portrait stands against any effort to define a "zygote" as a person. Far more complex development is required before such capacities can be attained or reasonably attributed. Birth, not conception, is far more consistent with the biblical portrait.

Certainly even in the Bible, I would argue, there is no equal standing—what we refer to as parity—between the fetus and the woman as a person before God and under covenant law. This is explicit in Exodus 21: 22-25 where a distinction is made between the penalty that is exacted for the loss of a fetus and any injury done to the woman. For the fetus, a fine is paid, while injury or death to the woman requires the application of lex talionus. Plainly, Genesis 9: 6 does not apply in this case.

The significance of this story is a clear distinction between the standing of the woman and that of the fetus under covenant law. The woman is regarded as person while the fetus has only a relative standing, certainly inferior to that of the woman.

This passage stands unequivocally against any effort to give the unborn equal religious or legal standing. The parity argument has no biblical support.

The combination of a biblical portrait of person, a clear distinction in the moral worth of the fetus and the woman, the absence of a clear prohibition of abortion, and the equally obvious call to moral responsibility before God seems truly to require that pregnancy termination be considered a matter left to the religious convictions of the woman and/or the family that is involved in that decision.

RELIGIOUS LIBERTY AND S. 158

This is why the issue of religious liberty is posed by Senate bill 158. The bill proposes to construct the scaffolding of law upon the foundation of a religious idea.

Certainly, there are those who believe and teach that a fertilized ovum is a person. They are fully within their rights to do so. I am acquainted with the history and sources of that tradition, but I

sincerely disagree with it. I believe it both unbiblical and theologically unsound.

Others accept this idea, while not subscribing to any particular religion or religious tradition. Even so, the effort to prohibit abortion based upon this idea is an exercise in the establishment of religion because of its religious and philosophical presuppositions.

What is at stake in this debate and before this forum is nothing less than competing visions of reality and differing, perhaps even irreconcilable, religious points of view. The first amendment was designed to protect the right of each religious group not to be coerced to live by the doctrine of any other.

We recognize, of course, that not all Americans support the notion of religious liberty. Some advocate the union of religion and government, and others teach that the church should exercise authority over government. Both theocratic and church-over-state traditions would abolish religious liberty as envisioned by the first amendment.

History is replete with the efforts to establish religion by law or have law designed to protect religious interests, encourage worship, punish impiety, heresy, and lack of decorum in dress and manner. The crusades, the Spanish Inquisition, and the Interdict were all based in the unholy alliance of religion and politics.

Baptists have strongly supported the notion of religious liberty. With Thomas Helwys, a 17th-century Baptist, we believe that the: "King might punish any person for temporal offenses; but for spiritual error, let them be heretikes, Turks * * * or whatsoever, it appertynes not to the earthly power to punish them in the least measure."

Virginia Baptists such as John Leland were instrumental in the framing of the first amendment to our Constitution. They and others of the free church tradition knew from bitter experience that tyranny may come from a misguided religious zeal as well as from unchecked political power. The combination of the two, however, was the most demonic of all.

The sufferings of our ancestors who were punished for their religious beliefs should remind us all that moralistic history is bad history. And, consistent with that, I believe that this bill is both bad theology and bad legislation.

As I have indicated, I believe Senate bill 158 not only moves toward the establishment of religion but also violates the protection of free exercise. Those of us who have different understandings of personhood or whose religious tradition gives support to pregnancy termination would have our freedoms severely limited.

In my own tradition, the emphasis would fall upon the responsibility of the woman to make the decision. She, along with others involved, including husband and physician, is to reflect on the meaning of this moment before God, consider the data, and make her decision in conscientious obedience to her creator and redeemer.

No one else, and certainly not the law, as Carl Barth noted, can make that religious decision for her. To do so is to impose an authority between the person and God which is religious imperialism and/or political tyranny. Religious liberty would be denied in

that she would be prevented from exercising her priestly powers of discerning and doing the will of God.

Pregnancy termination is a dilemma of conscience that belongs to the private realm of family life into which the State should not enter. To impose the sanctions of law upon women for obtaining an abortion under circumstances that they feel are threatening to their life, health, or well-being, is to persecute them by law based upon a religious presupposition.

Religious worship is not just confined to the rituals that take place at church or synagogue on the appointed days of religious observances. The free exercise of religion involves making decisions every day that we live that pertain to our total life in the light of our worship of the living God.

For these reasons, and others, it would be deeply distressing to me and others of my religious persuasion to have our right to protect persons meaningful to us constrained by a law, the philosophical and religious bases for which we do not accept.

Until and unless this society can develop a consensus on the personhood of the fetus, we should not impose one religious point of view upon everyone else.

For myself, the burden of proof plainly rests upon those who would argue that a fertilized ovum is, in fact, a person. This is extremely problematic from the biblical perspective and can in no way be proven except on the grounds of presuppositions that most of us do not accept.

I therefore call upon this subcommittee to refuse to support Senate bill 158. It is a serious breach of the right of religious liberty and will contribute to hostility between the various religions in this country and will result in the persecution of those who must dissent on religious grounds.

Thank you.

Senator EAST. Thank you, Reverend Simmons.

[The prepared statement and article of Reverend Simmons follow:]

# PREPARED STATEMENT OF REV. PAUL SIMMONS

I am Paul Simmons, an ordained minister and Associate Professor of Christian Ethics at the Southern Baptist Theological Seminary, Louisville, Kentucky. I have served as pastor of churches in Tennessee, North Carolina, and Kentucky, in addition to having taught Theological Ethics at Southern Seminary since 1969. I am married and the father of three children. These commitments shape my concerns and perspectives. I am a Baptist minister, a theologian and a family man.

My interest in Senate bill 158 stems from my pastoral experience with women confronting problem pregnancy, ~~and~~ the extensive study I have made of the literature in the area of abortion, my writings on the subject, and my concern for the relationship between religious understandings and law. From my perspective, Senate bill 158 is extremely problematic posing a number of substantive issues for religious communities in America.

As presently written, the bill would define the fertilized ovum as human life. This poses insurmountable problems for theological definitions of personhood and for the issue of religious freedom. As to definitions, the real concern is whether or not the fetus is to be regarded as a person, not whether it is "human life." Most people can agree that it is "human" and "alive." That statement simply acknowledges that a zygote is organic and that it belongs to homo sapiens; it is not bovine or feline. The same can be said of many other forms of life, of course. Sperm and egg are also human life before conception as is every other body cell including cancerous tissue. We are hardly inclined to attribute personhood or grant constitutional protection to those instances of human life, however. The terminology of "human life" cannot be substituted for the vastly more complex concept of "person." The attempt to do so raises the question of whether the bill is not an exercise in linguistic chicanery and thus disqualified as a serious attempt to deal with the issue at hand.

A second problem is posed by the suggestion that science has settled the issue beyond reasonable doubt. Aside from knowing that scientists disagree among themselves, the question of personhood is beyond the province of scientific proof. Certainly, a knowledge of the process of fertilization or even of the stages of development during gestation does not add up to evidence for personhood. The notion of person is a philosophical or religious concept and cannot be defined in terms of biological data. What is revealed is the religious or philosophical bias of anyone who makes the claim that a fertilized ovum is a person. This is the third and most important problem with the bill.

The definition of person contained herein is contrary to my Biblical and theological understandings. Thus, I must register my very strong objections to this effort to impose one religious notion upon those of us who do not subscribe to that belief. What the bill attempts to do is to disguise a religious bias in legal garb and give it the credibility of scientific standing. The effort will not stand the scrutiny of those of us concerned both with theological perspectives of personhood and the rights of religious liberty, however.

My own religious perspectives on this subject are shaped by the Bible which, for me, is authoritative in all matters of faith and practice. To be sure, the Bible does not give careful explanations of when one

becomes a person. However, it does give graphic images of personhood which are focused in the creation of Adam and Eve as male and female and who are created in the image of God (Genesis 1:26-28). The notion of imago dei has no biological equivalent. Certainly it does not mean a physical similarity or a genetic code. The characteristics associated with personhood in the Biblical portrait include such things as animation (Gen. 2:7), the ability to relate to the Creator (Gen. 1:28), the capacity for making moral choices (Gen. 3:22), and the responsibility to understand and do the will of God (1 Peter 2:9). Thus, the Biblical portrait of person is that of a complex, many-sided creature who reflects God-like abilities. The person is introspective, retrospective and prospective. One has direct access to God and the responsibility to know and do His will.

This portrait stands against any attempt to define a zygote as a person. Far more complex development is required before such capacities can be attained. Birth, not conception, is far more consistent with the Biblical portrait. Certainly, there is no equal standing between the fetus and the woman as a person before God. This is explicit in Exodus 21:22-25, where a distinction is made between the penalty that is exacted for the loss of a fetus and any injury done to the woman. For the fetus, a fine is paid while injury or death to the woman requires the application of lex talionus. The significance of this story is the clear distinction between the standing of the woman and that of the fetus under covenant law. The woman is accorded the standing of person before the law while the fetus has only a relative standing, certainly inferior to that of the woman. This passage stands against any effort to give the unborn equal religious or legal standing. The parity argument simply has no Biblical support.

The combination of the Biblical portrait of person, a clear distinction in the moral worth of the fetus and the woman, the absence of a clear prohibition of abortion and the equally obvious call to moral responsibility before God seems truly to require that pregnancy termination be considered a matter left to the religious convictions of the woman and/or family involved in the decision.

This is why the issue of religious liberty is posed by Senate bill 158. The bill proposes to construct the scaffolding of law upon the foundation of a religious idea. Certainly there are those who believe and teach that a fertilized ovum is a person. They are fully within their rights to do so. I am acquainted with the history and sources of that tradition, but sincerely disagree with it, believing it to be unbiblical and theologically unsound. Others accept this idea while not subscribing to any particular religion or religious tradition. Even so, the effort to prohibit abortion based upon this idea is an exercise in the establishment of religion as law. As Justice Douglas once noted, "Abortion statutes deal with conduct which is heavily weighted with religious teachings and ethical concepts." Quoting Justice Jackson he reminded us of the "treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case." [In U.S. v. Vuitch (1971).]

What is at stake in this debate is nothing less than competing visions of reality and differing -perhaps irreconcilable -religious points of view. The First Amendment was designed to protect the right of each religious group not to be coerced to live by the doctrine of any other.

We recognize, of course, that not all Americans support the notion of religious liberty. Some advocate the union of religion and government and others teach that the church should exercise authority over government. Both theocratic and church over state traditions would abolish religious liberty as envisioned by the First Amendment. History is replete with the efforts to establish religion by law, or have law designed to protect religious interests, encourage worship, punish impiety, heresy, and lack of decorum in dress and manner. The crusades, the Spanish Inquisition and the Interdict were all based in the unholy alliance of religion and politics.

Baptists have strongly supported the notion of religious liberty. With Thomas Helwys, a seventeenth century Baptist, we believe that the "King might punish any person for temporal offenses; but for spiritual error, let them be heretikes, Turks ... or whatsoever, it appertynes not to the earthly power to punish them in the least measure." Virginia Baptists such as John Leland were influential in the framing of the First Amendment to our constitution. They and others of the free church tradition knew from bitter experience that tyranny may come from a misguided religious zeal as well as from unchecked political power. The combination of the two, however, was the most demonic of all. The sufferings of our ancestors who were punished for their religious beliefs should remind us all that "moralistic history is bad history."

As I have indicated, I believe Senate bill 158 not only moves toward the establishment of religion but also violates the protection of free exercise. Those of us who have different understandings of personhood or whose religious tradition gives support to pregnancy termination during the early stages of the gestation process, would have our freedoms severely limited. In my own tradition, the emphasis would fall upon the responsibility of the woman to make the decision regarding pregnancy termination. She, along with others involved including husband and physician, is to reflect on the meaning of this moment before God, consider the data and make her decision in conscientious obedience to her creator and redeemer. No one else and certainly not the law can make that religious decision for her. To do so is to impose an authority between the person and God which is religious imperialism and/or political tyranny. Religious liberty would be denied in that she would be prevented from exercising her priestly powers of discerning and doing the will of God.

This I believe is fully supportable by the Bible from which I gain an authoritative perspective and by the religious tradition of which I am a part. To impose the constraints of law or to prevent women from obtaining an abortion under circumstances that they feel are threatening to their life, health or well-being is to persecute them by law based upon religious dogma. Religious worship is not simply confined to the rituals that take place at church or synagogue on official days of church services. The free exercise of religion involves making decisions every day that we live that pertain to our total life in the light of our worship of the living God.

For these reasons, it would be deeply distressing to me and others of my religious persuasion to have our right to protect persons meaningful to us constrained by a law the philosophical and religious bases for which we do not accept. Until and unless this society can develop a consensus on the personhood of the fetus, we should not impose one religious point of view upon everyone. For myself, the burden of proof plainly rests upon those who would argue that a

fertilized ovum is, in fact, a person. This is extremely problematic from the Biblical perspective and can in no way be proven except on the basis of presuppositions which most of us do not accept.

I therefore call upon this committee to refuse to support Senate bill 158. It is a serious breach of the right of religious liberty and will contribute to hostility between the various religions in this country and will result in the persecution of those who must dissent on religious grounds.

[From the Review and Expositor, Winter, 1981]

# THE "HUMAN" AS A PROBLEM IN BIOETHICS

By Paul D. Simmons

The human is an area in which the interests of science and religion meet. The nature of man as male and female, the components of human behavior, the relationship between biological "givens" and personal characteristics and the meaning and function of hopes and aspirations for understanding the essential nature of what it means to be a human being are appropriate subjects of study for both science and theological ethics. To be sure, the differing methodologies and conclusions between the life sciences and theology often invoke feelings of unreconcilable conflict between the two. However, their interconnectedness and mutual aid must be recognized if the complexity of this creature called human being is better to be understood.

Bioethics is a neologism coined to encompass the entire range of moral questions related to the life sciences. The enormous powers of science as seen in the ecological crisis, the nuclear dilemma, experiments in recombinant DNA, discussions of cloning, the development of bionic persons, the prospects for eugenically directing the evolutionary process, behavioral control by drugs, electronic devices and psychosurgery, and the debates over abortion and euthanasia all point to the interplay between the data of science and human values. The stakes are high in this enterprise, for the powers are ominous for good or ill to the future of mankind. As Jürgen Moltmann observed, "our knowledge of the stars is a matter of indifference to the stars themselves, but our knowledge of man is not without consequences for the very being of man."[1]

My purpose is not to examine all these issues *seriatum* nor to set forth a thorough-going theological-ethical understanding of the nature of human beings. What is intended is (1) to set forth the problem of the relation of the 'human' to issues in bioethics, (2) to indicate ways in which the 'human' as a normative understanding might be derived from Christian perspectives, (3) to show various attempts to derive normative meanings of 'the human' in the abortion debate, (4) to examine a suggestion as to a functional norm, and (5) to draw certain conclusions regarding particular contemporary issues.

## The Problem: Speaking of the "Human"

The term "human" and its cognate expressions ("human being," "person," and "human life") appear frequently in the literature of moral, theological, and scientific discourse. Discussions about the "human" are not

NOTE.—Footnotes appear at the end of article.

the exclusive province of any discipline. Rather, a concern with what constitutes "the human" and how that may function as normative is important for science as well as theology.

There are at least three discernible areas in which considerations with regard to the "human" are of concern in bioethical issues. The first involves criteria by which to make judgments regarding the human status of certain borderline cases. Questions pertaining to the fetus, for instance, raise the issue regarding what qualities must be possessed and to what degree to be considered a human being. The issue is crucial with regard to the anomalous fetus—those with radical deformity. What degree of departure from the norm is tolerated within the limits of what is meant by "human being"? Further, what of those at the outer limits of living—the comatose or those who are severely incapacitated physically or mentally? In what ways are considerations of what constitutes "the human" helpful in deciding cases of euthanasia? A more complex question, perhaps, relates to experiments with hybridization or cross-breeding between humans and animals such as gorillas or chimpanzees. There seems reason to velieve that such cross-breeding can be done because of the similarity of chromosomal structure between humans and the higher primates. Some regard the prospect as too "hideous" to believe anyone would attempt,[2] but such experiments are already under way. Would the product of such a union—a chimera—be a human being or something "other than" human and, if so, what?

A second area in which notions of the "human" are of concern in bioethics is in regard to persons' participation in their own evolution. "We are evolution," declared Teilhard de Chardin.[3] To recognize that we are the products of an evolutionary heritage says something both about the process itself and about the meaning of being human. Only human beings know that they are bound up in evolutionary struggle and that they now participate in that history. The development of technology and medical science significantly altered the evolutionary process, however. Instinct has been replaced by reason, randomness and chance have been modified, and medical intervention has kept alive many who otherwise would not have survived. Some scientists are alarmed, consequently, about what they perceive as the deterioration of the gene pool, holding out the prospects for a genetic apocalypse too horrible to imagine.

Considerations such as these say something about the responsibility to safeguard the human race against the deleterious effects of intervention. Thus, Lederberg argues, "The 'natural' outcome of a bad hand of genetic cards, or of many other of life's mishaps and misfortunes is a level of pain and distress that cries out for artificial reliaf . . . (But) we must learn how not to harm or suffocate ourselves in the process."[4] De Chardin put it even more pointedly. Noting the contrast between the vast numbers of human beings who are "misshapen subjects" and animal societies with flawless members, he

declared that thought needs to be given to the medical and moral factors that are needed to replace the crude forces of natural selection if they are to be suppressed. Rather than a random development of the human race, what is needed for the future is "a nobly human form of eugenics, on a standard worthy of our personalities."[5]

The significance of such statements is that they reveal an assumption concerning what it means to be a human being that, in turn, serves to provide normative guidance for questions relating to eugenics. The model for "humanness" is Universal Man—or man, the product of evolution, not specific, individual or particular persons. Every specific is considered in the light of the universal model. It nonetheless functions in a normative way. Again, for de Chardin, ". . . with thought, responsible control of evolution is in man's hand. Man should exercise reflective management of himself as reflective substance, keeping in mind all the implications of reflective substance regarding personal autonomy and dignity."[6] In short, for de Chardin and others, it belongs to humanness to participate in decisions regarding the evolutionary process, from decisions to abort for genetic reasons to those affecting experimentation with DNA.

A third way in which the "human" functions normatively in bioethical issues is a model from which intuitive judgments are made or by which specific guidelines may be developed. This applies to that category of actions upon or toward persons which may be regarded as "inhuman" or "depersonalizing" or "dehumanizing." The act itself is now being judged by criteria drawn from what it means to be and act as human beings and what it means to treat other persons as human beings.

Fetal experimentation is frequently opposed by persons who argue that such actions are fundamental denials of human rights—either to life or to privacy. It may be argued that they have not given "informed consent" and therefore have a right not to be injured or violated in any way. Similar arguments are used against experimentation on prisoners. The Tuskegee experiment which left syphilis untreated in prison inmates in Alabama, has been decried as "inhuman" and denying the prisoners' right to basic medical care. Further it is argued that they should know about and volunteer for any experiment in which they may be involved. Techniques in psychosurgery, including the now largely abandoned technique of lobotomy to remove mental anxiety, have been criticized for damaging the "human" capacities of those patients. Behavioral manipulation by drugs or chemicals or by behavior modification (Skinner) techniques have also been challenged as taking away "human" dignity and violating "human" rights.

Several things should be observed about the uses of the term "human" in bioethics. First, there is a great deal of looseness in the use of the term that seems to beg for greater clarity and definition of what it means to be human.

Often it is used as if the meaning were clear, its references universally understood and agreed upon and its persuasiveness undeniable. However, to an uninitiated stranger listening to the debate it might seem as if no one knows what constitutes the "human"—each does what seems right in one's own eyes.

Another thing noticeable is the interplay between biological factors or empirical data and certain philosophical or religious assumptions. At times the "human" seems the biological, and at other times the moral or personal. Judgments are being made about data drawn from the *bios*. The data itself, however, seems not to be self-evident—as in the argument concerning the human status of the fetus. Even so, the empirical data must be taken seriously as factors in the caring and decision-making process. Apparently what is involved in "the human" is a question of values, not simply of raw scientific data.

A third observation is that there are competing, highly differing if not contrasting views of the human at what in these discussions. A wide variety of models with their equally varied nuances can be discerned. These are not simply between atheists and theists or secularists and the religious. The differences appear as radically dissimilar *within* certain traditions as between religions. Thus, honest and sincere Christians are as divided over these perspectives as anyone.

Fourth, different areas in bioethics pose the issue of being human in differing but related ways. In abortion, the question pertains to that property or properties that qualify the developing fetus to be regarded as a human being with all the rights pertaining to persons. Euthanasia poses the question about those properties that might be measured to indicate that the human being has not been lost to death. Genetic engineering poses the vastly more complex issue of those qualities that might be retained, altered, or developed to assure the resultant entity is a human being and not something other.

These observations point immediately to the need for clarification in terminology and greater specificity in the uses of the term "human." This is vital for the clarification of moral discourse, the specification or particularization of moral judgments and decisions, and for the evaluation of the consequences of scientific endeavors. It might also serve to enhance and extend those vital ingredients to human community—understanding and toleration for varying perspectives.

## Deriving the Normatively Human: Christian Perspectives

From the Christian perspective, there are two primary concerns that are brought to bear upon bioethical issues: (1) the biblical portrait of the person (as male and female) and (2) the paradigm of the human found in Jesus Christ.

The biblical view of the person is that one is a creature made in the image of God. As creature, one is a psychosomatic whole—a unity in complexity, in-

tegrated as spirit and body. The Old Testament permitted no division whatever in this psycho-physical being. Man was created as *nephesh chayyah* (Gen. 2:7) or "living being." His uniqueness is seen by the fact that one's life is "God breathed." *Nephesh* is not a substance deposited in a body but the result of divine activity which is a reality both physical and spiritual.[7] *Nephesh* stands for the ego, the personal being in its totality, having both internal and external aspects.

Person is also *basar* or "flesh," which distinguishes people from God, but is never the principle of sin nor the "other side" of a matter-spirit dualism. Flesh becomes *nephesh* when it is animated by *ruach*.[8] One's flesh may long for God (Psa. 84:3), showing its spiritual characteristics. The heart (*lēb*) is both a distinct organ and the concentration of all the vital powers. From the "heart" one wills and knows, receives and acts upon knowledge. It is the seat of consciousness and of conscience (1 Sam. 24:5). From it comes both love and hate. And, as the seat of religious knowledge, it is related to God.[9]

For the Priestly writer, a person is also *imago dei*, one so uniquely endowed that he or she is the representative of God.[10] As such the person can enter into relationship with God and fellow creatures and exercise dominion over the created world.

The New Testament shows some signs of influence from the Greek notions of body-soul dualism. The Hebrew tradition is dominant and determinative, however. Here the person is portrayed as *soma* (body) which still refers to the corporeal totality of man and is never limited to its biological aspects. It stands for personal being in its concrete aspect.[11] "Soul *(psyche)* is used to describe the person in one's entirety. For Paul, it seems to mean *nephesh*—vitality or life itself—and thus can take on the meaning of "person" or "self." He uses it to designate the person as a living being.[12] "Heart" (*kardia*) is used to describe the willing, planning, intending self and thus is distinguished form mind *(Nous)*, which contains the element of "knowing."[13] *Pneuma* (spirit) is often used to mean the person (as is *psyche* and *soma*). It is not a "higher faculty" given as substance but is the self, the "I." Its usage approaches the notion of the self as consciously knowing its self to be a self. It connotes voluntary and self-conscious totality. "Flesh" (*sarx*) is the material corporeality which identifies the person's earthly existence, distinguishing him from God and having the capacity for becoming the special seat of sin (Gal. 2:20; Phil. 1:22; Rom. 8:5). Its psychical characteristics include its power to dominate the mind and the heart.[14]

The biblical portrait, therefore, is that the person is a totality, a psychosomatic whole. One is not body *and* soul but body-soul, a person who is both material and spiritual. As *imago-dei*, the person has the capacities of self-consciousness, of reflective choice, of thinking and willing, and of entering into relationship with God and fellow creatures.

The biblical paradigm for "the human" builds upon this concern for the unity of personal life and focuses on the incarnation and resurrection of Jesus Christ. The incarnation was not the habitation-invasion of body by a separable entity (the divine) but was a perception of the divine in the uniquely human life of Jesus. The resurrection points to the belief that in this life or the next, the person retains psychosomatic wholeness. Basic to this is the relatedness of mind to matter, soul to body, and of spirit to material. These cannot be separable as if they are antithetical in character. Such antitheses belong to Platonism, not to the Bible.

Thus, the incarnation focuses the biblical picture of person. Here is true man, perfect in relationship to God and to fellows, perfectly obedient in responsible awareness of one's special place before and with God, and totally integrated in self. Jesus could pronounce "I am" with emphatic definiteness. He was truly the unique bearer of God (Col. 1:15, 19). For this reason the church is unanimous in declaring that in Christ is to be seen what it means to be truly man (truly God). He is our model for understanding what it means to be a human being.

This provides a paradigm for Christian perspectives in bioethical issues—both those relating to the human status of particular entities and the moral criteria by which to judge the "humanness" of certain acts. Christian theology moves within these parameters while attempting to dialogue with medical specialists in bioethical issues. These images, models, paradigms become normative for Christian thought about the "human."[15]

The writings of Paul Lehmann, for instance, use extensively the phrase "making and keeping human life human."[16] This conveys normative understandings for Lehmann both for interpreting the activity of God and for establishing acceptable moral conduct by persons. Jesus is the paradigm. The term "human" becomes invested with meaning drawn from the church's memory of Jesus and theology's understanding of the revelation of God in Christ. Christ is the "new man," the second Adam and thus is the *true* man. All standards for what it means to be human are to be measured by Jesus, the God-man. "Making and keeping human life human" is to make persons Christ-like for "man's essential and original nature is to be found . . . in Christ."[17]

Considerations regarding the "human" derived from these perspectives might be noted around three statements:

1) The person is a complex entity in whom both spiritual and physical capacities are basic and integrally related;
2) The person as *imago dei* involves capacities for self-consciousness, self-transcendence, relationship to others and to God, and responsibility for choices; the model is that of a social self;
3) The person is understood distinctively, not in terms of origins,

> but in terms of its highest achievement.[18] Thus, Christ is the norm for what it means to be human and the goal for the human future.

These become basic to Christian notions about the human and inform our concerns in bioethical issues. The question remains as to how these understandings might provide concrete guidelines for those facing a hard case of *spina bifida* or *anencephaly*. The norms of theology are largely formal in nature while the guidelines for medicine must be specific in nature. Emil Brunner's concern for relational capacities as *imago dei* are difficult to transfer directly as criteria for the fetus as a human being. As Moltmann noted, his own treatment of man inevitably slipped into talk about God,[19] which is the problem with all theological talk where scientific data are involved. It is difficult to translate biblical, theological categories into biomedical terms.

## Bios and the Human: The Abortion Debate

Scientific knowledge concerning the physiological bases of human personality cause some to focus almost exclusively on biological factors in defining the "human." This is based upon several understandings. (1) The person is a psychosomatic whole consisting of the inter-connectedness of body and mind. The human capacities for thought, imagination, self-awareness, and inter-relatedness are all made possible by a complicated pattern of processes involving glandular secretions and neurological systems. Without these the very concepts of "mind," "personality," and "thought" would be impossible. (2) The person's physical makeup and, to a large extent, one's personality, are governed by the laws of heredity. One's genes and chromosomes determine everything from the color of hair and eyes to the glands that govern body chemistry. Not only physical but behavioral characteristics are rooted in the genes, since they shape every part of the developing human being's physiological and psychological machinery. Like a molecular IBM every cell is programmed to effect the required developments of the person. (3) The life of the person is on a continuum from conception to death. At the time of the fertilization of the female ovum by the male sperm the genetic information is established that may form a human person. Each person is a particular combination out of millions of possibilities from the same genetic material.

All these concerns come together in the abortion debate. The debate centers on the minimal factors which are necessary for one to be a human person. Two assumptions are being made: first, that there is an answer to the question as to what makes a fetus a human being, and, second, that this answer is to be found in a more-or-less quantifiable (biological-objective) factor which can be established as a criterion for being a human being.

### *Stages of Fetal Development*

There is a scientific consensus regarding fetal development that establishes a point of reference for biological considerations relating to the

"human." The stages of fetal development can be briefly noted.

The *zygote* is the ovum fertilized in the fallopian tubes of the woman where it remains for about three days during which cell division begins.

The *blastocyst* is the stage begun with implantation in the uterus where cell differentiation continues. Twenty to twenty-five percent never implant satisfactorily and pass unnoticed through the menses.

The *embryo* is the stage beginning two weeks after conception, during which there is rapid organ differentiation. All the internal organs one will ever have are present in rudimentary form by the end of six weeks.

The *fetus* is the stage from eight weeks to birth, during which there is continuous development (growth) but nothing new is added. It is the period of bringing to readiness for birth what is already begun. By 16-18 weeks there is usually movement by the fetus, referred to as "quickening." "Viability" is the stage at which the fetus would be able to survive independently of the womb. This makes it a very imprecise term, but is usually associated with fetal size of about 500 grams.

Given the facts that (1) there is a biological basis for being a human person and that (2) all persons began as a fetus, the terms "human," "human being," "person," or "human life" have variously been employed to speak of the fetus.

*Schools of Thought: The Fetus as Human*

Given these facts, two schools of thought have emerged which attempt to define the "human" in terms of biological "givens." The *Genetic School* proceeds from the notion that persons are their genetic code.[20] Thus, since the conceptus has a genetic code which is different from that of the woman, it is a person. This may proceed from the assumption that to be "human" one need only belong to the species *homo sapiens.* As John T. Noonan put it: "The criterion for humanity then, was simple and all-embracing: if you are conceived by human parents, you are human."[21]

Others argue the potentiality factors. Paul Ramsey states the position strongly:

> Thus it might be said that in all essential respects the individual is whoever he is going to become from the moment of impregnation. He already is this while not knowing this or anything else. Therefore, his subsequent development cannot be described as becoming something he is not now. It can only be described as a process of achieving, a process of becoming the one he already is. Genetics teaches us that we were from the beginning what we essentially still are in every cell and in every generally human attribute and in every individual attribute.[22]

This view results in what is called the parity argument—the fetus is "on a par with" or is to be regarded as of equal moral value to the woman.

The *Developmental School* argues that genotype is not enough—there must be more maturity in the process of developing physiological capacities before it is meaningful to speak of the fetus as human being or person. There are differences of opinion, however, as to what point or when the fetus becomes "human." Some focus on implantation, others on organ differentiation (thus 6-8 weeks). Still others consider "quickening" or movement necessary since the "otherness" and "presence" of the fetus are then apparent and established. Many regard *viability* as necessary since independence from the mother is then real biologically as well as genetically. Further, there is sufficient development of brain and other organs to speak meaningfully of personal *capacities*, not just potentialities.

The Genetic argument certainly has some value. It recognizes that beginnings are basic to the finished product. It also sets a recognizable standard (conception) that can be universally recognized by morals, law and medicine. However, it suffers from fundamental flaws in logic and data. Everything the person becomes is *not* established at conception, since neither sexual differentiation nor segmentation has taken place. Whether the person is to be male or female or be a twin is not decided at fertilization. Furthermore, while potentialities are important, they are not the same as actualities. Having a genetic code that may develop sensory and motor responses is not the same as having neural and muscular structures necessary to human activity. To blur the distinction between possibilities and actualities is to darken counsel.[23]

The logical fallacy may be stated in the following way. Even if one can draw parallels from basic properties in one entity and say that they are identical to another entity—a living human being—and even if it is true that these characteristics are determined by genetic codings that the conceptus already has, it does not follow, and it is not true to say, that the fetus already has all these characteristics. Thus, it is not logical to say that the fetus of which a person will develop is identical with a person and is, like a person, a living human being.

Even the prospect of cloning shows the problem of equating "person" with genotype. Cloning is the process of producing one who would be identical in genotype to the person whose DNA is copied. Presumably from the body cell of any person, a duplicate can be developed by ennucleating the cell of a fertilized female ovum. The resultant offspring would have all the physical features (but not necessarily the talents, tastes, interests, or disposition) of the parent. Thus, it can be said that most of the cells of one's body are *potentially* a person since they contain one's genotype. But one would hardly say each cell is a human being!

The Developmentalists recognize a relation between genotype and person but do not equate the two. They also recognize that statements made about the c iteria for the "human" in fetal life have bearing on criteria for other

stages in one's life. A certain symmetry can be found, for instance, between focusing on brain waves in fetal life and as indication of the death of a person by a flat EEG. A further value is that it recognizes the comparative value of different qualities and stages in the life continuum. A fully developed brain has more value than a rudimentary spinal cord; having muscular and skeletal features, it is of more value than simple genetic codings; a viable fetus has greater moral genetic value than a blastocyst because it possess more developed features and has established independence from the woman.

*Terminologies*

Running through these elements is a recognition of the complexity and variety that is involved in the term "human being" or "person" as over against the far simpler concepts of "human" or "life." At this point, terminological considerations are important. According to *Webster's New World Dictionary,*[24] the term "human" is an adjective, meaning 1) of or pertaining to or characteristic of man: human nature; 2) having the nature of man, being a man: the human race; 3) of or pertaining to mankind generally: human affairs. The term is used as a noun only colloquially or humorously to mean "a human being."

"Person," on the other hand, is a noun, meaning 1) a human being, whether man, woman or child; 2) a human being as distinguished from an animal or a thing; 3) (Sociol.) a human being who is conscious of social relations to other human beings toward whom he acts; 4) (Phil.) a self-conscious or rational being; 5) the actual self or individual personality of a human being.

"Life" (n.) is 1) the quality that distinguishes a living animal or plant from inorganic matter or a dead organism; 2) the state of possessing this property; 3) a living being, esp. a human being (the fire took 5 *lives*), etc.

Notice that "person" and "human being" are virtually synonymous while both "human" and "life" are descriptive but not comprehensive of "person." A human being or person is a complex entity who has *bios* but is more than *bios* since all animals have "life." "Person" signifies capacities of reflective choice, relational responses, social experiences, moral awarenesses, and self-awareness.

This is why the real issue in the debate is *what is a person,* since rights attach only to persons. All can agree that *the fetus is human* (even from the moment of conception) since it belongs to the human species. Further, it is human life—there are living cells involved. But the cells of the zygote and blastocyst stage hardly equal the complexity or sophistication of development basic to being a person or a human being. To refer to the fetus as human is simply to define its species. It is not *bovine* or *feline,* but human.

*The Social Definition of Person*

Focusing the social and relational factors of personhood causes some to

reject a biological basis for defining "person" altogether. This, Daniel Callahan calls the *Social Consequences School.* These argue basically that "life" itself cannot be equated with biological factors but must be considered qualitatively. One's "life" is more comprehensive than one's vital functions, consisting of well-being, happiness, sense of purpose and meaning. Victor Frankl, for instance, insists that "the will to meaning is integral to the human."[25]

Where the fetus is concerned this group would argue that its value resides not intrinsically but extrinsically. The society itself will decide what value to place upon fetal life. This may be decided from utilitarian considerations such as "what is this person worth to society?" or "how many people do we need?" to judgments concerning the stage of fetal deformity that may be acceptable or the family decisions that might be made regarding the number and spacing of children. The most persuasive of these arguments combine the "quality-of-life" notion with the family need and personal moral value structures of the individuals primarily responsible for making the decision, that is, the parents.

Moltmann, for instance, argues that a distinction is needed between protection against the destruction of *vitality* and protection against the destruction of *humanity* in the fetus.[26] He locates the origin of humanity, not in biological beginnings but in the atmosphere of acceptance and recognition by others, since "it belongs to the essence of humane life that it is *accepted* and *affirmed, recognized* and *loved.*" For him, abortion is a question of values, not of vital signs. Thus, the nurturing, "human" atmosphere of family is essential to the development of person from the embryo: "In the moment when the mother, the parents, the family—to name only those most proximately concerned—develop a relationship of acceptance and affirmation for the embryo, the atmosphere of humanity is established in which this nascent life can become a humane life."

Such arguments certainly have value. Aside from describing what actually does take place in human decision-making, it has the merit of reminding us that values are important to the very essence of our life in the world and in society. These perspectives would be vital for decisions regarding eugenics since Christians would certainly insist that moral capacities should be integral to what it means to be a human being. One of the problems running through the genetic perspective and certain developmental notions is that of a radical reductionism—the richness and complexity of "person" is reduced to a vital life sign. A "heartbeat" or "brainwave" is hardly the measure of a person, however much it may be basic to being alive.

The weakness of the social consequences view, however, lies at the other extreme—not enough importance is attached to the *bios.* While certain values are brought to the fetus by adult society, there surely is a value intrinsic to the physiological processes themselves. One cannot be "person" disembodied. The self is never separable from the biological basis of personality.

Thus, the task is one of deriving a model of human personhood that yields some definable, more-or-less quantifiable factors that still account for the complex features of personhood. The equation will never be simple, but the relation might nonetheless be integral. What is required is that, in some sense, the part not be substituted for the whole but that the shole be included in the part. The task is not to discover a criterion that explains or is the biological equivalent of *imago dei*. Indeed, there can be no such criterion. Even so, there is need for theologians to settle upon a criterion that is theologically supportable *and* medically determinable in order to provide specific guidance to physicians facing difficult cases.

The criterion must be sufficiently complex to be basic to human personhood but sufficiently simple to measure by medical procedures. This might be called the complexity-simplicity criterion.

## A Proposal

Joseph Fletcher's compilation of a list of factors in personhood (originally 20 elements but later reduced to 15) evoked considerable discussion among theologians and scientists. The question was whether any one of these "optimal traits or capabilities might be the *sine qua non*, the essential *one* without which no combination of the others can add up to humanhood."[27] Three factors have been suggested seriously. The first is subjectivity or self-awareness. One theologian called this "the self-consciousness requirement."[28] Basically this requires one to be able to think or say "I." However, fetuses and infants do not have that ability. Certainly machines do not. Probably animals do not, though experiments with chimpanzees have shown that some can be taught their name, recognize it symbolically, and communicate the same to their trainer. This suggestion is terribly problematic, therefore, for a baby would have to develop self-consciousness before being considered a person. This does not mean that self-consciousness is not important, it is simply too non-specific to serve as a basic criterion.

A second suggestion is that of relational ability. This view would argue that a human being's life should be preserved as long as there is capacity for relationship. This criterion would be valuable as an aid to decisions about quality-of-life, as in the case of severely handicapped newborns. Thus, anencephaly and extreme forms of mental retardation would not provide sufficient capacity for these infants to be regarded as persons and thus they would have no rights to be preserved. The moral norm would be that one need not save from death's approach that which does not possess the relational capacity.

Fletcher suggests that neo-cortical function is the key to personhood, the *sine qua non* of human beingness. Neo-cortical function is the synthesizing activity of the cerebral cortex. Without this, an entity has neither thought nor mind. This would apply to both the beginning and the ending of human personal life. "The person is non-existent," says Fletcher, "no matter how much

the brain stem and mid brain may continue to provide feelings and regulate autonomic physical functions." He continues:

> To be truly homo sapiens one must be sapient, however minimally. Only this trait or capability is necessary to all the other traits which go into the fullness of humanness. Therefore this indicator . . . is the first order requirement and the key to the definition of a human being.[29]

Two things should be noted. First, these traits are not mutually exclusive. However, only one (neo-cortical function) is both medically determinable and necessary before other capacities can be actualized. As H. Tristam Englehardt notes: "for a person to be embodied and present in the world, he must be conscious in it . . . the brain is the singular focus of the embodiment of the mind and in its absence man as a person is absent."[30]

Some fear that establishing a single trait in this manner will be a temptation for fanatics to attempt to remove persons regarded as less human or inferior to himself. However, neo-cortical function is not a psychological or spiritual quality. This is a biological trait which is sufficiently concrete and empirical so as to avoid a misdirected fanaticism.

Second, shifting the focus to the concept of "person" rather than "human" or "life" provides a much more adequate model by which to hold together those concerns which are qualitative in nature and those which are quantitative in nature. Both the spiritual and the biological, the *bene esse* and the *esse* of human beings are taken into account. The quality and value of the relative stages along the continuum of life of a person is also recognized. Each end of the spectrum of human personal life is now conceived of in terms of its capacities for personal existence rather than in terms simply of the vital life signs.

Following this line of reasoning James M. Nelson spoke of human life in three forms. *Pre-personal* forms of life are those which are embryonic or still in fetal stages. *Personal* forms are those in which the individual functions in all the dimensions of existence. Here one is consciously social, aware of the self, involved in interpersonal roles and morally responsible. The *post-personal* forms include the permanently comatose and those so severely brain injured that they have no capacity for interpersonal relations. This does not mean that the human community will not value those pre- and post-personal forms of life. Rather, it candidly recognizes that not every individual has the capacity for being person.[31]

Fletcher's suggestion certainly has value, particularly for those of the Developmental School. Neo-cortical function also seems to come as close to satisfying the criteria integral to biblical-theological concerns as any objectifiable standard might. It leaves unresolved the thornier questions of value raised by the Social Consequences School, however. This is inevitable, it seems

to me, since no objective or medically determinable standard is able fully to encompass the *imago dei*.

Neo-cortical function also has value as a manageable criterion for death. Physicians could discontinue life support or resuscitative techniques for patients when there is incontrovertible evidence of neo-cortical death. Any other criterion—relational capacities or self-consciousness—runs into serious problems, as with the mentally ill. They still have neo-cortical activity even though they may not think rationally. The patient who is vegetating, however, even though there may still be spontaneous vital functions, may be declared dead. Such elemental but all-important distinctions could have avoided a great deal of anguish by the grieving parents of Karen Anne Quinlan and those in Indiana who sought a court injunction to withdraw life support systems from their fifteen year old daughter. Andra Rubinelli had lost all brain activity from a rare blood disease that caused bleeding in the brain. However, because Indiana law does not recognize brain death, hospital officials kept Andra on a resuscitator which artificially maintained heartbeat and breathing. Even the judge delayed for two weeks the petition by the parents to declare Andra legally dead. The brain death, neo-cortical criterion would avoid such dehumanizing and depersonalizing practices.

As for fetal life, neo-cortical function is sufficiently complex as to require certain brain development. Certainly, "potential" is not enough, nor is the presence of EEG at eight weeks. There must be brain, not simply spinal cord. However, by the time of viability, there is sufficient brain development for the fetus to be considered the moral equivalent of person. Using this standard one could speak of the conceptus in the following ways: during the first twelve-fifteen weeks of pregnancy, the fetus is *definitely not* a human person. However, following the sixteenth week of development, the fetus should *probably* be regarded as person. After viability, the fetus should *definitely* be regarded as a human being with all attendant rights.

By such standards the woman confronting problem pregnancy would have the following guidelines. During the first sixteen weeks, pregnancy termination will largely be a matter of determining her own moral attitudes with regard to the conceptus. The argument that genotype establishes personhood is not self-evident, nor is the parity argument convincing during this period. However, if the woman (couple) believes it to have the value of person, she should in no way violate her conscience by choosing to abort. In either case, however, there are no objective standards for believing it would be murder to abort. Following the sixteenth, certainly the eighteenth week, however, the decision has greater moral weight. Increasingly, both the independent status of the fetus is established and its muscular and intellectual capacities are developed to the point that it is more appropriate to speak of "person." Barring complications of a very serious nature, abortion should not be elected after the eighteenth week. Certainly it is not a matter that "the situation

determines everything." One can never say that "the facts of the matter" add up to a "justification" of abortion. One can only make this decision as a human person, weighing the human factors involved in the context of freedom and governed by one's beliefs and values.

## Conclusions

The problem of defining the normatively human in bioethics seems to warrant the following conclusions.

I. *The concerns and criteria employed by the theologian and the scientist engaged in discussions on bioethical issues will be understandably different.* The data which the physician uses will be of a more empirical and specific character than that used by the philosopher or theologian. This is due in part to the very nature of the disciplines. While the theologian draws lines from revelation to the nature of humankind, the physician searches for data that is quantifiable and observable. The task faced by an obstetrician in deciding whether to resuscitate a radically deformed infant, or that of the physician facing a patient's request not to use extraordinary procedures to prolong life, or when to declare a comatose patient "dead" requires data that is significant ly different than that of the theologian. Those who deal with formal and abstract concepts such as "self-transcendence," or "inter-subjectivity," or "self-determination" or even "imago-dei" can and must be more general, less specific than the physician who is likely to be more impressed by a flat electroencephalogram or the absence of pulse or heartbeat.

This divergence of interest and concern about specificity-objectivity cannot be dismissed simply as a type of Cartesian dualism functioning in scientific circles. The person is a psychosomatic whole which makes neurological, endocrinological, and psychomotor functions basic to the presence of human personality. One of the functions of the scientist-physician is to remind us that without heart function there can be no living human being. The task of the theologian is to remind the scientist-physician that the being of the person cannot be captured in a heartbeat. The person—the human being—is never simply reducible to the vital life signs. Truly a person is more than the sum of the parts of bodily function. Thus, while the disciplines meet and serve a complementary and corrective role each to the other, they cannot simply converge.

II. *Regarding fetal life, the human status of the conceptus will be answered variously by those involved in the abortion debate.* Very likely, as Gustafson suggests, "the question that cannot be settled to the satisfaction of all disputants in the abortion issue is at what point the fetus is considered to be a human being or to have human rights."[32] This is true in spite of the very plausible suggestion that neo-cortical function be accepted as the *sine qua non* of being a human person. That notion has the value of being medically determinable, thus satisfying the specificity criterion, and being basic to all processes associated with being a human being, thus satisfying the com-

plexity criterion. It allows sufficient latitude for abortion early in the gestation period without a *laissez-faire* policy in the later stages of pregnancy. The debate will continue, however, since the presupposition and criteria for what it means to be a human being are so vastly different.

From that recognition, two concerns might be focused. First, the present legislation in the United States seems sufficiently to recognize the pluralistic nature of opinions regarding abortion. For this reason, it seems to me, the Supreme Court Decision of 1973 is entirely *supportable* even though at specific points it may not be entirely *satisfactory*. The court settled on viability as the point in fetal development at which the fetus could *reasonably be considered a person* under the Constitution of the United States. This gives apt recognition to the diversity of philosophical opinions regarding the human values involved in terminating pregnancy at an early stage (when a fetus should probably not be regarded as a human being or person) and the undeniable data of the presence of independent "otherness" by the time of viability (when the fetus probably should be regarded as having the moral equivalence of person).

The decision also has the merit of permitting moral factors to govern the abortion decision rather than imposing a legislative solution based upon one philosophical view. Elements of "humanness" are emphatically recognized by underscoring the responsibility of persons to make moral decisions regarding pregnancy termination. Those who believe profoundly that a fertilized ovum has the equivalent value of human being are permitted to do so and to act upon that understanding. In no way is their conscience violated by forcing an abortion upon them—regardless of circumstance (whether rape, incest, fetal deformity, threat to life of mother). They have simply been prevented from imposing that view upon others who have different notions of what it means to be a human being and what values to be attributed to germinating life.

A corollary to this conclusion is that those efforts to declare constitutionally that germinating life is to have the status of person should be resisted. The so-called "pro-life" or "Right-to-Life" movement has closed ranks and developed a non-negotiable spirit on this matter. Typical to this philosophical and religious tradition, they have now turned to power politics to accomplish by law what they cannot do on logical, philosophical or religious grounds. There is hidden in this effort "a premature ultimate"[33] that confuses more than clarifies and reduces rather than expands our notions of the human. Those who recognize the issues in the debate will not readily settle for a simplistic solution to this complicated human problem.

III. *All are engaged in the distinctively human and on-going process of discovering not only who we are but what we are intended to be.* The richness of the term "human" and all that it connotes is due both to its complexity and variety and to the fact that it is a dynamic not a static concept. Knowing what

it is to be human is an on-going process of discovery. Truly humankind is in the process of becoming. Knowing that, however, is significant. That very insight belongs to the grandeur (and the misery) of being a human being.

Being human, therefore, is also a calling to pursue the future of humanity as well as to discover the past of humanity. All moral issues in bioethics are now set in the context of the fact that "for the first time in the evolution of a life, a living creature (man) has both the understanding and the ability to design itself and its future."[34] De Chardin argued passionately, "We have become aware that in the great game that is being played, that we are the players as well as the cards and the stakes."[35] Our task and our calling as humans is to pursue the future. That will mean becoming what we now are not, engaging creatively and imaginatively in human self-creation.

To be *a* human being means to pursue a vision—and apart from that hope in a *telos* beyond the present, our very being will wither and decay.

---

[1] Jürgen Moltmann, *Man*, trans. John Sturdy (Philadelphia: Fortress, 1974), p. x.

[2] Harold T. P. Hayes, "The Pursuit of Reason," in *The New York Times Magazine*, June 12, 1977, p. 21.

[3] Teilhard de Chardin, *The Phenomenon of Man*, trans. Bernard Wall (New York: Harper, 1959), p. 231.

[4] From the Preface, *The Ethics of Genetic Control*, by Joseph Fletcher (Garden City: Anchor Press, 1974), p. xi.

[5] Joseph A. Grau, *Morality and the Human Future in the Thought of Teilhard de Chardin* (Cranbury, N.J.: Associated Univ. Presses, Inc., 1976), p. 299.

[6] Grau, op. cit., p. 300.

[7] Edmund Jacob, *Theology of the Old Testament* (New York: Harper, 1958), p. 159.

[8] Ibid. p. 161.

[9] Ibid. p. 165.

[10] Ibid. p. 167.

[11] Eric C. Rust, *Science and Faith* (New York: Oxford, 1967), p. 204.

[12] Rudolph Bultmann, *Theology of the New Testament*, trans. Kendrik Grobel (New York: Charles Scribner's, 1951), I: 204.

[13] Ibid. p. 222.

[14] Ibid. p. 227; Rust, op. cit., p. 205.

[15] Thus, Jenkins begins his treatment of *The Glory of Man* (New York:Scribner's, 1967) by saying that the answer to the question of what it means to be a human person is no different than a related question: What does it mean to believe in Jesus Christ! Similarly, David Cairns' treatment of *The Image of God in Man* (London: SCM, 1953) says that *Imago dei* is the key to Christian understandings of man. Also see Emil Brunner, *The Christian Doctrine of Creation and Redemption*, trans. Olive Wyon (Philadelphia: Westminster, 1952), pp. 61ff.

[16] Paul Lehmann, *Ethics in a Christian Context* (New York: Harper, 1963).

[17] Ibid., p. 119. See also Karl Barth, *Christ and Adam*, pp. 26-29.

[18] Brunner, op. cit., p. 81.

[19] Moltmann, *Man*, p. x.

[20] Daniel Callahan, *Abortion: Law, Choice and Morality* (New York: MacMillan Co., 1970), Chap. 11.

[21] John T. Noonan (ed.), *The Morality of Abortion* (Cambridge: Harvard University Press, 1970), p. 51.

[11] Paul Ramsey, "Points in Deciding About Abortion," in ibid., pp. 66-67.

[12] Charles Hartshorne, "Ethics and the Process of Living," Conference on Religion, Ethics and the Life Process. Texas Medical Center, March 18-19, 1974.

[13] *Webster's New World Dictionary* (Cleveland: World Publishing Co., 1957), p. 588.

[14] Victor Frankl, *Man's Search for Meaning*, trans. Ilse Larch (New York: Simon and Schuster, 1959).

[15] Jürgen Moltmann, *The Experiment Hope*, trans. M. Douglas Meeks (Philadelphia: Fortress, 1975), p. 166.

[16] Joseph Fletcher, "Four Indicators of Humanhood-the Enquiry Matures," *Hastings Center Report* 4:6 (Dec., 1974), p. 5. Karl Barth listed seven features of person-hood: independence, reason, self-awareness, response-able and responsible, freedom, purpose, fellowship with others. See *Church Dogmatics*, III/4 (Edinburgh: T. and T. Clark, 1961), pp. 327-333.

[17] See Michael Tooley, "Abortion and Infanticide," in *Philosophy and Public Affairs*, 2 (Fall, 1972), pp. 37-65.

[18] Fletcher, "Four Indicators. . . ," p. 6.

[19] H. Tristram Engelhardt, "The Beginnings of Personhood: Philosophical Considerations," *Perkins Journal*, 27 (1973), p. 21.

[20] James M. Nelson, *Human Medicine* (Minneapolis, Augsburg, 1973), p. 20.

[21] James M. Gustafson, *Theology and Christian Ethics* (Philadelphia: Pilgrim Press, 1974), p. 230.

[22] Sissela Bok, "Who Shall Count as a Human Being?" in *Abortion. Pro and Con*, ed. Robert C. Perkins (Cambridge: Schenkman Press, 1974), p. 91.

[23] Fletcher, *The Ethics . . .*, p. xv.

[24] Teilhard de Chardin, *Phenomenon*, p. 231.

Senator EAST. Our final witness is Mr. Robert Destro who is general counsel to the Catholic League for Religious and Civil Rights and an adjunct associate professor of law at Marquette University. He received his B.A. degree from Miami University and his J.D. from the University of California at Berkeley.

Mr. Destro, we welcome you this morning.

## STATEMENT OF ROBERT A. DESTRO, GENERAL COUNSEL, CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, MILWAUKEE, WIS.

Mr. DESTRO. Thank you, Mr. Chairman. It is a pleasure to be here today.

I would just like to make one correction in the record at the outset, and that is to emphasize that I am testifying today as an individual and not on behalf of the organization for which I work or the law school at which I teach.

I do testify, though, with a considerable amount of experience in first amendment law. I litigate almost exclusively in the area of religious freedom. Also, I teach primarily in the area of 1st and 14th amendment constitutional rights. I have also had considerable experience in litigating precisely the religious issues which have come up today at the district court level and the Supreme Court level.

One thing on which I agree with some of my fellow witnesses today is that Senate bill 158 does present an issue of fundamental social policy. It is, in fact, a human rights issue. But we are not, as some of the witnesses seem to be assuming, debating this question in a vacuum.

The focus of what we are talking about on this issue, whether the proposed legislation is a human life bill or a human life amendment, is not only what the bill or amendment would do, but what has already been done by the Supreme Court.

There is no question that the abortion issue involves conflicts between important interests and moral viewpoints, but Senate bill

158 is addressed to the most basic of those interests—the right to life itself and who shall have it.

The question this bill answers is that which concerns the legal value to be assigned to the unborn so that the balance will involve the interests of three people, not just two. The Supreme Court recognized that balancing process explicitly in *Roe* v. *Wade* and indicated that the result would have been far different had they recognized the interests of a third person.

I find it almost incredible from a first amendment perspective that an "establishment of religion" issue can be raised in this debate by anyone knowledgeable in the law.

Professor Simmons, for example, argued that Senate bill 158 "establishes" religion because it imposes a moral view which is contrary to his reading of the Bible. The same is true for Rabbi Siegman. Apparently, he seems to argue that the Supreme Court's view of the issue is more accurate than the human life bill's viewpoint.

But interestingly, both of these theologians ignore three fundamental points: (1) Their view of fetal life is also religious, (2) law and morality are not the same, and it is very dangerous to assume that they are, and (3) the term "person" under our Constitution has a legal effect. It is a legal term as well as a philosophical term.

The same criticisms apply to Mr. Thompson's testimony, but his emphasis is on personal choice of religious view and modes of conduct. His points ignore that Senate bill 158 does not interfere with freedom to believe, or necessarily, with freedom to act. That is a judgment which is left to the States. Before *Roe* v. *Wade,* all decisions regarding abortion policy were left to the States. The degree to which they may protect the interests of the unborn will not be clear until after the Supreme Court has had a chance to rule on the constitutionality of the bill which is now under consideration.

More importantly, however, existing first amendment "free exercise" doctrine does not support the notion that free exercise of religion is unrestricted. Even unquestionably religious conduct may be prohibited if there is a compelling State interest in doing so and no lesser alternative by which to achieve that means.

Religious belief itself has never been a talisman to avoid social constraint, and the key to each case in which this issue has come up is the existence of an overriding or compelling State interest in a competing value which has been deemed to be important by the legislature.

We do not, for example, allow human sacrifice. We do not, for example, in the State of Tennessee allow the practice of snake handling in the practice of religion. And we all know the very famous case of polygamy: its illegality was upheld by the Supreme Court notwithstanding the Mormons' rights to free exercise.

If one does believe that a fetus is entitled to the same protection as those who are born, one cannot in good conscience permit another to violate those rights.

Dr. Ruether's testimony, in my view as a legal scholar—and I do not purport to be a theologian—seems to me to be even more off the mark. It, more accurately than any others, recognizes the irreconcilable conflict between the basic interests we have here,

but it constructs an elaborate argument based on the thought of Thomas Aquinas which does nothing more than defend her own value judgments on how that irreconcilable conflict should be resolved.

But her arguments against the bill are, in essence, the same as mine in support of it; they simply reach a different result.

Her comments on Aquinas are equally as questionable as her result. Whereas it's at least as arguable that were Aquinas testifying here today with knowledge of current genetics, he might consider genetic humanity to be the test of human form rather than relying on simple physical form.

The basic point of all this, however, is that Senate bill 158 does present a moral question, but no first amendment problem. We are simply arguing about how the legal problem created by *Roe* v. *Wade* should be resolved.

All social policy questions involve moral questions and basic value judgments. The other witnesses would scarcely apply the notion that Congress should not make moral judgments to arguments supporting the abolition of slavery in the 1860's through the Civil Rights Act of 1864 and the Emancipation Proclamation. Both those were diametrically in opposition to the decision in the *Dred Scott* case, and their clear intention was to get around an unacceptable Supreme Court decision.

In our society, we do not leave the rights of minorities to the choice of others. The fight for equal rights of women is couched in moral terms, but few would argue that sex discrimination is justifiable as a matter of conscientious choice. The concept of "mutual assured destruction" in defense debates can be debated on moral as well as pragmatic terms, but a decision to adopt and pay for it does not establish the morals of its proponents.

The question presented by Senate bill 158 is whether or not an unborn child or fetus should be considered important enough to merit the law's protection. It is, in fact, a value judgment, and Congress is uniquely suited to make it.

There is nothing in the letter or spirit of the first amendment that prevents it. If it did, the Supreme Court could not have decided *Roe* v. *Wade* the way it did, for its opinion translated its value judgment into constitutional law. The Court imposed its judgment on the Nation as a whole in the face of an admitted lack of consensus. Why are we now told that, because there is a lack of consensus, we should not reject the Court's judgment?

As a professor of constitutional law, it never ceases to amaze me how unwilling students and others who debate these issues are unwilling to analyze decisions of the Supreme Court. When the Supreme Court makes a judgment regarding constitutional law, it implicitly expects the Nation to accept the proposition that a social consensus—a constitutional consensus, if you will—exists which supports its decision.

But its decision in *Roe* was that the Constitution does not support the notion that the fetus should be protected as a person. It is true that the Constitution does not say that a fetus should be protected as a person. It is equally true that the Constitution does not say that it should not be protected as a person. The question was, in fact, one of first impression.

Since there was no constitutional consensus, the Supreme Court was free not to decide the issue and to leave it to the States which could, in their own time and in their own ways, come to their own consensus on the topic.

But it recognized, just like the Congress should recognize here, that a nondecision on an issue which is presented for review or decision is equally a decision. The Supreme Court recognized that fact when it decided to reach the merits in *Roe*. It could easily have avoided them, but it sought to decide the issue "once and for all." Its ruling was simply that the fetus does not deserve constitutional protection. That decision is a clear value judgment, and it was even couched in those terms.

So I ask the subcommittee and I ask the Congress, why should it refuse to act on this bill? To do so is a decision to permit the Supreme Court to define those who are biologically human and those who should be legally defined and protected as persons based on the value judgments of a mere seven members of the Court. Seven of nine may be a majority, but is scarcely unanimous.

What the other witnesses who testified today ignore is that those value judgments do not become secular views by judicial decree. They do, however, become law by judicial decree. If Congress can reach a consensus on the basic values it prefers, those values should be adopted and written into the law, and the Court is free to accept them or reject them when it reviews the law itself, as it did with respect to the Hyde amendment in *McRae* where it opted to leave basic value judgments to the Congress, the elected representatives of the people.

On the question presented here, there are really only two views: either the fetus should be protected as a person, or it should not be protected as a person. Only after resolving that question do we reach the question of how much protection we shall give it.

What we are debating here is the reason for adopting one policy or another. Putting it another way, one could say that the question is either: Is abortion to be considered a social good, or is it not to be considered a social good?

Interestingly, none of the witnesses today has argued that abortion is a social good. Dr. Simmons noted that Exodus considered it to be a social evil, and most of the witnesses today agreed.

In *Roe,* however, the Supreme Court held that abortion was a social good—one of the fundamental rights, as we say, "implicit in the concept of ordered liberty." The lower courts have extended this notion and ruled that exposure of a minor to the religious views of her parents in opposition to abortion is harmful to her.

The National Commission on Human Subjects of Biomedical Research has come up with the notion of the fetus "ex utero"—the fetus which has been born—which is not entitled to the same fundamental rights as that which has been born. The list goes on.

In my view, the Supreme Court has ripped the fabric of the law and has led to the type of fuzzy legal thinking and fuzzy constitutional analysis which has marred these hearings.

Senate bill 158 or a human life amendment, asks Congress to reject the value judgments of the Supreme Court and substitute those which are more representative of the Nation's views. Nowhere in the history of this country, or in that of any other, has

abortion been seen as a social good. It has always been seen as a destructive act.

Thus, it is rational and reasonable to reject the Supreme Court's view. To do so is not an earth-shattering event or a threat to the Republic. What we have is a modest, yet well-supported proposal to return the task of translating social values and morality into legislative policy and turn that task back to the States where it belongs.

There is no consensus on this issue. This is precisely why the Congress should rip the cover away from *Roe* v. *Wade's* theoretical assumption that there is a consensus among the States and recognize that *Roe* itself has no constitutional foundation.

What all the witnesses forget is that *Roe* precludes recognition of the rights of the fetus by the States. It assumes that there is a constitutional consensus to prohibit them from doing so. What S. 158 does is simply to refute that notion. It asks the Court to reconsider.

In my view, the Congress has an obligation to get a reading out of the Supreme Court if it feels that *Roe* is unconstitutional. And I daresay that among the vast majority of constitutional law professors it will be very difficult to find one that supports *Roe* as an expression of any constitutional principle that we know of.

Thank you.

Senator EAST. Thank you, Mr. Destro.

[The prepared statement of Mr. Destro follows:]

## Prepared Statement of Robert A. Destro

Mr. Chairman. My name is Robert Destro. I am employed as General Counsel of the Catholic League for Religious & Civil Rights, and I serve as an adjunct associate professor of law at Marquette University School of Law as well. The Catholic League is a private, non-profit, tax-exempt civil rights organization which has as its purpose the protection of the civil rights of Catholics and all other persons of religion. On behalf of the Catholic League and its thirty thousand members, I would like to thank the Committee and its chairman for inviting me here today in order to address a matter which we at the League consider to be of utmost importance to a proper understanding of both the current debate over S. 158 and the First Amendment implications of the abortion controversy as a whole.

Over the past four years, the legal staff of the Catholic League has had many opportunities to participate in cases dealing directly with the First Amendment implications of abortion-related legislation. We have developed a great deal of expertise on the subject through both the practical experience gained through actual participation in state and federal court trials on the subject, and the research necessary to submit lengthy briefs on the subject in most of the major abortion-funding litigation which has reached the courts in the last few years. We have participated in both the trial and appellate stages of the recently decided Harris v. McRae, which decided the constitutionality of the Hyde Amendment, and we are currently involved in a number of cases raising the free exercise rights of those whose moral views on abortion forbid them to participate in the abortions of others. It is with this background that we welcome

the opportunity to share our views on the First Amendment implications of S. 158 with the members of this Committee.

Under the terms of S. 158, the Congress declares that, pursuant to its authority under the Constitution, "human life shall be deemed to exist from conception, without regard to race, sex, health, defect, or condition of dependency; an [that] for this purpose 'person' shall include all human life as [so] defined".

The intent of this language is clear. By enacting S. 158, the Congress will put the full weight of its constitutional authority behind the most basic of human rights: the right to life. In our view, the effort by Congress to protect life in all its stages and possible conditions is a laudable one. While this bill has caused a great deal of controversy on constitutional and other grounds, these hearings have served to provide the Congress with a thorough examination of all aspects of the abortion question. The Catholic League has not taken a position regarding the passage of S. 158, but my testimony today should make it clear that we do not feel that the bill raises any problems under the First or Fourteenth Amendments.

The involvement of the Catholic League in abortion-related issues has largely been limited to those in which the religious freedom rights of inviduals has been threatened. Perhaps the most insidious of the threats to which the League has successfully responded in every court in which the issue was argued, is the theory that legislation which is protective of the rights of the unborn is unconstitutional as an "establishment" of religion.

The argument takes several forms, several of which have been

used quite effectively by witnesses who have opposed S. 158 before this Commmittee. The first is what one might describe as the "Congress should not decide moral issues" argument. When pressed, its proponents will argue that it is based on the First Amendment's prohibition against Congressional "establishments" of religion. In essence, this argument holds that where reasonable minds may differ on public policy issues which turn on moral judgments, the legislature should refuse to take a position.

It should be obvious at the outset that this form of argument is jurisprudentially unsound. First, it ignores the fact that reasonable minds can, and do, differ on nearly every issue of public policy which has moral overtones. Capital punishment, sentencing for violent crimes, civil rights legislation and matters of war and peace are but a few of these issues. More importantly, however, a refusal to confront an issue of social justice or morality is a decision to take a stand on the issue: it simply allows someone else to define what it is. In the case of those who oppose S. 158 on the grounds that Congress should not make such choices, that "someone else" is the Supreme Court. Somehow, the argument never seems to address the competence of the Supreme Court to decide the issue. That facet of the controversy over abortion is simply assumed.

The other form of the argument is more difficult to describe, but it is infinitely more dangerous. It rests upon dictum which appears in the Supreme Court's decision in Lemon v. Kurtzman, 403 U.S. 602 (1971) and can be characterized as the "divisiveness doctrine". Its proponents argue that where a law engenders political controversy which is divided along religious lines, the Courts should carefully scrutinize the legislation to determine whether or not it has a "secular" purpose. In theory, the argument is appealing. In practice, however, it is appalling, and

the Catholic League has spent considerable time and resources seeing to it that it has been rejected in every court in which it has been raised to date.

The proof of such a claim is rhetoric, and the target is usually Catholics. Whether it is the rhetoric of the member of Congress giving a speech on the floor, the constituent who writes an impassioned letter in support of a bill, or the priest who gives a sermon on the moral aspects of the issue from the Sunday pulpit, all is suspect if it can be proved that "religious" beliefs are the basis of the position. Congressional mail has been opened and reviewed for the courts, sermons in Catholic churches have been monitored and summarized for the courts, and citizens have been cross-examined to determine whether their religion influences their politics.

Under this theory, a legislative response to political pressure from constituents whose motivation is "religious" opposition to abortion may be challenged on the grounds that it is really a "religious" law which "establishes" a single moral principle for society. Such arguments were used in the abortion-funding and other abortion-related litigation, and one may reasonably predict that the argument will form a part of an attempt to test this legislation in the courts should it become law. It is for this reason, among others, that the Catholic League welcomes the opportunity to address the First Amendment myths which have caused so much confusion in the public debate over abortion.

I. Law and Morality

Throughout the course of the hearings to date, this Committee has heard the repeated assertion that the essence of the abortion question is a moral one which the law cannot resolve. Other witnesses have contended that the bill

simply resolves legal doubts about the constitutional protection of the unborn by reference to commonly accepted scientific principles. In our view, both sets of witnesses are missing the fundamental point that all law reflects moral choices, regardless of its scientific underpinnings, and that neither the Committee nor the Congress need defend itself for taking a firm stand on this issue.

To the impartial observer, the abortion controversy is, at bottom, an issue of fundamental public policy. It involves such basic issues as the definition of human life, its comparative worth and abstract "value", the socio-legal significance of birth, the role of the judiciary as arbiters of social and moral controversies where no clear societal consensus exists, and the role of morality (whether collective or individual) in the formulation of public policy.

One could write a book on each of these topics, and some of the witnesses who have testified to date have written books addressed to one or more of them. What is clearly true from an examination of these and other sources which discuss the topics is that the potential for resolving such basic policy questions rests, in large part, upon the ability of the participants in the debate to accept and, ultimately, to internalize a system of shared values which would influence their final policy choices. Consensus is rarely unanimous, and all policy choices which reflect the values of society can be described as attempts to resolve "moral" dilemmas. Law cannot really resolve the abstract value questions inherent in human rights policy, and it serves no purpose to pretend that it can: it simply makes a choice. It is dangerous, in our view, to pretend that law and morality are unrelated. Law and morality are, to a large

degree, mutually dependent, but they are not the same.

In the case of the abortion controversy, much of the confusion over the proper role of the law relates to a misperception of the respective roles of law and morality in the formulation of a public response to the issue. It has been clear for quite some time that no firm consensus regarding the basic value to be given to fetal life exists, but this has not arrested the development of a judicial policy which assumes that it has no value. There is no First Amendment reason to assume that Congress cannot reject it in favor of its own policy on the subject.

In Roe v Wade, 410 U.S. 113 (1973), the Supreme Court took great pains to identify the positions of major religions and interest groups on the permissibility of abortion, but it simply denied any need to address the issue from a moral perspective. The Court stated:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer. Roe v Wade, 410 U.S. at 159.

The difficulty with the Court's reasoning, however, was that the nature of the controversy over abortion would not let it escape a decision on the issue of the ultimate social morality of abortion, no matter how hard it tried. It will be equally impossible for the Congress to do so. The Supreme Court's decision in Roe expressly recognized that opinions differed widely on abortion's permissibility, and that those opinions rested on both moral and pragmatic considerations. The Court's fundamental mistake was its futile attempt to make its its judgment on the issue a matter of basic constitutional policy without regard to either the theoretical nature of that policy as a reflection of a

societal consensus on a matter of fundamental public importance, or the practical reality that it had "taken sides" on an issue it was inherently unsuited to decide. The Court's preoccupation with the differing views of the major religions, medical and legal organizations, and schools of thought, taken together with its express disavowal of any need to resolve the moral issue, simply confirms the fact that the Court itself recognized (whether consciously or not) the impossibility of resolving the legal questions presented without also appearing to resolve the underlying moral issues as well.

Since the division in society over abortion is over the relative value of prenatal human life in those instances where the mother decides that she no longer wishes to be a mother, the Court could not avoid the value question which, it claims, had confounded medicine, philosophy and theology. By permitting itself to reach the merits of the case, the Court simply appointed itself as the "final word" on the subject, and its answer was simple:

> ...[W]e do not agree that, by adopting one theory of life, [the state] may override the rights of the pregnant woman that are at stake. . . . (410 U.S. at 162)

The inherent difficulty with such a holding, however, is that it blithely ignored the raging controversies it had just recognized. By misjudging the opinion of the electorate on the topic and attempting to settle an inherently political question of public morality by judicial decree, the Court simply assured that all three branches of the government would be forced to address the issue until the time when the most representative branch of the federal government -- the Congress -- reached a consensus. But the truly insidious and misleading nature of the Court's decision, cannot be fully appreciated unless one considers the tenor of the arguments against <u>any</u> legislative response to

its holding that abortion is a social "good" which is to be counted among the fundamental rights of humanity.

The essence of the argument that Congress is not free to reject the Court's decision and make its own value judgment on the abortion question rests on an explicit assumption that once the view of one faction in the controversy over abortion is accepted by Supreme Court decree, the other view is constitutionally eliminated as an acceptable basis for future policy decisions on the same subject. (e.g. the oft-repeated argument that the Hyde Amendment was unconstitutional prior to McRae v. Harris). The Constitution itself says nothing about either abortion or privacy. In effect, the right to abortion is founded upon an inference which may be accepted or rejected without doing violence to the letter or spirit of the document. By contrast, the Constitution has a great deal to say about race. The message is clear, and neither Congress nor the Court is free to ignore it.

Now that the right to abortion has been established as a matter of constitutional policy, the view that abortion is socially acceptable and should not be discouraged has taken on an aura of legal "secularism" quite distinct from its essentially value-based genesis. This aura conceals the true nature of Court's policy choice on abortion. It serves as the foundation of the argument that the Congress has no right to substitute its own value judgments for those of seven members of the Court, and ignores the Court's willingness to impose its notions of fundamental social and moral values on an electorate which had not yet come to grips with the issue.

The fallacy of all the First Amendment arguments against the enactment of a bill such as S. 158 or a constitutional

amendment to prohibit abortion is that a view that prenatal life may be terminated by abortion when there are sufficiently compelling justifications rests just as much on a pure value judgment or moral choice as the opposing view, which holds that prenatal human life is entitled to the same constitutional protection as that which is already born. As a matter of judgment, the two views merely reflect a different weighting of the respective interests of the mother, the unborn, and society as a whole.

## II. The Interplay of Law, Morality, and Ultimate Value Judgments: Does S. 158 "Establish" Religion or Otherwise Violate Either the Letter or Spirit of the First Amendment?

### A. Introduction

Given the divergence of value systems which inform contemporary social policy choices, it is difficult to argue from either a conceptual or practical basis in First Amendment jurisprudence that the adoption of any particular legislative or judicial approach to the abortion issue would violate the religion clauses of the First Amendment. The nature of the basic social issues involved -- the value of prenatal life and the extent to which a woman can exercise control over an existing pregnancy -- make it impossible for government resolve the conflict among the the divergent religious, moral, philosophical and scientific opinions on the subject. The argument over whether it should is pointless. The purpose of law is not to resolve moral questions, but to set standards for conduct. The only question is what those standards shall be. A decision to declare that a fetus shall or shall not be a full person under the law is not one which can resolve the moral issues recognized by nearly every witness who has testified here, and the decision to permit a woman to destroy that fetus at her option without regard to the interests of others, including the

unborn child, simply complicates them.

A decision-maker, whether a member of Congress or a Supreme Court justice, must choose which set of interests are to be preferred in the circumstances under consideration. There is no other option. Such decisions necessarily involve moral judgments, and the position ultimately chosen necessarily reflects the values of the person who adopted it. There is no need to apologize for it, or to defend the process.

B. Abortion Legislation and the Establishment Clause: Policy Choice or Religious Preference?

In the recently decided Harris v McRae, 100 S.Ct. 2671 (1980) the Supreme Court was called upon to decide whether Congressional refusal to provide federal funds to defray the cost of abortions for Medicaid-eligible women was of the nature of the unborn. It was argued, as has been implied by witnesses before this Committee and others, that Congress may not adopt a view of the unborn that the Supreme Court has rejected: that they are human beings entitled to constitutional protection. The plaintiffs in McRae argued that such a perception of the unborn was inherently "religious" because it could not be proved through science or reason, and that since the establishment clause of the First Amendment prohibits Congress from preferring one religious view over another, the Hyde Amendment was unconstitutional. The arguments of several of the witnesses who have testified before this Committee, medical as well as legal, implicitly press this view. In the view of the Catholic League, the argument is ridiculous.

The difficulty with such reasoning is that it assumes, wrongly, that one point of view in an inherently value-laden controversy can be "religious" while the opposing view on the same subject is not. If one examines the broad definition of the term "religion" adopted by the courts in other contexts, it can

immediately be seen that that both points of view on the question of abortion are inherently value-laden, and, therefore, "religious". To argue that Congress cannot adopt the policy position it prefers by majority vote of both houses because it has "taken sides" in an inherently moral controversy proves nothing; for the same argument would necessarily apply to the adoption of the contrary policy position by the Supreme Court.

In Harris v. McRae, the Supreme Court's decision implicitly recongnized this problem and left its resolution to the Congress:

> Although neither a State nor the Federal Government can constitutionally "pass laws which aid one religion, aid all religions, or prefer one religion over another," Everson v Board of Education, 330 U.S. 1, 15, it does not follow that a statute violates the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions." McGowan v Maryland, 366 U.S. 420, 442. That the Judeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny. Ibid. The Hyde Amendment, as the District Court noted, is as much a reflection of "traditionalist" values towards abortion, as it is an embodiment of the views of any particular religion. (citation omitted).
>
> * * *
>
> It is not the mission of this Court or any other to decide whether the balance of competing interests reflected in the Hyde Amendment is wise social policy. If that were our mission, not every Justice who has subscribed to the judgment of the Court today could have done so. But we cannot, in the name of the Constitution, overturn duly enacted statutes simply "because they may be unwise, improvident, or out of harmony with a particular school of thought." (citations omitted) Rather, "when an issue involves policy choices as sensitive as those implicated [here] . . ., the proper forum for their resolution in a democracy is the legislature." [citations omitted] McRae v Harris, 100 S. Ct. at 2693.

The holding in Harris makes it clear that the Court was not prepared to invalidate a legislative preference for the value judgment it had rejected in Roe v. Wade simply because that judgment was in accord with the tenets of religions which would deny that legalized abortion is morally acceptable as a matter of

public policy. For the Court to have held otherwise in Harris would clearly have exposed the decisions in both Roe and Harris to the effect that abortion is, and remains, a constituional right (i.e. that it is a social "good") to precisely the same criticism.

Thus, one arrives in the same position as when the analysis began: with the notion that when the issue is one which entails resolution of existential questions to which neither science, theology, nor reason can give an answer, one is faced with an issue in which religion and morality will, of necessity, be intimately involved on both sides of the controversy. Analysis of the rhetoric of the participants in the debates -- to the effect that their opponents are attempting to "impose" their moral choices on the body politic -- then shows that the charge is true, but irrelevant. The nature of the controversy itself, like that over slavery and equal rights, leaves little choice: either access to abortion is a "right", or it is not. The Supreme Court recognized as much in Roe when it conceded that its decision rested on a holding that the unborn have no rights, and it serves no useful purpose for this Committee to debate what should be obvious: there is no middle ground on this issue. Congress can, and should, make a choice if it can reach a consensus. That, we submit, is its constitutional role.

Thank you for your attention.

Senator EAST. We will turn to a few minutes of questioning, and then turn it over to our distinguished colleague here.

I regret that time continues to move in on us. We have had six excellent panelists here, all of them giving us much food for thought. I will quickly concede that we will not be able to do justice to all of the fine commentary that has been made this morning.

I might generalize for a moment, I am assuming that the purpose of this panel—and I like to think it is a fair and reasonable one—is at least to give us some introduction to this question of: one, whether there are first amendment problems here and, if so, of what nature; and, second, to suggest that there are, obviously, varieties of religious and secular opinion on this matter of abor-

tion. Perhaps, if nothing else, we have accomplished that by assembling this very distinguished group.

I am at a loss to know exactly where to begin. There is so much I would like to ask and to comment upon, and time will not allow, and I do not wish to indulge the patience of my colleague, let alone you and the audience, to go on ad infinitum with it.

I would like, without at the moment really asking a question, to state for a moment my summary in response to what has been said here this morning.

I will plead guilty: I would have to agree with Mr. Destro on this matter of the first amendment problem. As a lawyer and as a Ph. D. in political science—I am not attempting to pull rank here—I fully appreciate that reasonable minds trained in the law and in political science can disagree over many things. I cannot for the life of me see a barrier to a law dealing with abortion, whether it be one way or the other, that presents a religious problem within the meaning of the first amendment, be it the establishment clause or free exercise on the contention that there are religious implications here, religious values implied, or whatever. Well, that is simply true, I would contend, of all law. All law would then fall on the basis that you some way or other see implied the Judeo-Christian ethic in some way, and hence it is fatally flawed within the meaning of the first amendment.

Again, I do not wish to make light of the point, and, again, I concede fair-minded and reasonable-minded constitutional lawyers disagree over many things. I am simply stating one man's conclusion. But in terms of my experience and background in this area, I do not see that there is a barrier in terms of the establishment clause or the free exercise clause, again, because that would fatally flaw any laws that we pass which have any implication of religious value implied.

It is not really a legitimate constitutional concept, and I would be incredibly surprised if the Supreme Court—even the current Supreme Court—would accept such a premise.

Are we not then driven to the realization, which to me is a commonsense observation, that we have competing values here—religious, secular, humanistic? I concede that.

But then, this situation occurs often in great public debates on very important policy questions, be it women's rights, the rights of unborn children, the rights of blacks, and so it goes—this is not new to us. Sure, any political scientist or lawyer understands that all policy questions ultimately involve competing values. That is what we have here. That does not appal me or frighten me.

I think the good thing about it is that we are free in a democratic society to have the deliberative process of the legislative Chamber, as we are here, to pursue these competing values.

Ultimately, I suppose we all make our own decision in this area. You all have, and I guess I am free to do likewise, and everybody in this room is free to do it.

Again, I guess I am taking my few minutes to be a part of the panel—I want to be a panelist today.

Senator BAUCUS. May I ask you a question, too?

Senator EAST. Yes, you may. [Laughter.]

In terms of the values involved here, it seems to me we have been lectured by some that we ought to be very careful of imposing our religious values, and then they proceed to tell us precisely what their religious values are, and they are ensconced in *Roe* v. *Wade,* and we ought to let that stand.

We all are subject to that criticism—I would agree—we all have a policy value preference in this area, and we are trying to find out what that is and where might be an appropriate point to draw the line.

It strikes me on this matter of value that in the Western tradition—in the Judeo-Christian tradition which you are all focusing on, but I will broaden it out beyond the humanistic tradition in the West—it seems to me you could make a compelling brief that the sanctity in life and the dignity of life is, perhaps, the highest order of value, and it is subject to no other value in terms of viability, convenience, privacy—a fascinating problem of political theory.

### IMPORTANCE OF SANCTITY AND DIGNITY OF LIFE

But if I had to pick one thing out of the Western tradition and elevate it to the first principle of the moral and ethical base of Western thought, religious or humanistic, it would be the sanctity of life and the dignity of life.

Many will say that that does not quite solve the problem. Perhaps not. But I do not think it is a totally frivolous position to take in trying to slice into the value problem that you face in this area of abortion.

We are told that Baptists support abortion, we are told Catholics support abortion, we are told people of the Jewish faith support abortion, some do not, and Presbyterians apparently do. But yet we all know there is great diversity here.

If I might quote here, I would quote Mother Teresa who was in town recently. She said:

> God created the child, and in destroying the child we are destroying love; we are destroying the image of God. Abortion is a terrible thing and, I fear, the greatest destroyer of peace in the world today, the greatest destroyer of the family. The world was afraid for one more child to be born. The world was afraid to educate one more child. Instead, we need another car or something.

Mother Teresa, whose Missionary of Charity cares for hundreds of unwed mothers, is fighting abortion by encouraging wider practice of adoption. I do not find that a half bad position on this issue—and I am not even a Catholic. I am not saying you have to buy it.

But what she is saying is that there is a continuum of life from conception to death, and it is a sacred thing, and we ought to look upon it with great reverence and great sanctity.

And I would say in defense of Mother Teresa that is not the exclusive province of orthodox Catholicism. If it is, I commend them for it personally. But I would say you can find in Christendom, in Judaism, and in the whole humanistic tradition of the West an idea that is not totally at odds with that.

What we are talking about is not frivolous, and I would say there is greater agreement upon this than one might concede. At least it is a valid point of view that I think deserves to be expressed in this country, and I wanted to take my few minutes here to express it.

What I would like to do is to ask several members of the panel here, whoever might wish to comment upon it, whether it be Mr. Thompson, Mr. Siegman, Ms. Ruether, or Reverend Simmons—Mr. Destro and Mr. Siegel, I think I am comfortable with what you are saying.

But are the other four of you saying that abortion should be on demand as a form of birth control, with no limitations until the time of birth? If that is what is being said, fascinatingly, that goes beyond *Roe* v. *Wade*. *Roe* v. *Wade* conceded during the final trimester that the State might conceivably find a compelling reason to intervene on behalf of the unborn.

I did not find in the testimony of the four of you any limitation upon the idea of abortion on demand as a form of birth control from the time of conception to birth—at no point is the life of the unborn entitled to any way, shape, or form of protection, except upon the volition of the mother. Is that where we are, Mr. Thompson?

Mr. THOMPSON. Mr. Chairman, that certainly is not my position, nor is it the position of the general assembly of the United Presbyterian Church.

We feel that the decision is the decision of the mother, but we think that that decision must be informed by the advice and counsel of her religious advisers, it must be informed by a consultation with other members of her family. It is her decision, but there are limitations on it which should not be imposed by law. The limitations relate to the context within which that decision is made.

Senator EAST. But if the law imposes no limitation, then, in fact, the unborn child has no right at all under the law from the time of conception until birth. Whatever limitations there are you say are strictly whatever might be concluded between the woman and the doctor or whatever, but the law imposes no sanction—is that what you are saying?

Mr. THOMPSON. That is correct, and I would like to elaborate just a bit. Let me say that the position which I have taken here today relates far more to the establishment clause than to the free exercise clause.

It is my concern that a particular assumption about when human life begins and when personhood attaches should not be imposed by legislative fiat.

Senator EAST. What about judicial fiat? Clearly, a decision has been made by judicial fiat here.

### DISAGREEMENT OVER COURT DECISION

Mr. THOMPSON. With due respect, Mr. Chairman, I totally disagree with the conclusion that you and the two panelists have expressed.

The result of the decision of the Supreme Court in *Roe* v. *Wade* is not to impose any position, any assumption, any conclusion, upon anyone. It leaves the individual free to exercise his or her own religious convictions as to when human life begins, as to when personhood begins.

Senator EAST. I vigorously disagree with you. They have imposed a very real value judgment. The right of privacy is superior to the right of the unborn child to live. That is a very fundamental value

judgment. They have imposed it by edict and not even on your concern about unanimity or consensus. They had two dissenters out of nine which, in terms of building great consensus, is not——

Mr. THOMPSON. Mr. Chairman, I do not wish to argue——

Senator EAST. Well, that is what we are here for.

I am simply trying to find out at what point between conception and birth would you accord the unborn a right under the law, the Constitution of this country?

Mr. THOMPSON. I would not.

Senator EAST. At no point?

Mr. THOMPSON. I would not.

Senator EAST. All right. That is what I wanted to know.

Mr. THOMPSON. Now let me say why.

Senator EAST. I know why. You have already indicated, you simply feel that there is nothing there to protect.

Mr. THOMPSON. I would not go that far.

Senator EAST. That is, we both have an opportunity to state our value preference in here. I wanted to make sure I understood your conclusion because at no point in your analysis did I note the slightest evidence, even a scintilla, that you might some way or other protect the right of the unborn at any point during the time of gestation.

Mr. THOMPSON. Let me tell you what my concern is. I agree that there are values which are here in conflict, but the statute that you are considering, the proposed bill, does not deal with those values. It deals with an assumption which is prior to the establishment of values, and that assumption has, in my judgment, a basic religious and theological content.

Senator EAST. But that is yours, you see.

Mr. THOMPSON. I am not putting one forward or proposing that it be imposed.

Senator EAST. You were telling us what the Presbyterian position was on this.

### PRESBYTERIAN POSITION ON ABORTION

Mr. THOMPSON. The Presbyterian position is——

Senator EAST. At least as you understood the Presbyterian decision——

Mr. THOMPSON. That the position of the Supreme Court allows various groups who have differing positions regarding this basic assumption to realize those in their own lives and decisions.

Senator EAST. But it does not accord—and this is the nub of the problem—it does not accord the right to life of the unborn at any phase. It only suggests the possibility it might exist during the final 3 months, but even that is not guaranteed.

Mr. THOMPSON. Those who believe that are free to behave in that way consistent with that belief.

Senator EAST. But the nagging problem here is, those who believe in the sanctity and the dignity of life as the ultimate first principle of the Western tradition do not look upon the right to life as so easily negotiable, simply dependent upon what the family might say.

For example, the senile at the other end of the spectrum of life—old, weak, feeble, unable to take care of themselves, no longer

viable. Would you leave that decision as to whether they ought to exist—euthanasia, I am talking about—would you leave that up to the family to decide?

Mr. THOMPSON. No, sir.

Senator EAST. If you said: "Well, we ought not to protect that life because we would be imposing religious values" there is a whole continuum of life here from conception to death, and we are trying to figure out at what point you begin to protect it and what point you stop protecting it.

Certainly at the end of the spectrum of life, I doubt if there is anyone here on the panel who is going to say that the senile ought to be put away because they are inconvenient, because it is a matter of privacy of the family, it is trouble.

I had a senile mother from the time she was 75 to 82, and she got inconvenient from time to time. I do not know anybody that ever came up to me and said: "You know, you ought to think about doing Momma in."

It is not a frivolous point to say that there is a continuum of life here, you want to protect it, and at what point do we begin, and at what point do we end? And I do not find any willingness here to concede that from the time of conception to birth you will give any right under the law to the unborn.

That is the nub of it—the right of the unborn, that ultimate right to life. It is totally absent here. It is a matter of convenience, it is a matter of privacy, it is a matter of feeling, hunch, or whatever what might strike one's fancy. It is colored in awfully nice language in terms of freedom of choice and not imposing religious values.

But I will tell you what it is doing in all of this: It is stripping away any notion of the right to life of the unborn from conception to birth, and there are an awful lot of people in this country—and I will put myself in that category—that are deeply troubled with that as a final, ultimate, moral, ethical judgment on this issue.

When I hear theologians giving me no help and no assistance in this area, I wonder if their theology is not as bad as their constitutional law.

Ms. RUETHER. Sir, I do not think you heard anything that I said in my testimony. I spent my time very much defining changing ethical viewpoints in terms of stages of development and that that was very clear and very obvious in my testimony.

Senator EAST. Would you accord the unborn a right under the Constitution at any point prior to birth, I mean in a definitive way? At what point would you do it then? I did not hear that.

### DEVELOPMENTAL STAGES STRESSED

Ms. RUETHER. I think I said very clearly in here, sir, that there are developmental stages that need to be taken seriously—that one cannot talk about human personhood before there is any kind of developed body that is capable of bearing the distinctively human functions, and that is clearly the case in the first 3 months.

That is where I think it is quite appropriate to regard the decision as an open decision, not a neutral decision—still a conflict between evils, but nevertheless where the decision for abortion can

be regarded appropriately as a lesser of two evils. That is a clearly developed ethical principle.

In the second trimester, I would regard it as a changing kind of situation—the fetus is developing toward viability. Here, again, another kind of principle of the conflict between the mother's life and the fetus becomes a more strict principle but nevertheless would allow the possibility of abortion on that ground but nevertheless allowing for the possibility of saving the fetus if it is, in fact, delivered live. And that should be the absolute principle in the third trimester.

I think that kind of pattern is, in fact, the pattern we presently have. It is an operable pattern. It does not force anyone to have an abortion in the early period, but it does not impose the kind of dogma of human personhood existing from conception, which is clearly not accepted by vast numbers of American people.

The latest poll indicated that only 10 percent of American people accord with the belief that human personhood starts at conception. So you are imposing a very small, radical minority position on the entire American electorate. It will not wash, it will be chaos, and I suggest it will be repealed very much as the temperance amendment was appealed.

Senator EAST. I would simply say that there is a public dialog on it now, but you could use the same rationale on *Dred Scott* in 1857 that there was not consensus on it and so you ought to leave it alone, or on *Plessy* v. *Ferguson*. No one has a monopoly on virtue or wisdom here.

When the Court makes profound policy judgments in a free country, people have the right to try to find alternatives to them, as they did with *Dred Scott* when they said the black was just a piece of property, or when they said in *Plessy* v. *Ferguson* that "separate but equal" was all right.

I doubt if very many of you at that time would have said:

> Now, let's not quarrel with the Supreme Court. Let's not impose now our own moral and religious values. Just let it lie, because whatever the Court says, that is all right.

What you are really doing is defending your political turf. We all do this from time to time. You like the result of *Roe* v. *Wade*.

Ms. RUETHER. I think that is incorrect, sir. This bill would impose one view on everybody.

A position which allows abortion in the first trimester does not impose that on anyone who disagrees with it. That is a very fundamental point.

### RIGHT TO LIFE OF UNBORN: AT WHAT POINT?

Senator EAST. Again, back to my point about at what point you would protect the right of the unborn, with that ultimate right to life which all the rest of us have, even through senility and to death—I gather you are saying you like the result of *Roe* v. *Wade*? You would begin possibly to protect it during the final three months? I am just trying to get where in the chronology it is that you say: "Yes, at this point, the unborn has the right to life."

Ms. RUETHER. If the fetus is delivered live and viable, then it must be protected at that point.

Senator EAST. But only at the point of birth, then, would you protect it, not prior to then?

Ms. RUETHER. In an abortion in the last three months, you are talking about a premature delivery. That should only be allowed in the case of a conflict between the life of the mother and the child, and the child should be preserved if it is live and viable at that point.

Senator EAST. What if it is not viable? What if, at the time of birth, it is not viable?

Ms. RUETHER. We are talking about being dead, sir. You cannot preserve somebody's life if they are dead.

Senator EAST. But let me just tell you something about viability. Viability old people do not have, and I am a disabled person, and I want to tell you something—viability is a very, very flexible kind of thing. If sanctity and dignity of life is dependent solely upon viability, I am deeply troubled with that, too.

Ms. RUETHER. That is not what I am saying, so you are just confusing the issue.

Senator EAST. You used the word "viability" to say that you thought at the time of birth, if it were viable, then you would defend it. Is that what you are saying?

Ms. RUETHER. If it were delivered live is what I meant, sir.

Senator EAST. Pardon?

Ms. RUETHER. If it were delivered live, it must be preserved at that point.

Senator EAST. I want to get this for the record and in my own mind. You are saying then, between the time of conception and birth, there is no point at which you would protect the right of the unborn to life.

Ms. RUETHER. I have continuously said something quite different which you are unwilling to listen to, sir. It is in the testimony, it is in my oral report, and it is in my clarification.

Senator EAST. You said at the time of birth, when it was viable, then you would protect it.

Ms. RUETHER. No; that is not what I said.

Senator EAST. Well, maybe we are like two trains passing in the night.

Ms. RUETHER. We sure are.

Senator EAST. Reverend Simmons?

Reverend SIMMONS. Mr. Chairman, may I suggest———

Senator EAST. Let me ask you, when would you protect it? That is what I want to know. I want to know when would you protect it, because that is the problem we have got here.

Reverend SIMMONS. Mr. Chairman, may I suggest that I was called to this panel to respond to the bill that is presently before us.

Senator EAST. That is right. And this bill says life would begin at time of conception, and we are trying to find a mechanism for protecting that life.

When would you protect it?

Reverend SIMMONS. I have a faculty address which I presented on that very question.

Senator EAST. Without objection, it will be inserted in the record.

Reverend SIMMONS. But I would like to bring us back to a more substantive question that pertains to all that you have been saying.

Senator EAST. But this is a very substantive question: When would you protect it?

Reverend SIMMONS. I thought I had the floor.

Senator EAST. Pardon?

Reverend SIMMONS. Do I have the floor?

Senator EAST. Yes, you do, and I would like to know when you would protect it. You have the floor in terms of responding to my question. If you would answer my question, when would you protect it?

Reverend SIMMONS. Let me indicate that the question, sir, is: What are the proper constraints that a society should use to protect the value which it attributes to generative life? We are dealing with the gestation process.

I would agree with you, and I think most people in this room would agree that there is a continuum between conception and death. However, we would seriously disagree about the moral and religious value and thus the moral claim made upon society and those whose responsibility it is to protect those instances along that continuum about the various points along the continuum. That is your question?

Your question is: At what point in the continuum would a developing fetus have the same rights as the woman carrying the fetus? Now, is that your question, Mr. Chairman?

Senator EAST. I have stated it, Reverend, as well as I can. I would like to know at what point prior to birth, if any, would you protect the unborn and say that it had a constitutional, legal right to be protected. If we were before a court of law, I would ask the judge to instruct you to answer the question.

CALLS FOR CLARIFICATION

Reverend SIMMONS. Yes, sir. And I would insist that there must be clarification before there can be declarations. I do not find my position or that of my colleagues represented in what I regard as your polemical caricature of what we are saying and thus the clarification is needed.

Might I point out that by my reading of *Roe* v. *Wade* the Supreme Court said, after the moment of viability—and may I parenthetically enter the fact that I agree with you that it is a very flexible concept and thus not very meaningful or useful—even so, the Court said, at the point of viability, whenever that it—whether it is at week 20 or 28—the fetus' right to protection under the law has sufficient moral weight as to require real threat to the life of the woman for termination. Now, is that not right, Mr. Chairman?

Senator EAST. You are using the standard of viability, which you are entitled to use.

Reverend SIMMONS. And the language that was used there was that viability has the moral equivalent of birth.

Senator EAST. You like the standard of viability. I am trying to understand what you personally, as one reverend and one commentator, would prefer because this is the problem a legislature is faced with now.

Reverend SIMMONS. That is what I am doing, Mr. East.

Senator EAST. We cannot simply say that it is a matter of process and go off, drifting into the blue. At some point, you have to say: "We think the right of the unborn under the Constitution is established." And I am just trying to get from this panel of experts at what point that might begin or what mechanism we might use to determine it. You like the viability standard, I presume?

Reverend SIMMONS. I am saying that in *Roe* v. *Wade* the viability standard was, in fact, used and invoked, so that women are not free to terminate a pregnancy for reasons of convenience after viability. Is that not right, Mr. Chairman?

Senator EAST. I think you are right in theory Reverend. But do you see my answer? And, again, it is competing values, and I shall be silent.

Reverend SIMMONS. Now I am willing to answer the question.

Senator EAST. But I find viability a very troublesome standard for determining right to life because, for old people, it would do them in—they are not viable, if you mean the capacity to care for yourself independently.

Think of all the young babies after birth deformed, crippled, and so on, and so forth—blind, deaf, with cleft palate. What do you mean "viable"? The capacity to do what? To take care of themselves?

No one from the time of birth—just forget the preborn—is totally viable. It is an abstraction, and it does not exist in the real world. To believe that the sanctity and the dignity of life, the greatest right in the Western heritage, humanistic or religious, is dependent upon viability I find morally and ethically difficult to accept.

There may be a good case for abortion on demand as a matter of birth control; I just have not heard it.

Reverend SIMMONS. I am glad you used that phrase again—sanctity of life—because again we need very real clarification. The issue is not "sanctity of life," the issue is the rights that pertain to persons. Is that right, Mr. East?

Senator EAST. The Constitution, Reverend—and here I will pull rank on you—makes no distinction now between life and persons. That is yours, but there is no such thing in American constitutional law. "Life" and "personhood" and "human being"—they are used synonymously, interchangeably, so you make a distinction without a difference.

Reverend SIMMONS. That is understood, but when you talk about "sanctity of life" in the Judeo-Christian tradition, you are talking about the worth of persons. When you refer then to life in the beginnings of the gestation process in terms of animation, you then must move to the metaphysical and abstract speculative theologies to which theologians have been accustomed for many centuries of attributing an ultimate but premature value to a fertilized ovum.

A fertilized ovum cannot, by any standards of definition, have the same attributes or the same legal standings as a woman about whom there is no question pertaining to her personhood or her rights under the Constitution to life, liberty, and the pursuit of happiness.

That is precisely why I have indicated in my response that we are dealing with speculation. As the Supreme Court has repeatedly

indicated, the Court must deal with persons, it is not to deal with speculative reason or with metaphysics.

When we try to talk about human life synonymously with personhood, synonymously with fertilized ovum, we have not only lost the precision of language, we have moved now to an abstraction rather than to the concrete reality of persons in this society.

Senator EAST. I appreciate your fine thoughts. I am going to turn it over to Senator Baucus.

I know many fine Baptists in the South and in North Carolina who would vigorously disagree with you.

Reverend SIMMONS. I agree, and I know many of them, too. Since I was in North Carolina for 8 years, I know many of them.

Senator EAST. Senator Baucus? My apology for going on.

Senator BAUCUS. I thank the chairman.

I do not know that there is much that I can add, but I would like to ask Mr. Destro a couple of questions.

I am curious, Mr. Destro—you said you were speaking on your own behalf, and not for the league. Is there any reason why the league has not taken a position on this bill?

Mr. DESTRO. The Catholic league does not take positions on pending legislation in any event. It is a tax-exempt organization and would not take an advocacy position on this bill, whether it should be passed or not.

The only position it would take is that it is not unconstitutional, in our view. The decision is up to the Senate.

Senator BAUCUS. Are there any other Catholic organizations which have a contrary view—that is, that the bill is unconstitutional?

Mr. DESTRO. I believe that is the case.

Senator BAUCUS. Do you know which organizations those are?

Mr. DESTRO. I understand that the general counsel of the U.S. Catholic Conference has expressed the opinion that the bill is unconstitutional. I happen to believe that the opinion is not very good legal reasoning.

Senator BAUCUS. Mr. Chairman, I would place in the record at this point the memorandum from Wilfred Caron, general counsel of the U.S. Catholic Conference. He concludes that the bill is unconstitutional.

Senator EAST. Without objection, it will be inserted at this point.

[The memorandum referred to above follows:]

UNITED STATES CATHOLIC CONFERENCE

Office of General Counsel April 8, 1981

MEMORANDUM

TO: Father Bryce

FROM: Wilfred R. Caron

RE: HUMAN LIFE BILLS, S.158 and H.R.900

---

INTRODUCTION

In my memorandum to you dated March 16, 1981, I stated that a substantial question existed as to whether Congress has constitutional authority to define "person" in the manner and for the purposes contemplated by the captioned Bills, in light of the holdings in Roe v. Wade, 410 U.S. 113 (1973). After consideration of the relevant authorities, for the following reasons I am persuaded that the Congress is clearly not so empowered.

Roe v. Wade

Whatever else may be said of the majority opinion in Roe v. Wade, it is most certainly a comprehensive treatment of the issues which unequivocally enunciates the following principles:

1. A pregnant woman has a qualified right to terminate her pregnancy, which is protected by the Fourteenth Amendment;
2. That right can be subordinated only where there is a countervailing, compelling state interest;
3. The state's legitimate interest in protecting prenatal life does not derive (a) from any status

of the unborn as a "person" within the meaning of the Fourteenth Amendment, or (b) from any theory concerning the commencement of human life before birth; rather, it is grounded solely in the state's interest in protecting the "potentiality" of human life; and

4. Until the fetus is viable, the state's interest in protecting the "potentiality" of human life is not sufficiently compelling so as to warrant the state's abridgement of the mother's rights.

Regarding personhood under the Fourteenth Amendment, after extended review of relevant legal, medical and religious history (including conflicting views as to when human life begins), the Court held squarely:

> "All this, together with our observations, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person' as used in the Fourteenth Amendment, does not include the unborn."

410 U.S. at 158. Regarding the legal effect of extra-constitutional determinations of when human life begins, the Court declared:

> "In view of all this [legal and religious history], we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."

410 U.S. at 162. Having made these determinations, the Court nevertheless held:

> "We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

410 U.S. at 162-63. Clearly, the Court's determinations were a product of a legal analysis which explicitly and repeatedly

rejected the human "personhood" of the unborn as a proper measure of the rights of the mother, the unborn or the State.

Perhaps the most telling indication of the depth of the Court's holding concerning Fourteenth Amendment "personhood" for prenatal life is the following passage from the majority opinion:

> "The appellee and certain amici argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment. In support of this they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment." (Emphasis added.)

410 U.S. at 156-57. Thus, in the Court's view, the mother's constitutional right necessarily presupposes the absence of Fourteenth Amendment personhood for prenatal life.

Applications of Roe v. Wade

Assertions of a legislative prerogative to impinge on the mother's Roe v. Wade rights by declaring a countervailing policy in favor of the unborn have met the same fate as the claims of Texas in that case. See Doe v. Israel, 358 F.Supp. 1193 (D.R.I.), stay denied, 482 F.2d 156 (1st Cir.), cert. denied, 416 U.S. 993 (1973); Abele v. Markle, 351 F.Supp. 224 (D.Conn. 1972), vacated and remanded for further consideration, 410 U.S. 1417, adhering to previous holding, 369 F.Supp. 807 (1973). Doe v. Israel is particularly instructive by reason of the force of the court's expressions. In that case, a Rhode Island statute which prohibited abortions except to preserve the life of the mother had previously been invalidated by the court after the decisions in Roe v. Wade and Doe v. Bolton, 410 U.S. 739 (1973). In the words of the court, the Rhode Island legislature then attempted "to infuse constitutionality into its heretofore unconstitutional statute by declaring that human life begins at the moment of

conception and that such life is a person within the meaning of the Fourteenth Amendment to the United States Constitution." 358 F.Supp. at 1196. Declaring the unconstitutionality of this enactment, the District Court said:

> "Nor does the Rhode Island legislature have the power to determine what is a 'person' within the meaning of the Fourteenth Amendment. Such a question is purely a question of law for the courts, independent of any power in the state legislature to create evidentiary presumptions. It has always been the Supreme Court that has given content to the term 'person' under the Fourteenth Amendment.
>
> * * *
>
> "It is sheer sophistry to argue as the defendant does that Roe v. Wade and Doe v. Bolton can be nullified by the simple device of a legislative declaration or presumptions contrary to the court's holding. Indeed it is a surprising attempt by one independent branch of government to invade and assume the role of the other. The right of a state to declare an entity does not carry with it the judicial prerogative to determine the constitutional status of such entity.
>
> "Finally, it must be said that the Supreme Court having ruled on this issue, its judgment is the law of this land. Under our scheme of government, it is the Supreme Court, not state legislatures, that ultimately determines the meaning of constitutional guarantees. Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (U.S. 1803); McCulloch v. Maryland, 2 Wheat. 316, 4 L.Ed. 579 (U.S. 1819)."

358 F.Supp. at 1201-02. Of like tenor is the language of the Court of Appeals in denying the motion of Rhode Island's Attorney General for a stay pending appeal in the same case.[1/]

1. "Rhode Island can choose to assert or not to assert its interest in fetal life, but it cannot by enacting a legal presumption make its interest any more constitutionally robust and bind the Supreme Court or this court, to accord it more constitutional significance. Looked at in its most favorable light, regardless of the mechanism used by the statute the state's interest has not changed, and is no different from the state interest which the Court has found not to be compelling in Roe v. Wade.

> "It is true that the Court in Wade and Bolton did not

(Continued)

Judicial Supremacy

The Courts in Abele v. Markele were expounding the fundamental principle that the interpretation of the Constitution of the United States is ultimately the province of the judicial branch. The classic exposition of the principle was rendered by Chief Justice Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-179 (1803). The Court has often reasserted the principle. See, e.g., Nixon v. Administrator of General Services, 433 U.S. 425, 503 (1977); Powell v. McCormack, 395 U.S. 486, 548-49 (1969). This principle of judicial supremacy was well stated in the Powell case, supra:

> "But, as our interpretation of Art. I, §5, discloses, a determination of petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of the respect due [a] coordinate [branch] of government,' nor does it involve an 'initial policy determination of a kind clearly for nonjudicial discretion.' Baker v. Carr, 369 U.S. 186, at 217, 82 S.Ct. 691, at 710. Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.
>
> * * *
>
> Finally, a judicial resolution of petitioners' claim will not result in 'multifarious pronouncements by various departments on one question.' For, as we noted in Baker v. Carr, supra, at 211, 82 S.Ct., at 706 it is the responsibility of this Court to act as the ultimate interpreter of the Constitution. Marbury v. Madison, 1 Cranch (5 U.S.) 137, 2 L.Ed. 60 (1803)."

---

(Continued)
attempt to decide the point 'when human life begins.' No reading of the opinions, however, can be thought to empower the Rhode Island legislature to 'defin[e] some creature as an unborn child, to be a human being and a person from the moment of its conception.'" 482 F.2d at 159.

The final authority of the U.S. Supreme Court to interpret constitutional and federal law needs no further exposition.

U.S. Constitution -
14th Amendment, Sec. 5

Proponents of the Bills have suggested that Congress' authority to enact this legislation may be founded upon its power under Section 5 of the Fourteenth Amendment[2/], which provides: "The Congress shall have power to enforce by appropriate legislation, the provisions of this article." Reliance is placed on cases such as Fullilove v. Klutznick, 100 S.Ct. 2758 (1980); City of Rome v. United States, 100 S.Ct. 1548 (1980); Oregon v. Mitchell, 400 U.S. 112 (1970); Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

Careful analysis of these and other authorities readily reveals that they do not support the proposition that Congress may overrule or alter the Supreme Court's interpretations of basic constitutional concepts. Rather, they merely recognize that the Congress may "enforce" constitutional rights by adopting appropriate legislation designed (a) to avoid practices which infringe on those rights or (b) to achieve other legitimate ends. Properly understood, the cited cases are merely applications of a basic principle long ago expounded by Chief Justice Marshall in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819):

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to the end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."

17 U.S. at 421. Not only do the Bills purport to overrule the U.S. Supreme Court's denial of Fourteenth Amendment personhood to the unborn, but they would simultaneously

abrogate or abridge the mother's Fourteenth Amendment rights. No case even remotely suggests that the Congress has such authority. Indeed, even Katzenbach v. Morgan, supra, expressly held:

> "Contrary to the suggestion of the dissent, infra, . . . §5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under §5 is limited to adopting measures to enforce the guarantees of the amendment; §5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be--as required by §5--a measure 'to enforce' the equal protection clause since that clause of its own force prohibits such state laws."

384 U.S. at 651, n.10. Similarly in announcing the Court's judgments in Oregon v. Mitchell, Justice Black stated:

> "Congress has no power under the enforcement sections to undercut the amendments' guarantees of personal equality and freedom from discrimination, see Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966), or to undermine these protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the States."

400 U.S. at 128-29. These views are in accord with the more recent expressions by Justice Stewart in Harris v. McRae, 100 S.Ct. 2671, 1685 (1980): "It is well settled that, quite apart from the guarantee of equal protection, if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional'."

Finally, it should be emphasized that reliance upon the fact-finding authority of Congress fails to recognize the actual thrust of the rationale of Roe v. Wade. The Court was immersed in the conflicting views of when human life begins. Indeed, its considerations of extensive data prompted the Chief Justice to observe: "I am somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its

conclusion; however, I do not believe that the Court has exceeded the scope of judicial notice accepted in other contexts." 410 U.S. at 208. The Court rejected all efforts to root the protection of the unborn in concepts of when human life begins in the womb. It did so as a matter of constitutional law. It is utterly unrealistic to suppose it would alter its views because the Congress might be willing to do otherwise based on the same basic data that were considered by the Court. In this regard, it should be noted that when the Court acknowledged the judiciary's inability to speculate as to when human life begins, it did so in the context of the state's interest in safeguarding potential life--not in the context of the question of personhood under the Fourteenth Amendment. The Court's candid admission cannot reasonably be regarded as opening the way for what is contemplated by these Bills.

OTHER LEGAL OBSERVATIONS

So that all my observations will be integrated in a single document, the following restates the several views expressed in my memorandum dated March 26, 1981.

The Bills do not purport to operate as a constraint upon private action, i.e., abortions procured without state assistance or involvement. Such abortions would continue unaffected by this legislation.

These Bills define "person" to include human life from the time of conception for purposes of the Fourteenth Amendment. That amendment obliges states not to deprive persons of life without "due process of law." Although the legal effect of the Bills is to proscribe certain state action which would support abortions, I understand there is an underlying expectation that such legislation would encourage state action in opposition to abortions. I express no view upon such speculations,

Although the Bills are structured as a constraint on state action which would support or facilitate abortions, they by no means prohibit all such state action under all circumstances. They purport merely to prohibit the states from supporting abortions in circumstances which would amount to a denial of "due process of law" to the unborn child. There are volumes written on the esoteric concept of "due process", which is a flexible standard designed to assure fundamental justice in particular cases by balancing competing state and private interests. As one scholar has aptly observed: "What process is due always depends upon the circumstances, and the Due Process Clause is always flexible enough to take the circumstances into account."3/ If these Bills became law the circumstances would include the rights of the unborn, the rights of the mother including those expounded in Roe v. Wade, and the States' right to formulate policy in the field of abortions as indicated in Harris v. McRae, supra. In my opinion, even if these Bills could survive constitutional scrutiny it is probable that a state could support abortions in certain circumstances without necessarily offending the Fourteenth Amendment as interpreted by these Bills.

How the "due process" test would actually work is a matter of considerable conjecture. However, it is probable that the "due process" approach would give rise to a disparity of results in the various states, subject only to certain limitations that may be determined by the U.S. Supreme Court. The prospect that certain states may become havens for abortions should not be overlooked.

Subject to the deficiencies noted, the Bills would protect prenatal life against state action from the time of

---

3. Hart, The Power of Congress to Limit the Jurisdiction of Federal Court: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1393 (1953).

"conception". This is a critical term which is not free from ambiguity. Although the term "conception" refers to the event of fertilization according to one body of opinion in which the Bishops concur,[4/] others maintain it refers to the time of implantation of the fertilized ovum. Such a potential for ambiguity could result in a failure to protect prenatal life to the degree we desire.

Section 2 of the Bills would deny jurisdiction to all inferior federal courts to issue injunctions (temporary or permanent) or declaratory relief in cases involving several specified categories of state and local laws geared to the protection of prenatal life. Two points can be made concerning the scope of this provision. First, it would not deny federal jurisdiction in cases ihvolving state action which permits or otherwise supports abortion, or in other cases which do not involve state action. Second, because the denial of jurisdiction is limited to particular remedies (injunctive or declaratory relief) it is possible that lawsuits involving other relief could be entertained even though involving the specified categories of state action. In short, this provision would not necessarily prevent the inferior federal courts from determining important constitutional principles in cases not clearly covered by this section of the Bills.

For present purposes I express no view on the constitutionality of Section 2. Likewise, I express no view concerning possible "equal protection" difficulties which might arise out of the fact that the Bills place restrictions on State action, through the Fourteenth Amendment, which are

not expressly imposed on the federal government, through the Fifth Amendment.

Finally, if enacted the Bills would be open to amendment at any time, and from time to time. This should be taken into account by those responsible for assessing the political and other realities as they relate to the Human Life Amendment.

---

4. Testimony of United States Catholic Conference on Constitutional Amendment Protecting Unborn Human Life Before the Sub-Committee on Constitutional Amendments of the Senate Committee on the Judiciary (March 7, 1974), reprinted in Documentation on the Right to Life and Abortion, 1-33 (NCCB/USCC 1974). See pp. 4, 6, 32 fn.18.

Senator EAST. If I could ask for a point of clarification—is it not true that this conference prefers a right to life amendment—that it is opposed to abortion, and it simply feels this may be too weak of a measure to accomplish that end? Am I correct there? Please correct me if I am wrong.

Mr. DESTRO. Yes, that is true. And I think it also should be noted for the record that the U.S. Catholic Conference itself is, organizationally, the lay arm of the National Conference of Catholic Bishops. To my knowledge the conference has not taken a position. I do not know what their position is. I know that they support a human life amendment. I have not ever heard that they oppose the human life bill.

That was an internal memorandum. I do not even know how it got out of the office.

Senator BAUCUS. Mr. Chairman, I might add that I have read through the memorandum. The reason that the general counsel of the U.S. Catholic Conference states that the bill is unconstitutional is not because it is a weaker bill.

I would not be surprised if the general counsel supports a human life amendment. But the reason the general counsel is opposed to the bill on constitutional grounds is essentially the point we have debated many, many times in these hearings. It is the *Marbury* v. *Madison* point.

### MEMORANDUM DISAGREES OVER COURT CASE

The memorandum goes to great length in explaining why, despite the assertions of some that this is an extraordinary case and that the Congress can overrule the Court in this case—despite all those analyses, he, the general counsel disagrees with the *Katzenbach* v. *Morgan,* analysis involving section 5 of the 14th amendment.

That is the reason the general counsel takes that position—not because it is a weaker approach, but because, in his view, on a legal basis, it is an unconstitutional bill.

I would just like to ask a couple of questions. I would like to ask any of the four panelists who are opposed to the bill to articulate

what the free exercise or establishment problems are with this bill. We have already had some of that discussion.

I tend to agree with some of the points that were made by the chairman and Mr. Destro—that, in some sense, all laws have some kind of religious overtones.

The question that comes to my mind is the degree to which the religious overtones of this bill do begin to constitutionally impinge upon either the free exercise or establishment clauses of the first amendment.

Rabbi SIEGMAN. Senator Baucus, I am glad you asked that question since it gives me an opportunity to correct the record.

It was stated specifically by Dr. Destro that I had argued that the proposed legislation fails on establishment grounds. I specifically said in the testimony the contrary—that I do not see an establishment problem.

I do see a very serious free exercise problem—that is, a problem that expresses itself most seriously in the case where the life of the mother is threatened and where there is consequently a specific religious obligation, certainly on the part of Jews, including the most orthodox of Jews, to abort. In this kind of a situation—and I cite the most extreme—there is clearly the free exercise problem for members of the Jewish faith.

It was also said—and I should like to clarify the record on that score as well—that no one on the panel suggested that abortion is seen as a social good. At least in my case—and I thought I heard several other panelists make precisely the same point—there are circumstances where abortion is a social good and, indeed, is religiously required. And again I cite the example of where the life of the mother is threatened.

Rabbi SIEGEL. I would just like to say that——

Senator BAUCUS. I will get back to you, Rabbi. Let me ask the other panelists first, and you can take the contrary view—either Reverend Simmons or Dr. Ruether.

Reverend SIMMONS. I see both an establishment and a free exercise constraint supposedly established by this bill, the primary being under free exercise.

The point at which I see some problem with establishment is plainly not that of giving priority to or some union between an official religion as a tradition, or a church, or a denomination in the United States—it plainly is not that. The point at which I see an establishment problem deals with the language which is proper to religion and to theological language and that language which is proper to law.

It is a principle that law deals with specifics, with persons, it does not deal with abstract, metaphysical speculation.

When we attribute personhood to simply a fertilized ovum, that, to me, certainly has a tradition in theology, but it is a religious presupposition, and it seems to me to violate the proper concern of law as dealing with persons who are real.

Senator BAUCUS. With all respect, I still have a hard time seeing the establishment problem. It is not as though this bill establishes Presbyterianism or Baptism as a religion here.

Reverend SIMMONS. I agree.

Senator BAUCUS. So what is the establishment problem here?

Reverend SIMMONS. I indicated that by saying I think the burden of proof, religiously, legally, morally, rests with those who would claim that a fertilized ovum—we are talking about an ovum still in the fallopian tubes of a woman, a zygote, we are not even talking about attachment. The language of this bill, again, is so imprecise at that point. We are talking about that as person?

I would raise the question as to whether or not that really is the proper province of law and to impose then that particular speculative point of view, which is beyond the province of science to prove personhood—we can all agree on the biological data that are there, I do not think that is at issue at all.

But is the law then to build a scaffolding upon a metaphysical assumption which is shared by so few people in this society, as I already indicated in terms of statistics, but also is objected to by most mainline religious denominations in this country?

Even among those in my tradition who oppose, as I do, radical permissiveness toward abortion on demand on moral grounds, they still do not hesitate to say: "No way do you simply equate a fertilized ovum with a woman." And I can quote you instance after instance of leading, very conservative scholars in my tradition on that point.

That is my point with regard to establishment. Again, I concur that it is not favoritism toward a particular church or denomination—it is not that at all—but what is the proper language of law.

Senator BAUCUS. Would anyone else like to comment on this point?

Rabbi SIEGEL. First of all, we forget the testimony that began this session this morning in which the law under consideration does turn the determination over to the States. We had a distinguished legal officer of an important State testify that the reasonable assumption is that even if the law is enacted the States would not bar abortions where the life of the mother is obviously at stake.

Therefore, the comment that this law would bar that and therefore prohibit free exercise of religion, I think, is not realistic in light of the information that we have gotten here.

Second, I think the notion of person which was brought up here is just not speculative, although I do not believe that metaphysics and speculation are something bad—that you have to call the legislative ball game off because of theological darkness when any kind of metaphysical principles, like a just war, for example is involved.

When we had the Vietnam war, everybody was discussing it right here—"Is it a just war or not a just war?" These are also religious, metaphysical, and speculative principles.

I think the notion of person, as I understand it, is defined by the law. That is to say, it is not a platonic idea in which there is only one universal meaning to the word "person." The law itself defines person, as I think Senator East pointed out. It defined a black as not a person at one point before the 13th, 14th, and 15th amendment, and then it changed its definition of person.

Person is a pragmatic notion determining who it is or what it is that has the right to protection by the law, and therefore it is not speculative at all. It is a legislative determination.

Senator BAUCUS. On that point, the *Dred Scott* decision was overturned by a constitutional amendment because, a large portion of the American people felt that it should be overturned.

Rabbi SIEGEL. Only in the North. We had a big war about it, you know.

WIDESPREAD DIVISION ON ISSUE

Senator BAUCUS. The point is that certainly today most agree with the amendment which overturned the *Dred Scott* decision.

Frankly, it seems to me that the medical community is divided on this issue, the scientific community is very divided, theologians are divided, religious leaders are divided, the American people are divided.

I therefore tend to think that in all probability the result that the Supreme Court has left us with is fairly wise. It has left the choice to people to make their private choices, certainly in the first trimester, based upon their private, religious, theological, and moral beliefs.

Some might suggest: "The sanctity of life is involved here. The life of the fetus should be protected. Therefore, this bill should pass, and if not this bill perhaps a constitutional amendment should pass."

The difficulty I have with the bill—less so with the amendment—is that in all probability the result would be imposing a choice on this issue that is contrary to the views of a large group of Americans and, in all probability, a majority of Americans. Certainly, most polls indicate that the majority of Americans—about two-thirds—even among Catholics, are in favor of abortion under certain circumstances. I think that most Americans are against abortion on demand, in the sense that that term is used.

But I do think that most Americans do favor permitting a personal choice about abortions in certain circumstances. When confronted with such a choice they do wrestle with the moral, religious, theological, and private problems that that choice involves.

The right to life amendment, if it were to pass, would arguably be an amendment which would have the widespread support of the American public because it would take two-thirds of the Congress to pass and three-quarters of the State legislatures to adopt. That would be an expression then, or a better expression, of the universality of American opinion.

With this bill, it seems to me it is more narrowly imposing a view upon the country which is contrary to the view of a large majority—two-thirds—of the American people.

And I suspect the people in Italy voted the way they did, despite the wishes of the Pope, even at a time when there was an attempt on the Pope's life, because this is a very personal issue.

If this bill were to become law it would, to a very large degree, take away the choice of people—women particularly. And we can argue the degree to which it would take away that choice, but it would take away the choice to such a significant degree that it would cause in many cases more problems than the bill would solve.

I wonder if anyone could comment generally on that?

Rabbi SIEGEL. First of all, all laws that we pass impose the will of somebody on somebody who do not like them.

Second, with all due respect, you sort of denigrate the ability of this body to reflect the American people. I think if the American people do not like this law it is presumed that the Senate and the House will not pass it.

Senator BAUCUS. Well, that is likely to happen, too.

Some suggest that because the Supreme Court upheld statutes striking down polygamy that somehow represents an analogous situation. There is a deeply held American tradition of monogamy. I think that is primarily why the antipolygamy statutes were upheld, despite the argument that such action would violate the first amendment.

Now we are dealing with a case that is different. There is no deeply held American tradition that the life of the fetus is as protectable from the moment of conception as the life of the child at birth. That is not a universally held feeling in America, nor is it rooted in American tradition.

Rabbi SIEGMAN. Could I add something to that particular point? There is an obvious distinction: Unlike the legislation we are considering, in the case of polygamy there is no religious tradition that says that one must marry two, three, or five wives. So one's religious sensibilities are not deeply offended by the cause of polygamy.

I would like to make one brief observation——

Rabbi SIEGEL. The Mormons do say you do.

Rabbi SIEGMAN [continuing]. With the permission both of you and my colleague, my respected and cherished colleague.

Rabbi SIEGEL. Likewise. [Laughter.]

Rabbi SIEGMAN. The phrase "dignity of life" has been used constantly and invoked repeatedly in these proceedings, and it is constantly invoked in the general discussion of the subject, with the obvious implication that those who are not in support of prohibiting all abortions are less sensitive to the dignity of life.

I would like to say in the strongest terms possible that I consider that a very invidious and offensive implication, because the issue is not who is more concerned, it is not a contest of who is more concerned for the dignity of life. We are all committed—all religious traditions are deeply committed to that concept.

The question is, and that is where the differences arise, how is that dignity best served? There are religious traditions—and they are not marginal, they are central, and they are mainstream, and they are normative in Western civilization—which hold that the welfare of the living and of the mother, specifically—her health, her life, and so on, are as decisive in affecting the dignity of life as the welfare of the fetus.

I think it does a disservice to the serious issues we discuss when we use that term "the dignity of life," in the invidious ways in which it has been used.

Mr. DESTRO. Mr. Baucus, I would like to make a comment on the point that you just made, if I may. You seem to take the position that, because there is no consensus in society with respect to the rights of unborn from conception, the law should not take a position on it.

I might also add, as I did in my testimony and reemphasize here that there is also no consensus in society, and clearly not so among the States, that the law may never recognize the unborn as a person. However, that is the consensus that the Supreme Court rammed down everybody's throats in *Roe* v. *Wade*.

The Ohio constitution, for example, recognizes the rights of individuals to protect and defend life. But I myself was involved in some litigation in Cleveland where a father-to-be attempted to stop the abortion of his 8-month-or-more fetus, but a Federal court prevented him from doing that on the basis of *Roe* v. *Wade*.

The viability principle in *Roe* v. *Wade* is a shibboleth. If you read *Roe* v. *Wade* carefully, you will note that *Roe* v. *Wade* says that whenever an important interest of the woman is in conflict with the interest of the fetus, the fetus loses. That is what *Roe* v. *Wade* says, and the Supreme Court has constitutionalized that as if there were a consensus that the fetus must always lose. That consensus surely does not exist, just as a consensus does not exist that the fetus should always win.

This is what we are talking about—where to draw the line. The Supreme Court has drawn it at the end of pregnancy, the human life bill wants to draw it at the beginning, and a lot of people would like to see it drawn somewhere in the middle, but sometime and some place someone has to make a choice. The Supreme Court made the choice. I just do not see anything unreasonable or unconstitutional to suggest to them that their choice was wrong.

Senator BAUCUS. I am not going to get into an argument with you over this. Whenever two people read anything, whether it is a Supreme Court decision or anything else, there are going to be two different views on what it actually said.

The case did acknowledge State interest in fetuses prior to birth, and the States are given the authority to protect fetuses under that decision prior to birth. It is a question of degree and that gets a little confusing, I grant you.

Mr. DESTRO. It is not confusing to the Federal courts, Senator. The Federal courts have consistently held that the fetus has no rights. When South Carolina, in *Floyd* v. *Andrews*, tried to prosecute a doctor for refusing to take care of a baby that was born live after an abortion, the Federal court said: "No. The woman has a right to a dead baby after an abortion, not just a right to terminate a pregnancy." The Supreme Court did not review that decision; they dismissed the appeal. That is what is going on in this country.

Senator BAUCUS. I am not familiar with that case.

I want to thank the panelists for coming today. This has been, I think, a very helpful discussion. I would particularly thank the panelists for very thoughtful statements; they were very good. Thank you all for coming.

Senator EAST. I would like to join in his remarks. We have had a spirited debate, but you have made a great contribution to this discussion, and we on this subcommittee deeply appreciate it.

As I noted earlier, your prepared statements will be included in the record.

If there are no further questions, we shall stand adjourned.

[Whereupon, at 1:25 p.m., the hearing was adjourned.]

# THE HUMAN LIFE BILL

THURSDAY, JUNE 18, 1981

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10 a.m., in room 6226, Dirksen Senate Office Building, Senator John P. East (chairman of the subcommittee) presiding.

Present: Senator Baucus.

Staff present: James McClellan, chief counsel; Grover Rees and Craig Stern, counsels; Debbie Freshwater, research assistant; Ken Kay, chief minority counsel; Debbie Landau, legislative assistant.

## OPENING STATEMENT OF CHAIRMAN JOHN P. EAST

Senator EAST. We are ready to proceed on this final session of the Separation of Power Subcommittee hearings on S. 158. I hereby declare this session convened and we shall proceed.

I would like to report that my distinguished colleague, the ranking minority member, Senator Baucus, who has been deeply faithful in his attendance at all of these sessions—I have greatly appreciated his cooperation and deep interest in these hearings—unfortunately is caught up in a conflict this morning with the Finance Committee. He will be coming in and out, doing the best he can. That frequently happens around here.

However, I did want to point out that his interest remains exceedingly high and we will be seeing him from time to time. We look forward to that because of his great contribution to these proceedings.

As those of you who have followed these proceedings with care are aware, this is our last hearing. Senator Baucus and I feel that we have been able to have extensive and, we like to feel, balanced hearings, exhausting hearings if not exhaustive. We have done what we would like to feel is at least the best one can do under the severe limitations you have at congressional hearings.

You can be assured that all of the statements will be considered and all of the evidence looked at. We anticipate a markup session on this bill possibly sometime in the middle of July, depending upon a date that Senator Baucus and I might agree upon, which we have not yet done. However, we are somewhat of the mind that we ought to be heading in that direction. When that date is firm, we shall, of course, let the public know.

The two of us do feel that we have accumulated a record here that ought to be of value to us in the subcommittee as well as to

the Judiciary Committee as a whole, and we hope ultimately to the U.S. Senate in its deliberations on S. 158.

I would like to say that I regret we have not been able in this final session to hear all of the groups and all of the individuals who would like to be heard. That is true on both sides. I would hope that the public will understand and be indulgent. You simply cannot hear every person and every group unless we go on ad infinitum.

We have tried to do what we can with the time limitations we have to make it balanced on both sides. Sometimes we have cancellations which are unavoidable. That might appear to give it a degree of imbalance. However, we are hoping this morning that we will end up with a session, although not as comprehensive in terms of all of the groups that we would like to have had, as comprehensive as we can make it in terms of the limitations under which we work.

As chairman of the subcommittee, I would like to encourage any group that would like to submit a statement to us on this matter to feel free to do so. We shall happily make it a part of the record of our deliberations.

We are under very severe time restrictions. We have a lot of witnesses today. We hope to end this hearing at 1 o'clock. We have the complicating factor that we are going to be having votes in the Senate, which will mean running back and forth over there, or rolling back and forth, however you get over there. That is going to cut into our time.

We want to do justice to the subject, but I would like to encourage myself as well as you good people who are testifying to be as concise and brief as you can so we can have questions and answers and move on. Above all, we do not wish to make it so that those at the end of the witness list have very little time and we have to sort of hustle them along to get them out of here.

As our first witness this morning, we have a distinguished colleague from the House side, the Honorable Henry Hyde, a Member of the House of Representatives from the State of Illinois.

We were also to have had the very distinguished Congressman, Louis Stokes, who unfortunately because of conflicts had to cancel this morning, although we will have a statement by Congressman Stokes on this matter. I can assure the audience of his deep interest in and concern for this matter. He will also have a written statement that we will make a permanent part of our record. We deeply regret that the Congressman could not be here.

I do welcome the distinguished colleague, Henry Hyde.

Congressman, we welcome you this morning and would appreciate your comments.

## STATEMENT OF HON. HENRY HYDE, A U.S. REPRESENTATIVE FROM THE STATE OF ILLINOIS

Mr. HYDE. Thank you, Senator.

I shall defer to your request not to read my statement, although the temptation is great because of the importance of this subject, but I will summarize.

However, I would like to at least read the first couple of paragraphs.

Thank you, Mr. Chairman, for granting me the opportunity to testify in support of S. 158 and your effort to provide a sound legal basis for a congressional determination of when human life begins, or at least at what point during the continuum characterizing the life span the constitutional guarantees of life and due process of law ought to arise.

May I also state that never in my experience have I witnessed such a display of journalistic abuse as has been dumped—that is a more appropriate word than heaped—upon you, Senator East, for daring to explore this fundamental question.

There is something about the topic of abortion that arouses all of the talents for invective that most of our sophisticated opinion molders possess, and their syndicated ridicule is the reward for defending the right to life of the defenseless, voiceless preborn.

EFFORTS OF CHAIRMAN LAUDED

I stand in awe at your courage and fortitude, Senator East, and can only say that this most selfless and worthy of causes has in yourself found a champion worthy of the battle.

We are here talking about the great 13th floor of the human family. Everyone knows it is there, but it is convenient to pretend that it is not there. I am talking about the humanity of the unborn. One of the great misperceptions of many of the media is that we prolife Congressmen and Senators are a willful, small, arrogant little band of people trying to manipulate the entire country into a rather vulgar, out-of-date, anachronistic view of human life and its value, and whether it should be protected by the Constitution.

I think it is important to point out that out there in the country there are millons of people who are appalled by the results of *Roe* v. *Wade* and who constitute the prolife movement, which is growing every day.

Centuries ago we had alchemists, people who sought to change base metal into gold. We today have our alchemists who have successfully turned what was once a crime, the crime of abortion, into the gold of an act of compassion and humanity.

*Roe* v. *Wade* certainly is the keystone of that result and we are told that it is the ultimate authority, that the Supreme Court, having spoken on the question of personhood and having confessed its incompetency to determine when human life begins because it said it could find no consensus in law, theology, and philosophy, then said it is not necessary to determine when human life begins, but then they did pronounce on the basis of that vacuum that the preborn is not a person within the meaning of the 14th amendment.

Forgive my reading to you, but one of your witnesses, one of the most prominent, was Archibald Cox, former Solicitor General. He wrote a fascinating book, "The Role of the Supreme Court in American Government." I would like to put into the record what he said about *Roe* v. *Wade*. I am quoting from page 53:

Oddly, but possibly, because counsel did not stress the point, the opinion—

Speaking of *Roe*—

fails to even consider what I would suppose to be the most compelling interest of the State in prohibiting abortion, the interest in maintaining that respect for the paramount sanctity of human life which has always been at the center of western civilization, not merely by guarding life itself, however defined, but by safeguarding the penumbra, whether at the beginning through some overwhelming disability of mind or body, or at death * * *.

For one concerned with the proper role of the Supreme Court in American Government, and more particularly with the debate over judicial activism, the abortion cases have threefold significance. First, the decisions plainly continue the activist reforming trend of the Warren Court. They are reforming in the sense that they sweep away established law supported by the moral themes dominant in American life for more than a century in favor of what the Court takes to be the wiser view of a question under active public debate.

Second, the justices read into the generalities of the due process clause of the 14th amendment a new "fundamental right" not remotely suggested by the words. Because they found that right to be "fundamental," the justices felt no duty to defer to the value judgments of the people's elected representatives, current as well as past. They applied the strict standard of review applicable to repression of political liberties.

Then I go to page 113:

My criticism of *Roe* v. *Wade* is that the Court failed to establish the legitimacy of the decision by not articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment based upon the evidence currently available from the medical, physical, and social science. Nor can I articulate such a principle unless it be that a State cannot interfere with individual decisions relating to sex, procreation, and family with only a moral or philosophical State justification, a principle which I cannot accept or believe will be accepted by the American people.

The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations whose validity is good enough this week but will be destroyed with new statistics upon the medical risks of child birth and abortion or new advances in providing for the separate existence of a fetus. Neither historian, layman, nor lawyer will be persuaded that all the details prescribed in *Roe* v. *Wade* are part of either natural law or the Constitution.

Constitutional rights ought not be created under the due process clause unless they can be stated in principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time and to lift them above the level of the pragmatic political judgments of a particular time and place.

Corporations have been persons for over a hundred years. Justice William O. Douglas, a liberal luminary in the Court, in the famous case of *Sierra* v. *Morton* said that rivers and trees and swamplands and air ought to have standing as persons before the Court. What is so strange about attaching personhood to a preborn child?

Mr. Chairman, about a week ago I had the pleasure of having lunch in Montgomery, Ala., with the chief judge of the fifth circuit during the course of hearings on the Voting Rights Act. He and I got to discussing judicial activism.

I, of course, inveighed against it, asserting that judges should adjudicate and not legislate. He told me that there are times when the court has to take some action. They have no options.

I asked him to relate one of those times. He said in cases of reapportionment where a State legislature repeatedly fails to recognize changes in the census, there is no choice but for the court to act.

## CALL FOR "CONGRESSIONAL ACTIVISM"

What is the matter with a little congressional activism? When we are faced with a decision that has been criticized from Austin to Boston by legal scholars who themselves may support abortion as a solution to unwanted pregnancies instead of, as I would say, the failure to look for a solution, but who criticize the case as totally

unwarranted, are we to be impotent? Are we to say we cannot do anything in the face of 1.5 million abortions a year?

If reapportionment is important for courts not to be activists, I suggest to you that the carnage involved in the killing of 1.5 million defenseless, voiceless, preborn children is justification for a little congressional activism.

You have heard a great deal of testimony about the question of congressional power to legislate in contradiction of a Supreme Court interpretation on the Constitution. I am not going to burden my testimony now or my prepared statement with repeating that.

However, the views of Thomas Jefferson, Andrew Jackson, and James Madison were influential at the time of the adoption of the 13th, 14th, and 15th amendments, not only on the drafters of these amendments but on the States that had to ratify those amendments. A study of their contemporary writings would be most instructive.

A great void was left by the Court's declared inability to decide when an individual's human life begins. They said it was not anything they needed to decide, as though personhood was an independent ambulatory term not necessarily associated with human life.

We have been told that we are going to call poor pregnant women, who have a problem and want an abortion, murderers. We have been told we are opposing contraception. Neither of these charges is true.

Murder is a legal term. Abortion is a legal term. By the way, before 1973, when the world still spun on its axis and abortion was a crime in most of the States, it was the abortionist who was prosecuted, the doctor making money out of someone else's misery, not the poor woman who had enough troubles and worry and who needs compassion, love, understanding, and support. That is the way it will be again.

Contraception prevents pregnancy. Contraception prevents a new little baby from being created and conceived and it is not a part of this legislation. It is not anything about which Congress can or ought to legislate.

The 14th amendment guarantees a right to life. Professor Cox made the statement when he testified that this legislation was a "radical and unprincipled assault" on the constitutional process. I suggest that there is a constitutional right to life, it is set forth explicitly in the 14th amendment.

In section 5 of the amendment, it says that Congress shall have the authority to implement the provisions of this amendment. Contrast that explicit power with the fuzzy notion of a right to privacy, which nobody found in the Constitution for 200 years, now used in justifying the killing of 1.5 million preborn children a year.

Mr. Chairman, Planned Parenthood, which is at the cutting edge of the abortion movement, had a pamphlet in 1964 called "Plan Your Children." I read to you from it:

> It is an abortion? Definitely not. An abortion kills the life of a baby after it has begun. It is dangerious to your life and health. It may make you sterile so that when you want a child you cannot have it.

I have debated the Counsel for Planned Parenthood a few times. I have asked her what medical developments have occurred since 1964 to vitiate or gainsay that statement. I never get an answer.

However, Fay Wattleton, the president of Planned Parenthood, when I debated her once on television, referred to this pamphlet as "unauthorized." That is the first time I had heard that explanation.

I present and offer for the record a document put out by the education department of Planned Parenthood in 1971. In this document, they related the sexual process and how a baby is born. On page 9, it says: "If one sperm meets the egg, they join and move into the womb." Then on page 10: "And a baby starts to grow in the mother's womb."

Either a baby is growing in the mother's womb, and if it is a baby, it is a human life, and if it is a human life, it is a person, and if it is a person, it ought not to be thrown away like a used piece of Kleenex, or it is a nothing. Snail darters are more important, or dolphins, whales, and wild horses.

Are those judgments unimportant? Is that something we ought not to explore? We are legislating about life and dealth all the time. We have been financing abortion. We provide for abortions in insurance policies. Abortions are not becoming an accepted retroactive form of birth control. It is important to explore the questions of when an individual's life begins and whether there are legal consequences?

I accept Planned Parenthood as a supporter of my position that abortion kills the life of a baby once it has begun and I ask leave to have these two documents included in the record.

Senator EAST. So ordered.

Mr. HYDE. The miracle of Louise Brown, Mr. Chairman, was that her begining was in a test tube. That was the beginning of something, not nothing. That was a unique genetic package of 46 chromosones. To say that was a nothing is like believing in the tooth fairy and is more than primitive biology.

### BREADTH OF S. 158

Mr. Chairman, I think it is important not to claim too much for S. 158 in terms of congressional power versus Supreme Court interpretations. S. 158 does not assert a general power for Congress to redefine constitutional rights. It only asserts the power of Congress to supply an answer to a fundamental question concerning the Constitution, when does human life begin, which the Court has declared itself unable to answer.

I know the question of when human life begins is a classic example of the semantic gymnastics involved in the abortion question. Therefore, to be more precise, the real question should be when does human life become a human being?

Mr. Chairman, I will not spend much time on the euphemisms that are used in the subject: prochoice. I suppose that means that a woman should have a choice whether to have a baby or not. The problem is once you are pregnant, you have a baby. The question is what do you do with it? The choice is shall we destroy the baby with the dilatation and curettage? Shall we use the suction machine? Shall we use the salting-out method where the little fetus is

scalded to death and then stillborn? Or perhaps if pregnancy is too far advanced, the choice is hysterotomy. Perform a cesarian, put the little baby on the table, and ignore it while it gasps for breath. That is the choice. Some choice.

We are told the only way we can reverse *Roe* v. *Wade* is through an amendment to the Constitution. Parenthetically, I think it is interesting to note that the Civil Rights Commission issued a report in 1975 that for us to amend the Constitution to protect unborn life would be unconstitutional. That is a great way to lock in abortion permanently.

Mr. Chairman, birth is a change of address. A few days ago we saw a network newspaper poll that said most people favor abortion. Those of us who are in politics know that polls can be useful and they can be misleading. However, if you believe as I do that the right to life is a sacred human right, then the existence of such a right should not be dependent upon nose counting or on polls.

Alexander Hamilton said it best when he said:

> The sacred rights of mankind are not to be found rummaging among old parchments or musty records. They are written as with a sunbeam, across the whole volume of human nature by the hand of divinity itself, and can never be erased or obscured by mortal power.

In closing, I would like to share with you the views expressed nearly 40 years ago during World War II by Dr. Joseph D. Lee, a leader in modern obstetrical medicine, which was printed in the 1940 edition of the Yearbook of Obstetrics and Gynecology. Here is what Dr. Lee said:

> At the present time, when rivers of blood and tears of innocent men, women, and children are flowing in most parts of the world, it seems almost silly to be contending over the right to life of an unknowable atom of human flesh in the uterus of a woman.
>
> No, it is not silly. On the contrary, it is of transcendent importance that there be in this chaotic world one high spot, however small, which is safe against the deluge of immorality and savagery that is sweeping over us. That we, the medical profession hold to the principle of the sacredness of human life and the rights of the individual, even though unborn, is proof that humanity is not yet lost . . .

Mr. Chairman, I am proud to support S. 158.

Senator EAST. Congressman Hyde, I deeply appreciate your statement and your very eloquent defense of this bill.

I also would like to acknowledge your overly generous comments about the chairman.

Mr. HYDE. Under generous, Mr. Chairman.

Senator EAST. You are very kind.

I would like to say that I have admired your great work in this area. I do agree that in some quarters those who raise the possibility of opposing *Roe* v. *Wade* are looked upon as asking an impertinent question. I think your testimony is very eloquent in at least suggesting that there is another point of view and that reasonable and fairminded people can disagree over this matter.

People who believe that *Roe* v. *Wade* forecloses the issue and will not longer allow or permit it, and that we should not want additional discussion on it, are naive because whatever happens to S. 158, or whatever happens to any constitutional amendment, as long as that policy stands as the national policy in this country, there are going to be individuals and groups working to change it.

You have been one of the great leaders in that process. It is an honorable cause. I say that appreciating that there are different points of view on it.

In the brief time that you and I can discuss this matter, I would like to ask you several questions if I might, Congressman.

You and Senator Helms are the principal sponsors of S. 158. Senator Helms in the Senate and you in the House. Your testimony is particularly valuable to us. I would like to ask you some specific questions about the effect of S. 158 as you see it.

First of all, what would it do to *Roe* v. *Wade?* In what way would it change the impact that that decision has had in American public policy on the abortion issue?

RECONSIDERATION URGED

Mr. HYDE. Most importantly, it would give the Court another opportunity to reconsider its holding in *Roe* v. *Wade. Roe* v. *Wade* found that the preborn, the unborn, the fetus was a nonperson within the meaning of the 14th amendment. It based this finding on some vague right of privacy which it said was lurking there in the Constitution.

Passing S. 158 would be a reassertion of the explicit words of the Constitution that there is a right to life, a constitutional right, and that Congress has the right and the constitutional duty to implement the 14th amendment by appropriate legislation.

In addition, it would present the Court with a finding of fact, assuming this is to be the finding of fact of Congress, that an individual's human life does have a beginning. At that point, the constitutional protections of due process of law against having that person's right to life arbitrarily destroyed will attach.

The Court will have another opportunity, I would say, to correct its error. That is what it will do. It will establish by a coequal branch of Government that the preborn is a person within the meaning of the 14th amendment. That is about all it does.

It then permits the States, based on this legislation, to pass their own abortion laws or antiabortion laws.

Senator EAST. Let me ask you another question then just to get the record staked out here on the effect of this bill.

Would this bill make abortion murder?

Mr. HYDE. No, sir. It makes abortion abortion and not murder. As a matter of fact, it simply provides the underpinning for the States to take such action as they choose to take based on the establishment of personhood within the status of being preborn, but it certainly has nothing to do with murder. It has to do with abortion.

Senator EAST. You are saying that it is an invitation to the Court to recognize when life begins. Hence, that would certainly alter the decision in *Roe* v. *Wade.* That would be point No. 1.

Point No. 2, you are suggesting it would return the matter to the State level for States to consider action in this area consistent of course with the due process requirements of the 14th amendment.

Mr. HYDE. Senator, when we talk about when life begins, because of the ambiguities that some biologists and scientists infuse this subject which is rather simple to you and me, perhaps because we are not trained scientists—I have already heard that politics is too

important to leave to the politicians, but I will not transpose that over to science—I think we should say we seek to determine when an individual's human life begins. We are talking about an individual. That is what the Court failed to address. This would give them the opportunity to address that vital question.

Senator EAST. On the question of murder, I hear that phrase thrown around casually by people who ought to know better, but sometimes they do not. Frequently in discussing this bill, it is prefaced with the notion that this would make abortion murder. You have clearly said that that is not the case.

Mr. HYDE. It never was, Senator. For all of the time before 1973 when abortion was a crime, it was the crime of abortion. I have never heard the term murder discussed by any legislator, unless of course they are on the other side of the question and they want to inflame the jury. Then these rhetorical and inflammatory words are used. It is the crime of abortion. The person prosecuted is the abortionist.

Senator EAST. That is one point we hear which simply is not valid. I would agree personally with your assessment of it. It is a scare tactic. The bill would not do that. The abortion laws of the States never did that prior to 1973. Unless one thinks that State government is in the grips solely of lunatics, which I do not—I am willing to trust them—they would not do that not either.

Mr. HYDE. I think that those of us who support this legislation can establish legislative history. If it must be bilingual history, we can do that. We can say we are not talking about murder. We are talking about abortion.

Senator EAST. One final question is one that we frequently hear touched upon, but I would like to clarify it for the record. We are told that this bill would forbid the use of contraception or birth control of any form. I would appreciate your concise response to that charge, as a cosponsor of the bill.

Mr. HYDE. Sir, contraception means the prevention of a pregnancy, the prevention of conception. It means the inhibiting or obstructing of the union of the male sperm and the female ovum. If that is prevented, you do not have a pregnancy.

It becomes more complicated when you get into the notion of fertilization, the process of fertilization following the union of the male sperm and the female ovum. In my judgment from having read the literature and listened to people who are knowledgeable and expert, you do at that point have the beginning of an individual human life, the fertilized egg.

The problem is that egg must travel the fallopian tube and implant itself on the wall of the uterus to survive, to receive nourishment and shelter to become the 693-month-old fetus that I am. If that does not happen, it is not going to make it.

I do not believe the law is competent to protect the fertilized ovum. There may be some who think it is, but I do not think it is. I think a pregnancy must be established before one can legislate against the terminating of that pregnancy.

Once implantation has occurred, a pregnancy is detectable. Chemical signals are given off. You can determine medically that there is a pregnancy. To get rid of that pregnancy then, a surgical abortion is required. There will be a corpus delecti.

With the IUD or abortifacient contraceptives which are more interceptors than contraceptors, there is no way to measure a fertilized ovum. There is no way to tell there is a pregnancy.

I assert that it is my intention based on my understanding of the biology of the problem and the limitations and competency of the law not to ban IUD's or morning-after pills or any form of those contraceptives because such a law would be unenforceable, asserting of course that an individual's human life begins at the completion of the process of fertilization.

It is surgical abortion where a pregnancy has been determined and a doctor and woman decide for whatever reason to get rid of it, to kill it that I think this law is directed at. Certainly that is my intention.

Senator EAST. Thank you, Congressman.

Those are all of the questions I have. Again, time presses in on me. I wish to thank you for coming. We appreciate your appearance and your fine statement will be a part of our record.

Mr. HYDE. Thank you, Senator.

[The prepared statement and articles submitted by Representative Hyde follow:]

PREPARED STATEMENT OF REPRESENTATIVE HENRY J. HYDE

Thank you, Mr. Chairman, for granting me the opportunity to testify in support of S. 158 and your effort to provide a sound legal basis for a Congressional determination of when human life begins -- or at least at what point during that continuum characterizing the life span, the Constitutional guarantees of life and due process of law ought to arise.

May I also state that never in my experience have I witnessed such an incredible display of journalistic abuse as has been dumped (that's a more appropriate word than "heaped") on you, Senator East, for daring to explore this fundamental question. There is something about the topic of abortion that arouses all the talents for invective some of our most sophisticated opinion-molders possess and their syndicated ridicule is the reward for defending the right to life of the defenseless, voiceless pre-born. I stand in awe at your courage and fortitude, Senator East, and can only say that this most selfless and worthy of causes has in yourself found a champion worthy of the battle.

One of our opposition's fundamental misperceptions is that we pro-life advocates in Congress are a small isolated willful band manipulating the laws to our own narrow and unenlightened ends. By reading each other's writings exclusively, these commentators are blissfully unaware that the pro-life movement is growing all the time and speaks for millions of people who are literally appalled by the fact that one in three pregnancies ends in abortion, that we tolerate one and a half million abortions a year in America -- all in the name of "compassion." The inhumanity of the humane is one of the curious phenomena of this controversy -- justifying a sort of humane holocaust of the unborn.

We all remember the alchemists, those scientifically primitive souls who sought to change base metals into gold centuries ago. We have our social and legal alchemists today who have succeeded in changing what was once the crime of abortion into an act of humanity and compassion. I suppose some would call this progress, but our regression to a time when human sacrifices were a part of some cultures is not my idea of progress.

The proposition has been repeatedly asserted before this committee that in Roe vs. Wade the Supreme Court's finding that the unborn is not a person within the meaning of the 14th Amendment is the ultimate authority and this pronouncement by the Court is the last word -- it is decisive and determinative and forecloses Congress -- a co-equal branch of government -- from even exploring the correctness of that pronouncement. This view holds that if ever that finding of fetal non-personhood is to be reversed, it can

only be by that Court or by an amendment to the Constitution itself. (It is worth noting parenthetically that the U. S. Commission on Civil Rights in April 1975 issued a report holding in effect that a Human Life Amendment to the Constitution would itself be unconstitutional! How's that for locking in abortion for all time!)

It is this proposition that the elected Congress has no role to play in developing the meaning and the legal content of the word "person" that I reject.

As background for this discussion it is worth remembering that corporations have been deemed to be legal persons for over 100 years. Moreover, Justice William O. Douglas, a liberal luminary of the Court, in his famous dissenting opinion in Sierra Club vs. Morton (405 US 727,742,743 1972) commented on the corporation being considered as a "person" and urged "personhood" be extended to valleys, Alpine meadows, rivers, lakes, estuaries, beaches, ridges, trees, swampland and even air, so that each could speak for the unit of life that it is a part of and which is threatened with destruction.

When the Court stated in Roe vs. Wade that it "need not resolve the difficult question of when life begins" because of a lack of consensus in the disciplines of medicine, philosophy and theology, must we take that assertion as foreclosing the determination of, if not when life actually begins, then at what point thereafter the Constitutional guarantees of life and due process do apply? The Court's holding that questions of the pregnant woman's health (broadly defined) are superior to the pre-born's right to life, even through the third trimester, is not beyond the reach of the Congress to correct. This is particularly true since both the 5th and 14th Amendments explicitly guarantee the right to life, whereas the Court's new-found Constitutional rights to privacy and to health (defined as the absence of distress) are only found in the majority opinion of the Court, not the express language of the Constitution.

I have read some of the testimony before this committee that Congress has no business trying to bestow personhood on the pre-born, because this is a question left exclusively to the Court. Last Friday I was in Montgomery, Alabama, for hearings on the Voting Rights Act extension and had lunch with the Chief Judge of the 5th Circuit U. S. Court of Appeals and we got to discussing "activist judges." He told me that there were occasions where the Judge has almost no choice but to rule on a question that, by law and precedent, is a legislative and not a judicial matter -- citing legislative reapportionment as an instance. Surely this is a legislative function, but when the legislature repeatedly ignores its duty, census changes become meaningless and justice and democracy are not served unless the Court finally acts.

Well, if there are occasions when the force of circumstances are so extreme that the Court must act, then I suggest there is nothing wrong with a little "Congressional activism" in the face of a million and a half abortions each year under a Supreme Court decision that has been aptly described as "grossly, even grotesquely, erroneous."

I see nothing wrong and much right about passing a Human Life Bill and giving the Court an opportunity to reconsider Roe vs. Wade.

The absence of any probative evidence for the Court to review on the question of when life begins surely contributed to their confession of incompetency to adjudicate the issue. Their statement that such a determination is not necessary to support their denial of personhood to the pre-born almost refutes itself. Surely if the pre-born is human life from its conception, a denial of personhood to that human life would be a regression to Dred Scott -- the last time a human being was denied personhood by the Court.

Congress, the people's body, is not powerless in the face of such illogic and such a tragic result.

You have heard a great deal of testimony, pro and con, on the question of Congressional power to legislate in contradiction of a Supreme Court interpretation of the Constitution, and I shall not burden you or this statement with its repetition.

Suffice to say that the views of Thomas Jefferson (see his letter to William C. Jarvis, September 20, 1820 in The Writings of Thomas Jefferson, Ford Ed. 1899), Andrew Jackson (see his veto message of the Banks Bill, July 10, 1832) and James Madison (4 Elliot, Debates on the Federal Constitution 549-50 1836) were most influential with the drafters of the 13th, 14th and 15th Amendments and the States that had to ratify these Amendments. These men were strong supporters of the power and duty of Congress to legislate in contradiction, if necessary, to an interpretation of the Supreme Court.

A great void was left by the Court's declared inability to decide when human life begins. They said it wasn't anything they needed to decide, as though "personhood" was an independent ambulatory term not necessarily associated with human life.

A wise teacher, Jean Garton, has referred to the humanity of the preborn as the great 13th floor of society -- everyone knows it's there, but it is much more convenient to pretend it just isn't there.

But the drafters of the 14th Amendment expressly provided that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this Amendment."

To call Congressional exercise of this power "usurpation of judicial authority" and an assault on the processes of Constitutional government, as one distinguished member of your chamber has done, is unhistorical as well as quite incorrect law.

In adopting this bill, Congress will be indicating its view that the Supreme Court has seriously misinterpreted the Constitution in its ruling in the abortion cases. As Professor Kurland wrote Senator Baucus on April 17, 1981, the bill "will give the courts an opportunity to reconsider its position." Interaction between the branches of government in interpreting the Constitution is old and familiar and entirely Constitutional. As Professor Tribe has put it in his textbook on the Constitution, "Judicial review does not require that the Constitution be equated with the Supreme Court's view of it." For Congress to seek the Court's abandonment of error is a basic part of our Constitutional process.

Others have told you that this bill will mandate the treatment of abortion as murder or homicide. The fact is for over 700 years, abortion was a crime in Anglo-American law. It was never confused with murder or with homicide. The bill permits the states to restore the traditional Anglo-American protection of the unborn child. The bill does not make abortion murder or homicide.

Witnesses in opposition have testified that the bill will require the banning of contraceptives. The fact: The use of contraceptives will be in no way affected by the bill's provisions, recognizing the right to life belonging to persons after conception.

Ex-Solicitor General Bork has testified that Katzenbach vs. Morgan 384 US 641 and Oregon vs. Mitchell 400 US 112 support the power exercised in the bill, but "are very bad, indeed pernicious, Constitutional law." He concludes that he opposes the bill and thinks it unconstitutional because it "rests upon the principle of Katzenbach vs. Morgan."

My response is that this argument repudiates the Supreme Court's recognition of the right of Congress to interpret the Constitution. This argument ignores recent recognition of this Congressional power such as Chief Justice Burger's opinion in Fullilove vs. Klutznick 100 S.C.T. 2758 (1980). This argument ignores the many other examples of the Court deferring to Congress in correcting its own interpretation of the Constitution. The examples range from the Court acceding to Congress' interpretation of the Commerce power (e.g. Prudential Insurance Company vs. Benjamin 328 US 408 (1946)), to the Court bowing to Congress' definition of the meaning of "Court" itself (Glidden Co. vs. Zdanok 370 US 330 (1962)).

Ex-Solicitor General Cox has testified that Congress can act under

the 14th Amendment only to determine issues bearing on the enforcement or securing of "separate and established Constitutional right." The bill, he has testified, "would not protect any established Constitutional right." I mean no disrespect, but how blind can one be! The right to life not an established Constitutional right! What right is more basic, more established? It is the foundation of all the other rights of a person. All of the other rights are but words without the right to life.

The 14th Amendment provides, "Nor shall any State deprive any person of life, liberty or property without due process of law." Could express words and intention be clearer in setting out and establishing a separate right to life? In contrast to the fuzzy foundations of the alleged right to kill the unborn, the right to life is here, in so many words, recognized by the Constitution.

How can this right be enforced or secured if life cannot be defined? The Court pronounced itself incapable of providing a definition and signed a death warrant for the taking of life from over one and a half million unborn children annually. In the face of this inaction by the Court, in response to this massive epidemic of destruction, Congress has the responsibility to provide a definition securing the right to life guaranteed by the 14th Amendment to every human, even if it is just a small island of humanity known as the fetus.

The opposition to the bill is wildly confused. Opponents misconstrue the bill as banning contraception, as making abortion murder, as preventing Supreme Court review, as abandoning ordinary Constitutional processes. Such misconstruction suggests despair at meeting the bill fairly on its own terms. Opponents treat as bad law the wide variety of Supreme Court decisions where the Court bowed to interpretation of the Constitution by Congress. Most remarkable of all, opponents do not mention the right to life as established by the Constitution.

With such arguments offered in opposition, it is plain that Congress needs to act to enforce and secure this most fundamental of American liberties.

I think it is important not to claim too much for S. 158 in terms of Congressional power versus Supreme Court interpretation.

S. 158 does not assert a general power for Congress to re-define Constitutional rights. It only asserts a power of Congress to supply an answer to a fundamental question concerning the Constitution -- when does human life begin -- when the Court has declared itself unable to answer that question.

And please note, S. 158 does not mandate abortion policy for the

Court -- it presents the issue anew to the Court buttressed by such hearings, testimony and conclusions as Congress elects to make. The Court still has the last word! The bill can stand on the narrow pedestal of Justice Harlan's dissent in Katzenbach vs. Morgan adverting to Supreme Court deference to legislative findings.

The sum and substance of the question is simply this:

> Protection of life is a right expressly guaranteed by the Constitution -- we should not decide who shall be protected without at least examining the question of who is a human being!

How is government to deal with a million and a half abortions a year? Is human life involved? Does America value all human life? Only some human life? Are some human lives not worthy to be lived?

The Supreme Court has answered none of these questions and the proponents of S. 158 urge only that some branch of government deal with these questions.

As Stephen Galebach, the attorney who has catapulted this issue to the forefront, so eloquently states, "For important public policy questions, life and death, surely the radical proposal is to cover up the questions, not to address them."

It is awesome how many worshippers at the altar of science, who have been asserting its boundless horizons, now ridicule the testimony of other scientists seeking to provide an answer to perhaps the most fundamental question of all.

Since basic human rights accrue to every human being, is it such a fool's errand to try and determine, if not the exact moment when they accrue, then at least the earliest moment when they ought not to be arbitrarily denied? We're talking about legislation concerning life and death, are we not? Now if we agree that the right to life arises at the moment one is born, do we concede that ten minutes -- or ten days -- prior to birth, no such human right exists?

Listen to the late Alan Guttmacher, M.D., President of Planned Parenthood, who wrote in 1961, "Fertilization, then, has taken place; a baby has been conceived, "(Birth Control and Love: The Complete Guide to Contraception and Fertility," Macmillan). In an earlier book (Having A Baby, 1947) he referred to the being produced at fertilization as "the new baby which is created at this exact moment."

In 1964, Planned Parenthood issued a pamphlet asserting that "abortion kills the life of a baby, once it has begun." However, by 1968 they and Dr. Guttmacher changed their minds -- not as a result of any

biological revolution -- but because the social engineering called abortion became their focus.

I have a Planned Parenthood pamphlet issued as late as 1971 asserting that when "one sperm meets the egg they join and move into the womb and a baby starts to grow in the mother's womb."

Wasn't the miracle of Louise Brown that her human life began in a test tube? As we enter the developing field of "in vitro" fertilization, isn't the question of the beginning of human life worth asking?

The list of medical and scientific authority for the definable beginning to human life is long and distinguished and not to be ignored simply because it is inconvenient to the new abortion ethic.

Using the term "murder" is an effort to "inflame the jury." No one in Congress that I am aware of, uses this term. Rather, the term as used in the criminal laws of every state (prior to 1973) was "abortion" and the person prosecuted was -- and will be -- the abortionist; the person making a fee out of someone else's misery; not the distressed woman seeking an abortion, who needs support and understanding.

Oh, I realize how awkward it is for those who want to keep abortion "safe and legal" to confront the problem of when human life begins. For if the fetus is human life -- not a diseased appendix nor a tumor -- then abortion kills that human life and we concede the Hitlerian notion that some lives are not worthy to be lived. How much better for them to obscure and obfuscate -- to pretend that the very question is beyond (or beneath?) answer.

And what if these hearings cannot prove when human life begins? Can any of our adversaries prove the unborn is <u>not</u> human life? And where, in Western Civilization, do we assign the benefit of the doubt?

It is no excuse in law or common sense for a hunter to claim he thought he was shooting a moose when he shoots at some rustling leaves in a forest and kills instead another hunter.

If these scientists cannot disprove that the pre-born are of the human species and indeed alive, then ought not important legal consequences follow?

Mr. Chairman, every abortion by definition and intention happens over someone's dead body. The mortality rate for the unborn in abortions is 100%.

The "semantic gymnastics" indulged in by pro-abortionists would be amusing if they weren't such deadly weapons in the struggle to protect the defenseless unborn.

Take the term "pro-choice" -- meant to convey that a woman ought to

be able to choose whether or not to have a baby. The problem is, once you are pregnant, you already have a baby, so the only choice is how to kill the unborn -- by curette, by the suction machine or perhaps the salting out method. That's some choice for the unborn! Abortion is the ultimate in child abuse.

The term "terminate a pregnancy" is another case in point. Do you "terminate" crabgrass or a mosquito or a cockroach? No, you kill them.

I used to think that pro-abortionists had an animalistic view of unborn children and human life, but I was quite wrong. We think a lot more of animals than we think of unborn children. The snail darter is protected by law as one of the endangered species. The dolphin, the white whale, the furbush lousewort are too, and yet, the unborn child hasn't got any protection at any time during the nine months of gestation, should the mother desire an abortion. A blade of grass has more protection under our law.

Mr. Chairman, very few days go by when we are not told that some network or newspaper has conducted a poll and found that most people favor abortion. Those of us in politics have learned that polls can be useful and misleading as well. But if you believe that the right to life is a sacred human right, then the existence of such a right should never be subject to polls. Alexander Hamilton said it best:

> "The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of the Divinity itself; and can never be erased or obscured by mortal power."

In closing, I should like to share with you the views expressed nearly 40 years ago during World War II by Dr. Joseph D. Lee, a leader in modern obstetrical practice, which was printed in the 1940 edition of the Yearbook of Obstetrics and Gynecology:

"At the present time, when rivers of blood and tears of innocent men, women and children are flowing in most parts of the world, it seems almost silly to be contending over the right to life of an unknowable atom of human flesh in the uterus of a woman.

"No, it is not silly. On the contrary, it is of transcendent importance that there be in this chaotic world one high spot, however small, which is safe against the deluge of immorality and savagery that is sweeping over us. That we, the medical profession, hold to the principle of the sacredness of human life and of the rights of the individual, even though unborn, is proof that humanity is not yet lost ..."

Mr. Chairman, I am proud to support S. 158.

. . . healthy if they are both around two years apart, rather than only a year apart. When babies are born two years or more apart, mother and baby are healthier. Furthermore, babies do cost money, and so more time between them gives the family budget a chance to recover, too.

### WAYS TO PLAN YOUR CHILDREN

Birth control can help you plan your children so that you can have the number of babies you want and have them when you and your husband are well and able to take care of them. Birth control means the use of medically approved methods to postpone pregnancy until you are ready for it. The method your doctor advises for you is harmless and safe.

Planning your children does not only mean being able to wait until you are well enough and able to take care of a baby. Family planning also means being able to have your baby when you *do* want it. Sometimes couples find that for some reason the wife does not become pregnant. New discoveries in medicine give fresh hope to couples who find they cannot have children when they want them.

### YOUR QUESTIONS ANSWERED

In order that you will have a better understanding of the means of family planning here are the answers to the questions which people most often ask:

*What is birth control?*

It is a safe and simple way to plan for your children and to have them when you want them.

*Is it an operation?*

It is not an operation of any kind.

*Is it an abortion?*

Definitely not. An abortion kills the life of a baby after it has begun. It is dangerous to your life and health. It may make you sterile so that when you want a child you cannot have it. Birth control merely postpones the beginning of life.

*Is birth control harmful?*

Birth control methods which have been approved by leading medical authorities cannot hurt you in any way.

### WHERE TO GO

You can learn about family planning and child spacing at the address below:

*This pamphlet published by:* Planned Parenthood, World Population, 515 Madison Avenue, New York 22, N.Y., "Every Child a Wanted Child".

Planned Parenthood is a service mark registered in the U.S. Patent Office.

EDUCATION DEPARTMENT
PLANNED PARENTHOOD ASSN.
Memorial Hospital
1200 So. 5th Ave.
Phoenix, Arizona 85003

Price: Single Copy 25¢

| | | |
|---|---|---|
| Quantity Rates: (Plus Postage) | 50 Copies | $ 5.00 |
| | 100 Copies | $ 7.50 |
| | 1000 Copies | $55.00 |

PLANNED PARENTHOOD-WORLD POPULATION
810 SEVENTH AVE., NEW YORK, N.Y. 10019

No. 590 4-71/300

2.1

932

**TO BE A MOTHER OR A FATHER** is a wonderful experience and a happy one when that mother and father know they can give their child those things necessary for a good life.

Having babies too often may be harmful to a mother's health. Too many children may be a hardship rather than a joy.

**FAMILY SIZE CAN BE PLANNED**

There are many good methods, approved by doctors, to choose from. See page 18 for where you can get this help.

Revised, 1971

Copyright © 1967 Planned Parenthood Federation of America, Inc.
All Rights Reserved

933

WHO DOESN'T LOVE

A NEW BABY?

EVERY PARENT

WANTS GOOD THINGS

FOR HIS CHILDREN

- GOOD HOME
- GOOD FOOD
- GOOD EDUCATION
- HAPPINESS

WHEN YOU PLAN

YOUR CHILDREN

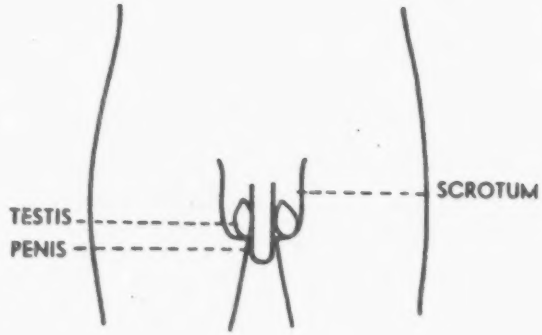
YOU HAVE A HAPPIER

HEALTHIER FAMILY.



934

## MAN'S BODY




THE MAN'S SEEDS (SPERM)
ARE PRODUCED IN
HIS TWO SEX GLANDS (TESTES)
LOCATED IN
THE SAC-LIKE SCROTUM.



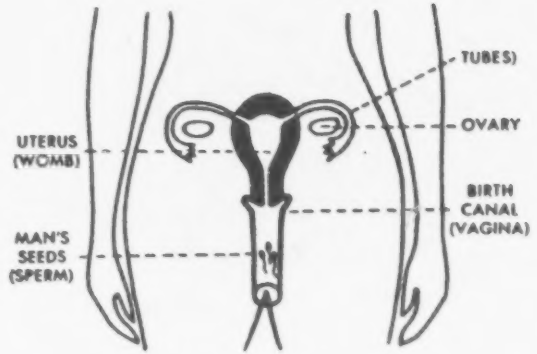
## MAN'S SEEDS
(SPERM)

THERE ARE 400 MILLION SPERM
IN EVERY TEASPOON OF MALE FLUID.
THEY ARE TOO SMALL
TO BE SEEN
EXCEPT THROUGH A MICROSCOPE.
EACH SEED HAS A HEAD
AND TAIL
AND MOVES.



935

## WOMAN'S BODY




DURING SEX RELATIONS

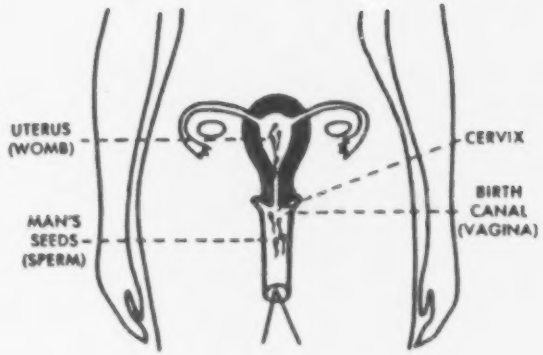
THE MAN'S SEEDS

PASS FROM HIS SEX ORGAN (PENIS)

INTO THE

WOMAN'S BIRTH CANAL (VAGINA).






THESE SEEDS (SPERM)

SWIM UP THE BIRTH CANAL

INTO THE WOMB (UTERUS)

THROUGH A SMALL OPENING

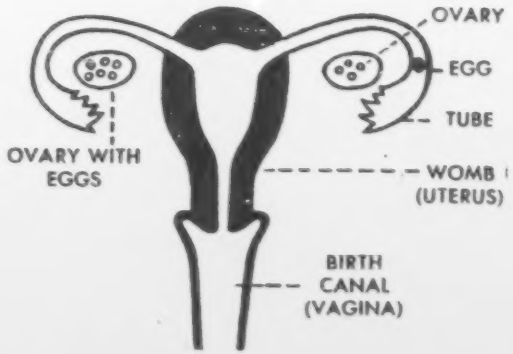
CALLED THE CERVIX

(THE MOUTH OF THE WOMB).



936

84-581 O—81—60




ONE EGG (OVUM)

PASSES FROM THE WOMAN'S

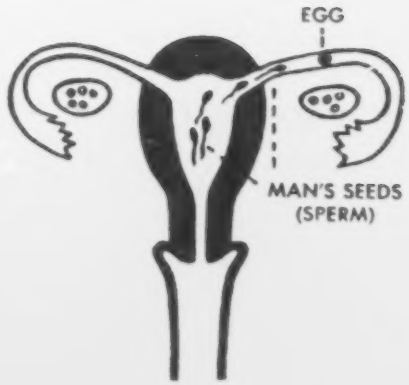
SEX GLANDS (OVARIES)

EACH MONTH

INTO A TUBE

AND TRAVELS TOWARDS THE WOMB.



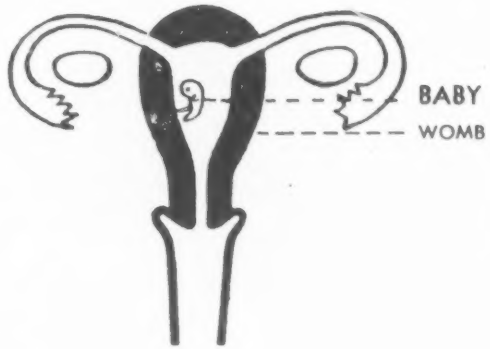



IF ONE SPERM MEETS THE EGG

THEY JOIN

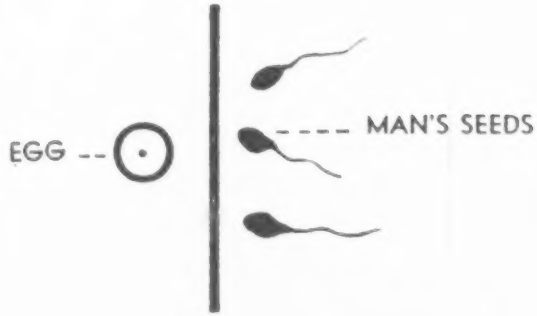
AND MOVE INTO

THE WOMB




AND A BABY
STARTS TO GROW
IN THE
MOTHER'S WOMB.






TO PREVENT PREGNANCY
THE MAN'S SEEDS
MUST NOT BE ALLOWED
TO MEET THE EGG.

A BABY THEN CANNOT BE STARTED.

THERE ARE MANY WAYS
TO STOP THEM FROM MEETING.



938

BY DOCTOR'S PRESCRIPTION ONLY

BIRTH CONTROL PILLS TAKEN BY MOUTH

ACCORDING TO DIRECTIONS

STOP THE OVARY

FROM FORMING EGGS.

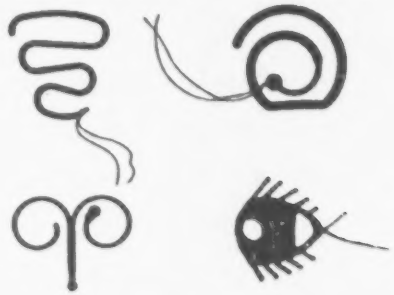
IF THERE IS NO EGG

PREGNANCY CANNOT OCCUR.

• Ask your doctor, the doctor at the public health clinic, hospital clinic or the doctor at your Planned Parenthood Center to give you the American Medical Association booklet: "What You Should Know About The Pill."



BY DOCTOR'S PRESCRIPTION ONLY



SMALL PLASTIC OR

METAL CONTRACEPTIVES—

CALLED INTRAUTERINE DEVICES (IUDs)—

ARE PLACED IN THE WOMB

BY A DOCTOR.

ONCE IN PLACE

THIS BIRTH CONTROL METHOD

REQUIRES LITTLE FURTHER

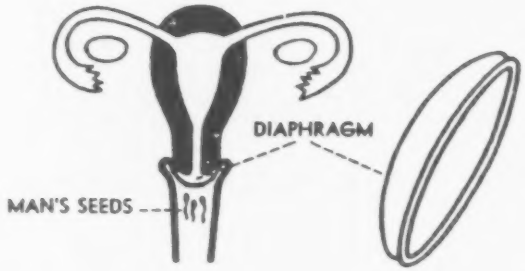
ATTENTION.

• Ask your doctor for information about them.



939

BY DOCTOR'S PRESCRIPTION ONLY




ANOTHER METHOD

IS THE DIAPHRAGM AND JELLY.

THIS COVERS

THE MOUTH OF THE WOMB

KEEPING THE SPERM OUT.

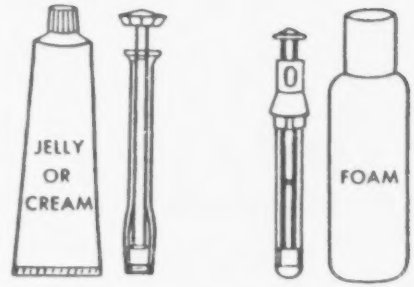
THE SPECIAL CONTRACEPTIVE

JELLY KILLS THE SPERM.

A DOCTOR MUST FIT AND TEACH
YOU HOW TO USE A DIAPHRAGM.



NO PRESCRIPTION NEEDED




CONTRACEPTIVE FOAMS,

CREAMS, JELLIES, VAGINAL TABLETS

AND SUPPOSITORIES

CAN BE PUT

INTO THE BIRTH CANAL

BEFORE SEX RELATIONS

TO STOP THE MAN'S SEEDS.

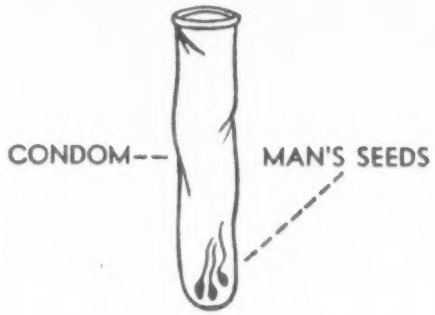
YOU CAN BUY

THESE AT ANY DRUGSTORE.



940

NO PRESCRIPTION NEEDED




ANOTHER WAY

IS USING A CONDOM (RUBBER).

THE CONDOM

IS PLACED OVER

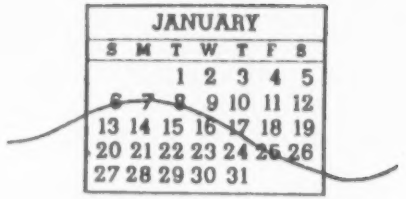
THE MAN'S SEX ORGAN (PENIS)

BEFORE SEX RELATIONS.

THE MAN'S SEEDS

THEN CANNOT REACH THE EGG.






THE RHYTHM METHOD

IS BASED

UPON A 'SAFE PERIOD'

EACH MONTH.

YOUR DOCTOR OR THE DOCTOR

AT A PLANNED PARENTHOOD CENTER

CAN HELP YOU FIGURE OUT

YOUR 'SAFE PERIOD.'



941

TO GET
BIRTH CONTROL, ASK

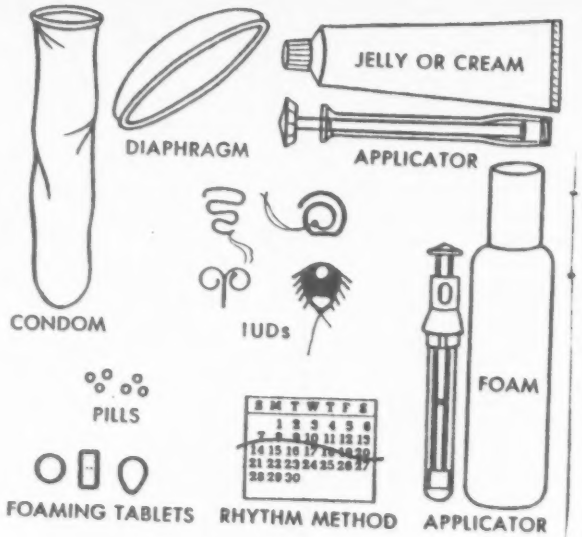
- YOUR DOCTOR
- YOUR LOCAL PUBLIC HEALTH CLINIC
- HOSPITAL CLINIC
- THE DOCTOR AT YOUR
NEAREST PLANNED PARENTHOOD CENTER.
- YOUR NEIGHBORHOOD DRUGGIST

EACH COUPLE
SHOULD USE A METHOD
THEY LIKE.

THE ONE YOU LIKE BEST
AND USE EVERY SINGLE TIME
IS THE BEST ONE FOR YOU.



942




**WHEN YOU WANT A BABY**

**STOP USING**

**BIRTH CONTROL.**



This publication was prepared originally by William Fritz, M.D., Director of the Health Departments of Accomack and Northampton Counties, Virginia, in cooperation with the Virginia State Department of Health.

943

Senator EAST. I would appreciate it if our next panel would come forward: Ms. Sarah Weddington, Ms. Judy Collins, Dr. Carolyn Gerster, and Ms. Mary Meehan.

Ladies, I welcome you this morning. We appreciate your taking the time from your demanding schedules to come and share your thoughts with us on this matter.

I would like to run through all four of your statements. Then we can begin to have questions and answers. Again, I would like to encourage you very strongly please to summarize your statements because of time limitations. If you read, I would appreciate your reading selectively. That will move things along and allow us more time for discussion. I remind you that your whole written statement will be a part of the record of this subcommittee.

Sarah Weddington received her law degree from the University of Texas and is a former three-term member of the Texas House of Representatives.

Ms. Weddington argued the *Roe* v. *Wade* case before the Supreme Court. She also served as a special assistant to former President Jimmy Carter.

Ms. Weddington, we welcome you this morning and look forward to hearing your statement.

## STATEMENT OF SARAH WEDDINGTON, WASHINGTON, D.C.

Ms. WEDDINGTON. Mr. Chairman, I thank you for this opportunity to appear before you and to present testimony which I hope the other members of the subcommittee will also consider.

### REPRESENTING NATURE OF TESTIMONY

I would like to begin by pointing out that I am here representing 34 million people who are the members of 75 different organizations. You know from your work with groups on an opposite side of this question how difficult it is for groups to come to any consensus and shared testimony and opinion.

Yet I come to you as the representative of those millions of people and those 75 organizations. They join together in opposing this bill, and they ask the members of this subcommittee not to pass it. In addition to my prepared statement as their representative, some of them have prepared a statement for the record. I would ask at this time that these statements be given to you and later furnished to other members of the committee for consideration.

[The prepared statements mentioned above appear in the appendix, volume 2.]

Ms. WEDDINGTON. I often seem to find myself appearing in a representative capacity. In 1971 and 1972, I appeared before the Supreme Court to represent concerned citizens throughout this country, many of them women, who believed that the U.S. Constitution preserved for the individual decisions about their own childbearing capabilities. Today, I am again compelled to speak on behalf of many others who could not speak here for themselves.

You have already heard from constitutional scholars, academicians, clinicians, religious representatives, and Governement officials, but the people you have least heard from are those who are most affected by the issues under consideration.

For example, it might be an 11-year-old girl from Nebraska who recently had an abortion. It might be the mother of several from Pennsylvania, pregnant and unable to afford more children. It might be the mother from Virginia who carried to term a fetus with Tay-Sachs disease because she could not afford an abortion and later had to watch the deterioration and death of that child.

There are many with personal experiences who could appear before you, but I appear today as their representative. I am here in the place that is rightfully theirs.

I will abide by your request that witnesses not read their prepared statements but instead summarize them. I also want to comment on several issues raised this morning.

### SUPREME COURT'S ROLE

The Senate was referred to earlier in this hearing as a coequal branch of Government. Certainly it is in some context. However, it is not coequal where the interpretation of the U.S. Constitution is concerned. That is a function given expressly to the U.S. Supreme Court.

Nor am I here to say that the interpretation of the Constitution should rest on polls; nothing would be further from the truth. The task of interpreting the Constitution rests with the U.S. Supreme Court.

I brought with me today my copy of the Supreme Court's decision in *Roe* v. *Wade* autographed by the nine Justices. This decision makes many things very clear.

First, the Supreme Court is not anxious about, waiting for, or even necessarily concerned with whether or not this Senate subcommittee or any other group of Members of Congress gives them guidance on the answers to the questions the Court has already answered. They have answered the question of whether or not abortion is constitutional; they have interpreted the Constitution to say that it is basically the right of the women of this Nation under the Constitution to decide for themselves what the progress of a pregnancy will be.

You have heard testimony from all kinds of legal scholars, so I will not put on my lawyer's hat today. I will simply remind you that you have had a statement from 12 constitutional scholars, a statement by 6 Attorneys General, an unprecedented kind of legal sentiment both from those who oppose abortion and those who would favor its availability, all saying this bill is not an appropriate legal way to deal with the issue of abortion.

It is clear that this legislation is not constitutional. The Supreme Court has not abdicated its role. It does not ask for any term to be defined. Rather, absent a constitutional amendment, it has already answered the questions posed by your work.

Even if your explanation of this bill were correct—that the Court in *Roe* invited Congress to make a finding of scientific fact—that finding which is necessary to justify this bill constitutionally cannot be made on the basis of the testimony you have heard. There is no greater consensus today than there was in 1973 on the answer to the question of when life or legal being begins.

I have read most of the testimony that has been presented here, and I know most of the people who testified before you. While not

all of the ideas were presented to the Supreme Court in 1971 and 1972 and while not all of the same people presented written evidence, most of the ideas and many of the players are the same. The Court had before it a stack of briefs and documents presenting extensive facts, theories, and arguments about this issue.

There is no consensus on when legal being begins. You had testifying against the conclusions that the authors of this bill suggest be made witnesses from the National Academy of Sciences, the American Medical Association that joins us today, and many others.

It is clear that the ultimate goal of those who support this measure is to eliminate the choice of abortion, except perhaps in the most dire of circumstances when a woman's life is at stake.

The Court in *Roe* v. *Wade* recognized that some decisions are so private in nature that they are not appropriate for Government, State or Federal to decide. Therefore the Court sought to remove those questions from government decision and to allow, in fact, the citizens to make those decisions.

### THE ROLE OF STATES AND CITIES

Certainly States remain free under *Roe* v. *Wade* to pursue many positive programs of trying to see that the choice of abortion is not necessary because pregnancy is prevented. All of us support those efforts.

As a former member of the Texas House of Representatives, it is interesting to me that, as best I understand your interpretation of this proposed bill, it would prevent the States from being able in any way to assist in the performance of abortion, even by funding them for specific categories of people, even by allowing abortions to be done in State-supported institutions, or perhaps even those of the local government.

Senator, through this bill if it were passed, you would be denying your own State of North Carolina—which has three times specifically through its State legislature chosen to continue funding abortions for the poor—the flexibility to make that choice. You would be saying to your own State that they cannot do that any more, despite the will of the people as expressed through their elected State legislators.

Carol Bellamy from New York was here saying to you that as a local government official she wants it left within the purview of local government to decide when and under what circumstances they might fund abortions.

### VAGUENESS OF MEASURE

As you said a moment ago, never before has abortion been considered murder. However, never before has there been a Federal law that attempted to define the fertilized egg as a person for any purpose whatsoever. That has never been the law. That should not be the law now.

I am glad that you are putting into the record some statements that perhaps will limit the impact of the bill, but the impossibility of defining precisely its impact still worries me. It is extremely vague. The committee is not giving definitive answers to legisla-

tures or courts or others who might interpret this bill as to what it is meant to do.

There is certainly a possibility that some States might choose to define the crime of abortion, if they chose to make it a crime, as murder, or others as manslaughter, or that there might be problems about the medical treatment appropriate for pregnant women, or whether or not a pregnant woman who miscarrries might be subject to negligent homicide charges.

Even though Representative Hyde tried to say that it was always the abortionist who was prosecuted, there were certainly States prior to 1973 that made the women who sought the abortion a part of the criminal act. There was even the crime of self-abortion.

We worry about what the impact of defining fertilized egg as being a person will be on the use of contraceptives. There are many other things that might be said, but it is interesting to me that the attorney general of Utah would come before you saying that he is not worried about the possible consequences of this bill because of his experience antiabortion laws are seldom enforced and violators seldom prosecuted.

Certainly the proponents of this measure would not mean to propose its passage based on the likelihood that it would not in fact be enforced and would instead be disregarded, although I agree that it would probably be disregarded in many, many individual instances.

OPPOSITION TO BILL

I come before you because I represent these organizations who do not want the opinion of *Roe* v. *Wade* reversed. They do not consider abortion a convenience. When they think of the girl who has been raped, or the woman who carries an anacephalic fetus, or the teenager who is pregnant, or the woman who cannot feed or clothe her children and is pregnant again, they do not think of abortion as a convenience.

I would conclude with only two comments. I would say that, more than anything else, what the testimony by all the witnesses you have heard would seem to indicate is that there is not a consensus today on the issues which you seek to address, but rather that the Supreme Court has already determined that for the purposes of the 14th amendment the fetus is not a person. Many people, in fact about 78 percent of the citizens of this country under the recent Washington Post-ABC poll, would indicate they do believe that abortion should be available in some circumstances.

We come before you asking you not to disregard the integrity of the constitutional process, the separation of powers provision, the religious liberty of our citizens, the will of the people, the sound practice of medicine, and the needs of many women who face problem pregnancies. On behalf of all of these, I urge you and would urge the other members of this subcommittee to vote against Senate bill 158.

I thank you. [Applause.]

Senator EAST. Thank you. Ms. Weddington, I deeply appreciate your comments.

As I have done before, I would like to remind the audience that whatever side you are on, we shall have order in the room. I regret

that we cannot do it otherwise. I appreciate there are two sides, maybe even three or four, in this room. I would ask your indulgence and indeed will insist upon proper decorum so we can conduct these hearings.

Ms. Weddington, I deeply appreciate your statement. You have presented it very well and very concisely. I also appreciate your staying well within the time limits. That will be of great help to us and allow us to discuss many of the excellent points you raised.

[The prepared statement of Ms. Weddington and list of organizations which submitted prepared statements follow:]

PREPARED STATEMENT OF SARAH WEDDINGTON

Mr. Chairman, Senator Baucus, and members of the Subcommittee, I want to thank you for giving me the opportunity to appear before you today. I am here specifically representing the 34 million members of 75 national organizations who care about the health and welfare of women, and who are committed to the rule of constitutional law in this country. From your work with the various right-to-life groups, Mr. Chairman, you must be aware how difficult it is for organizations to come to an agreement on any particular piece of legislation. And so my presence today is of particular significance, for although these groups I represent have widely differing purposes and goals, as well as differing natural constituencies, they have found a common agenda in opposing the bill that the committee has before it. Each of these organizations has prepared a statement for the record, and I now respectfully request that all of these statements be included in the hearing record.

It seems I often find myself in a representative capacity; when I argued Roe v. Wade before the Supreme Court in 1973, I was representing women and girls across the country who found their ability to make decisions regarding child bearing circumscribed by state laws prohibiting abortions, often to the severe detriment of their mental and physical health and the well-being of their families.

The history of events has brought us to the point where I again feel compelled to speak in their behalf, for they are very much on my mind. In the course of these hearings, on a bill whose purpose is to reverse the Supreme Court ruling which struck down those restrictive abortion laws, none of these women has been permitted to speak for herself before this committee.

You have heard from constitutional scholars as to whether or not Congress has the authority to pass this law. You have heard from academicians and clinicians as to whether scientific fact supports the premise of this bill. You have heard from theologians on the religious implications of the legislation.

And you have heard from governmental officials on its implementation and enforcement.

But you have not heard from the people who will have to live under this law if it is passed. You have not heard from the family of the 11-year-old in Nebraska who became pregnant and who had an abortion last month, but who might not have had that choice if this bill were law. You have not heard from the pregnant welfare mother of three from Philadelphia, who has cancer and who might have had to forego treatment for that disease if this bill were law. You have not heard from the Virginia mother who is watching her child die an agonizing death from Tay-Sachs disease, who is pregnant again, and who, if this bill were law, would face the possibility of condemning another infant to the same torture. I am here in the place that is rightfully theirs, to speak out for the sake of the millions of women in this country who have, on the basis of a personal moral decision, chosen abortion, and those who, while they might not choose it for themselves, strongly believe the choice must remain available for others.

I do not think there is a need for further in-depth analysis of the constitutional issues raised by S. 158. The committee has received very fine and extensive testimony on those issues from Lawrence Tribe and Robert Bork who, while they disagree on abortion, are unanimous in their opposition to this bill, and I would refer you, once more, to their comments. As one of the attorneys who argued the Roe [illegible] before the Supreme Court, I feel a need to use part of my time to clarify some serious misunderstandings of Roe that apparently remain, and I find also that I must challenge some of the statements and conclusions that you, Mr. Chairman, and some of the witnesses before me have made.

That interpretation of Roe which would permit one to contend that this legislation is constitutional is incorrect it is a product of wishful thinking and deliberate misunderstanding. According to this interpretation, the following statement of the Court in Roe is an <u>invitation</u> to Congress to make a positive finding of fact: "when those trained in the

respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus (on when life begins), the judiciary, at this point in the development of man's knowledge, is not in a position to speculate." To conclude that the high court was assigning such a speculative task to a body of politicians, who are neither philosophers nor theologians, nor scientists, stretches the meaning of the words beyond reason.

The Court did not abdicate its role of defining constitutional terms. It said very clearly that in the Fourteenth Amendment the term person does not -- not "should not," nor "might not," nor "pending further information not," but does not refer to the unborn. The Court went on to say that there was no point in its engaging in philosophic or theological speculation on the beginning of life, since there was no consensus among those who concern themselves with such things, and since the constitutional meaning of 'person' was already clear without the court assuming a function which was foreign to it.

But even if the primary rationale of this bill were correct, i.e. that the court in Roe invited Congress to make a finding of scientific fact, that finding which is necessary to justify this bill constitutionally cannot be made on the basis of the testimony you have heard.

There is no greater consensus today than there was in 1973. The court had before it a broad range of briefs and research from scientific, religious and legal authorities. There have been no significant scientific discoveries to discredit or fundamentally alter the data since that time. In fact, some of the scientists who supported the finding in S. 158 did so by quoting standard textbooks which were widely used prior to 1973, and therefore would have been available to the Supreme Court as well.

One cannot escape the monumental lack of consensus in our society on when life begins. Given the testimony which this committee received, how are you as legislators to decide? On the one hand you have the National Academy of Sciences, and American College of Obstetrics and Gynecology, the American Medical Association, 1200 scientists in Massachusetts and Connecticut and the 8 scientists of impeccable credentials who testified orally

before this committee expressing opposition to the bill's definition of human life; on the other you have Drs. LeJeune, Gordon, Mathews-Roth, and the 5 others, also of impeccable credentials, who testified in support of the scientific hypothesis of the bill. What criteria do you as non-scientists use to evaluate these? Which testimony will you credit, which will you discredit?

Finally, even if one should determine on the basis of science that the beginning of human life is conception, it does not logically follow that one therefore can define legal personhood by equating it with that human life. That definition of personhood ignores all the traits and functions, obvious to everyone, that are commonly associated with persons,and reduces them to genes, chromosomes and DNA molecules. The Fourteenth Amendment considers life an attribute of persons, not identical to them. I would like to remind the subcommittee that there is at least one other attribute of persons which is protected by the Fourteenth Amendment and ranked alongside life itself -- and that attribute is liberty.

The ultimate goal of proponents of S. 158, including the author and chief congressional sponsors, is to eliminate the freedom to choose abortion in this country except in the most dire circumstances, when a woman's life is at stake. For them, this bill is an interim measure which encourages states to ban abortion, pending passage of a constitutional amendment requiring them to do so. If it were ruled constitutional, I join the legal scholars in believing that S.158, in establishing by law that the fetus is a person from the moment of conepption, could have much the same impact as an amendment, through enforcement of the definition of person by the courts. I am certain, however, that at the very least, S. 158 will do far more than reverse Roe.

The champions of this bill claim that, in deciding Roe, the Court imposed upon the states a federal policy on abortion, and that S. 158 will reestablish the right of the states to determine abortion policy. Neither of these assertions is accurate. Actually, what the Court did was recognize the private nature of the abortion decision and remove it from the realm of

government, state or federal. Having determined that the word "person" as used in the Fifth and Fourteenth Amendments was not intended to include the unborn, the court concluded that the state does not have a right to unduly burden the conscientious decision that a woman, whose right to privacy is protected by the Constitution, might make on abortion. Thus, rather than establishing a federal policy of abortion on demand from conception until birth as a form of birth control, the court was applying a fundamental principle of the Constitution: that a state may pass no laws which infringe on the basic civil and constitutional rights of its citizens.

Yet even though the court acknowledged constitutional claims only for the born, it recognized that individual states may have an interest in the potential life of the fetus prior to birth. It was also sensitive to the problems that are peculiar to the issue of abortion. So in articulating the concept of trimesters, the court was actually permissive in allowing individual states the authority to regulate abortions in the second and third trimesters.

For instance, Roe specifically allows states to outlaw abortion when the fetus becomes viable, except when the life or health of the mother is at risk. This most certainly is not abortion on demand as a method of birth control right up until birth. Perhaps confusion arises in the mind of the public because viability appears to be a very imprecise concept, since it is obviously impossible to predetermine a specific point at which all fetuses will become viable. However, in individual cases it is much more identifiable than conception, which can only be inferred from information available no earlier than two weeks after the conception actually has taken place. Medical witnesses have testified repeatedly before the courts that viability is a concept with which they are totally familiar and which they have no problem using.

Viability is determined operationally rather than scientifically. The court describes it as the point in gestation at which "the fetus then presumably has the capability of meaningful

life outside the mother's womb." It is not the same as independence, for all of us are dependent on one another to varying degrees. Rather, prior to viability the fetus has no hope of surviving outside the womb, with or without the best technology medical science has to offer.

Abortion on demand as a form of birth control right up until the time of birth is a myth. The question of viability becomes important in less than 1% of the time, since in over 99% of the cases, there is absolutely no question that the fetus may be viable. Over 90% of all abortions take place in the first trimester before the 12th week of pregnancy and the 10th week of fetal development. (In 1978, the most recent year for which statistics are available, 99.2% of all abortions took place prior to the 21st week of gestation, and medical doctors are agreed that prior to that time there is virtually no chance for survival outside the womb.) Nevertheless, if for any reason abortion is induced -- and in late trimesters what I am referring to is actually early induced delivery -- and it results in a live birth, that newborn is protected by the laws as a person.

Returning now to a state's ability to establish public policy on abortion under Roe, I would like to make one further point. States remain free under Roe to pursue positive programs which are aimed at or help in reducing the number of abortions. Thus they may, and do, provide support for family planning programs, economic assistance to families, sex education, tax breaks for contributions to charitable institutions, adoption programs, health and custodial care for the mentally retarded and physically disabled, and so on. What they <u>are</u> prohibited from doing is, <u>coercing women</u> into making a particular decision regarding a pregnancy. No matter how strong our zeal for states' rights, we must always remember that the Constitution remains the highest law in the land and stands to protect the rights of the individual over and against the action of any legislative body.

As a former member of the Texas state legislature, I have an immense respect for the role of state government, and I am very concerned with the need to preserve flexibility for the states within constitutional bounds. Furthermore, I certainly

trust the wisdom and compassion of the American people. But this bill allows for neither flexibility on the part of the states nor the exercise of wisdom and compassion on the issue of abortion.

S. 158 does not return the country to the pre-1973 period when the states exercised the authority to permit or restrict abortion within their boundaries. It is something new under the sun. Never before has federal law defined a fertilized egg as a person for any purpose whatsoever. To adopt this concept would grant to fetuses rights far greater than those now granted to existing persons, for the law presently allows no person the right to touch, interfere with, or in any way use the body of another law-abiding person against his or her will, let alone the right to use the body of another in a parasitic way, as does the fetus. The National Center of Health Statistics reports that there were health complications in ~~6%~~ 5.4% of all pregnancies which were carried to term in 1978. In compelling all women to continue their pregnancies, this bill takes the unprecedented step of forcing them to place their own health and lives at risk. Only in the case of drafting men for war has the state ever passed a law which compels a person, regardless of his will, to place his life or personal health in jeopardy.

By requiring states to enforce the Fourteenth Amendment due process protection using that definition of person, as the author of the bill testified, S. 158 automatically prohibits the use of state funds and facilities for abortions and abortion related services. This means that in your state of North Carolina, Mr. Chairman, which has, for the past three years, chosen to fund Medicaid abortions for the poor, legislators would not be free under this bill to exercise their own wisdom and judgement. Poor women who are victims of rape or incest would be unable to obtain medical assistance to terminate a resulting pregnancy. The legislature could not choose to give assistance to a woman with heart disease whose pregnancy was not immediately life threatening but obviously dangerous to her health. State hospitals would not be able to provide anmiocentesis and genetic counselling

to the Jewish couple who has already had one child afflicted with Tay-Sachs disease, because of the degree of risk to the fetus associated with the test. In these instances, North Carolina and other states would have no options.

While you, Mr. Chairman, say that the bill itself does not directly require states to pass anti-abortion legislation or impose criminal penalties for abortion, it is designed to provide the states with a compelling interest in fetal life which could override the interests of the woman and ban abortion in all but the most extreme cases. Some believe the bill obliges states to protect all fertilized eggs and fetuses under existing statutes implementing due process protections. In this case, is there any state which has a statute which justifies the taking of any person's life except for the preservation of another or in cases of capital punishment? If the Chairman is correct and this bill would give states wide latitude to permit abortion in certain circumstances, then he has an obligation to make that clear in the language of the bill. He ought not to endorse or allow a bill which permits another interpretation.

Today is the last day of hearings on S. 158, and still the public has no definitive answer as to what this bill would authorize their legislatures to do or would do automatically. I am dismayed at the refusal of the subcommittee to provide any guidance to the states about the full range of options in abortion legislation opened to them by this bill. An expression of trust in state legislatures is commendable, but not helpful to them in understanding the limits of permissable action, or in informing the courts about Congress' understanding of these limits, if there are any.

Is it possible to deny that in some states abortion may be classified as murder, in others as manslaughter with criminal penalties attached? Medical treatment for pregnant women will become very problematic if the appropriate treatment for her poses a risk to the fetus. Can we be certain that the law will permit a doctor to take action in her behalf even when he or she is aware that the treatment may jeopardize the life of the

fetus? Would the physician be made legally liable for any consequences to the health of that fetal person? Under any circumstances would a pregnant woman who miscarries be subject to charges of negligent homicide?

If the states felt they should protect fetal life by prohibiting pregnant women from participating in activities at work or in sports, which might jeopardize the life of the fetus, would they be permitted to do so? And certainly, any legal definition of person which encompasses the fertilized egg will necessarily have a tremendous impact on birth control practices in this country. Some of the most effective and widely used forms of contraception, the IUD and some forms of the pill, which work after fertilization to prevent the implantation of the fertilized ovum on the uterus, would no longer be available in state-funded programs. Could the states prohibit these altogether? Could state or private interests initiate court action on behalf of a fetus to protect it from potential harm? Conceivably, would the federal government be able to pass additional laws implementing fetal personhood on the basis of their authority to enforce the Fourteenth Amendment?

Section Two of S. 158 prohibits lower federal courts from issuing injunctions and declaratory judgments on anti-abortion laws passed by states and localities pursuant to S. 158 -- even if these laws violate fundamental constitutional rights. Doesn't this place in jeopardy an underpinning of our form of government: the principle of checks and balances? Although Section Two allows Supreme Court review of state court decisions, it is important to note that the Supreme Court cannot rule on more than a small percentage of the cases brought before it. This relegates review of anti-abortion laws to state courts which are not designed to interpret the full effect of statutes such as S. 158. What is to prevent fifty states from enacting and upholding fifty different interpretations of S. 158? Isn't it dangerous to allow basic constitutional rights to differ depending on residence? Isn't every citizen in this country entitled to certain liberties no matter where he or she lives? Isn't it a violation of the

principle of equal protection when existing rights of pregnant women to seek relief in the lower federal courts are eliminated while newly created rights for fetuses permit fetal rights to be litigated in federal courts?

We submit, Mr. Chairman, that these concerns are not far-fetched "horror stories," as we heard them described to this subcommittee last week, but legitimate legal questions which must be answered. We were shocked to hear that the Attorney General from the state of Utah say that there should be no worries about the possible consequences of this bill, since in his experience anti-abortion laws were seldom enforced and violators seldom prosecuted. Do the proponents of this measure really mean to propose its passage on the likelihood that its enforcement would be disregarded? If not, then a serious, thorough exposition of all of the potential effects of the legislation is mandatory.

Passing this bill without knowledge of its full ramifications has been compared to pulling the pin on a grenade, setting it down in a field and walking away from it. Mr. Chairman, you have said you are untroubled by not knowing what state laws will be passed subsequent to this bill; that you are quite willing to allow them to weigh the issues. But the people have a right to know what could happen so they can make their will known to their representatives.

Even if S. 158 were to effect a simple reversal of the Supreme Court in Roe, a conclusion I believe is totally unjustified, none of the organizations for whom I speak today believes that is a desirable or even an acceptable goal. Prior to 1973, nearly one million abortions were performed annually. By reversing Roe and retreating to an earlier time, you will not reduce the number of abortions, because you will not have eliminated the reasons that women feel compelled to seek abortions.

The proponents of this bill evidence a blithe disregard of the tragedies of life which have through the ages led women to choose to terminate a pregnancy. To callously describe the decision as one of "convenience" denigrates the integrity and humanity of all those millions of women who have throughout

the ages been forced to take that course. To the girl who has been raped, abortion is not a "convenience"; to the woman who is carrying an anacephalic fetus with no brain, abortion is not a "convenience"; to the teenager who faces the loss of her home and parental support if her pregnancy is discovered, abortion is not a "convenience"; for the family who cannot feed or clothe the children they already have, abortion is not a "convenience." And for those who, before 1973, faced the very real possibility of death or maiming from a back alley procedure, rather than carry a pregnancy to term, abortion was not a "convenience."

The groups I represent today encompass a wide range of segments of the American population. As individual organizations they hold varying attitudes and interests and concerns on the issue of abortion, but they are all agreed on one fundamental principle: the abortion decision must remain, as it is now, a matter of individual decision, free from governmental interference and from the moral and religious dictates of others. This principle has the overwhelming support of the American public, as consistently shown in every single opinion survey since 1973. The most recent ABC-Washington Post poll, in fact, showed that only 10% of the population supports the anti-abortion concept embodied in this statute.

It is inconceivable to us that the Congress of the United States could seriously consider the passage of a bill which so blatantly disregards the integrity of the constitutional process, the separation of powers, the religious liberty of our citizens, the will of the people, the sound practice of medicine and the desperate needs of women facing problem pregnancies. On behalf of the organizations I represent, their individual members, and the millions of affected American women, I urge this subcommittee to vote against S. 158.

STATEMENTS FROM ORGANIZATIONS SUBMITTED BY

SARAH WEDDINGTON

TO

SENATE JUDICIARY SUBCOMMITTEE ON

SEPARATION OF POWERS

JUNE 18, 1981

THE ALAN GUTTMACHER INSTITUTE

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

AMERICAN CIVIL LIBERTIES UNION

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS

AMERICAN HOME ECONOMICS ASSOCIATION

AMERICAN PSYCHOLOGICAL ASSOCIATION - DIVISION OF PSYCHOLOGY OF WOMEN

AMERICAN PUBLIC HEALTH ASSOCIATION

AMERICANS FOR DEMOCRATIC ACTION

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

B'NAI B'RITH WOMEN

CATHOLICS FOR A FREE CHOICE

CENTER FOR POPULATION OPTIONS

COALITION OF LABOR UNION WOMEN

COMMITTEE TO DEFEND REPRODUCTIVE RIGHTS OF COALITION FOR MEDICAL RIGHTS OF WOMEN

EPISCOPAL URBAN CAUCUS

FEDERATION OF ORGANIZATIONS FOR PROFESSIONAL WOMEN

MS. FOUNDATION

NATIONAL ABORTION FEDERATION

NATIONAL ABORTION RIGHTS ACTION LEAGUE

NATIONAL ALLIANCE FOR OPTIONAL PARENTHOOD

NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN

NATIONAL CONFERENCE OF PUERTO RICAN WOMEN, INC.

NATIONAL EDUCATION ASSOCIATION

NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION

NATIONAL FEDERATION OF TEMPLE SISTERHOODS

NATIONAL WOMEN'S HEALTH NETWORK

NATIONAL WOMEN'S POLITICAL CAUCUS

THE PHYSICIANS FORUM, INC.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.

PRETERM REPRODUCTIVE HEALTH CENTER, INC.

RELIGIOUS COALITION FOR ABORTION RIGHTS
AMERICAN BAPTIST CHURCHES, NATIONAL MINISTRIES
AMERICAN ETHICAL UNION
AMERICAN ETHICAL UNION, NATIONAL WOMEN'S CONFERENCE
AMERICAN HUMANIST ASSOCIATION
AMERICAN JEWISH CONGRESS
AMERICAN JEWISH CONGRESS, WOMEN'S DIVISION
B'NAI B'RITH WOMEN
CATHOLICS FOR A FREE CHOICE
CHRISTIAN CHURCH (DISCIPLES OF CHRIST), DIVISION OF HOMELAND MINISTRIES
EPISCOPAL URBAN CAUCUS
EPISCOPAL WOMEN'S CAUCUS
NATIONAL COUNCIL OF JEWISH WOMEN
NATIONAL FEDERATION OF TEMPLE SISTERHOODS
PRESBYTERIAN CHURCH IN THE U.S., COMMITTEE ON WOMEN'S CONCERNS
PRESBYTERIAN CHURCH IN THE U.S., GENERAL ASSEMBLY MISSION BOARD
UNION OF AMERICAN HEBREW CONGREGATIONS
UNITARIAN UNIVERSALIST ASSOCIATION
UNITARIAN UNIVERSALIST WOMEN'S FEDERATION
UNITED CHURCH OF CHRIST, BOARD FOR HOMELAND MINISTRIES
UNITED CHURCH OF CHRIST, OFFICE FOR CHURCH IN SOCIETY
UNITED METHODIST CHURCH, BOARD OF CHURCH AND SOCIETY
UNITED METHODIST CHURCH, WOMEN'S DIVISION, BOARD OF GLOBAL MINISTRIES
UNITED PRESBYTERIAN CHURCH, U.S.A., THE PROGRAM AGENCY
UNITED PRESBYTERIAN CHURCH, U.S.A., COUNCIL ON WOMEN AND THE CHURCH
UNITED SYNAGOGUE OF AMERICA
WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM
YOUNG WOMEN'S CHRISTIAN ASSOCIATION

SOCIOLOGISTS FOR WOMEN IN SOCIETY

SOUTHEASTERN PENNSYLVANIA TASK FORCE ON ABORTION RIGHTS

ACLU OF PHILADELPHIA
AMERICANS FOR DEMOCRATIC ACTION
CLARA BELL DUVALL EDUCATION FUND
CHOICE
CHRISTIAN ASSOCIATION
CONGRESSO DE LATINOS UNIDOS
DEMOCRATIC SOCIALIST ORGANIZING COMMITTEE
ELIZABETH BLACKWELL CENTER
EPISCOPAL COMMUNITY SERVICE
FAMILY PLANNING SERVICE-CCMC
FEMINIST THERAPY COLLECTIVE
GRADUATE HOSPITAL
HEALTH LAW PROJECT
JUVENILE LAW CENTER
LUTHERAN SETTLEMENT HOUSE
MEDICAL COLLEGE OF PA
NARAL OF SE PA
NARAL OF PENNSYLVANIA
NOW OF PENNSYLVANIA
PENN WOMEN'S CENTER
PA FOR JUSTICE AND FREEDOM OF CHOICE
PEOPLE'S EMERGENCY CENTER
PHILADELPHIA LAWYER'S GUILD
PHILA. REPRODUCTIVE RIGHTS COALITION
PHILADELPHIA NOW
PLANNED PARENTHOOD, BUCKS COUNTY
PLANNED PARENTHOOD, SE PENNSYLVANIA
PUERTO RICAN ALLIANCE
RELIGIOUS COALITION FOR ABORTION RIGHTS
REPRODUCTIVE HEALTH AND COUNSELING CENTER
WELFARE RIGHTS ORGANIZATION
WOMEN ASSOCIATES
WOMEN ORGANIZED AGAINST RAPE
WOMEN'S HEALTH CONCERNS COMMITTEE
WOMEN'S INTERNATIONAL LEAGUE FOR PEACE & FREEDOM, BUCKS COUNTY
WOMEN'S LAW PROJECT
WOMEN'S POLITICAL CAUCUS
WOMEN'S PROJECT, AMERICAN FRIENDS SERVICE COMMITTEE

WOMEN'S RESOURCE CENTER
WOMEN'S SUBURBAN CLINIC
WOMEN'S SWITCHBOARD
YWCA, CENTRAL MONTGOMERY COUNTY

UNION OF AMERICAN HEBREW CONGREGATIONS

UNION WAGE

UNITED CHURCH OF CHRIST-COORDINATING CENTER FOR WOMEN IN CHURCH AND SOCIETY

UNITED CHURCH OF CHRIST-UNITED CHURCH BOARD FOR HOMELAND MINISTRIES, DIVISION OF HEALTH AND WELFARE

UNITED CHURCH OF CHRIST-NEBRASKA CONFERENCE

UNITED STATES WOMEN'S HEALTH COALITION

WAR RESISTERS LEAGUE

WOMEN AGAINST PORNOGRAPHY

WOMEN FOR RACIAL AND ECONOMIC EQUALITY

WOMEN'S EQUITY ACTION LEAGUE

WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM

WOMEN, USA

YOUNG WOMEN'S CHRISTIAN ASSOCIATION

ZERO POPULATION GROWTH

Note.--The prepared statements of organizations listed above appear in the appendix.

Senator EAST. Dr. Carolyn Gerster is our next witness. Dr. Gerster practices internal medicine and cardiology in Scottsdale, Ariz. She was a member of the original executive committee which drew up the National Right to Life bylaws in 1973. In 1975 to 1978, she served as chairman of the board of the National Right to Life Committee and as president from 1978 to 1980. She is presently the committee's vice president for international affairs.

Dr. Gerster, we welcome you this morning. As I have been urging the witnesses, I would appreciate it if you could summarize your remarks as best you can so that all will have an equal opportunity to make a statement and also then to discuss the matter. We welcome you and thank you for coming.

## STATEMENT OF DR. CAROLYN GERSTER, SCOTTSDALE, ARIZ.

Dr. GERSTER. Thank you very much, Mr. Chairman and distinguished members of the subcommittee.

I welcome this opportunity to speak in support of statutory protection of innocent, dependent human life until such a time as a human life amendment to the U.S. Constitution is passed.

As you pointed out, Senator East, I am a physician in the practice of internal medicine, cofounder and immediate past-president of National Right to Life Committee. I am also the mother of five children, and since it oddly enough seems to lend credibility, I am a Protestant.

DO WE KNOW WHEN LIFE BEGINS

The subject of abortion can be viewed from any of these aspects, but paramount to the issue is when the life of a human being begins.

There are actually only two questions either medically or legally to be decided. One: Is the intrauterine child a living human being? If this is not so, then the second question is not of any importance, but if it is true, the second question is: May this individual's right to life be set aside to satisfy the social or economic needs and demands of society?

The first question must be answered honestly. Just as there is no such thing as a little bit pregnant, and, as our friends in the civil rights movement told us, there is no such thing as a little more equal, there is no such thing as a little bit human. This is either a human being or not. There are no degrees of humanity.

It is generally conceded that a species reproduces its own kind. That is, horses beget horses and cats beget cats. Anyone conceived by human parents possessing the genetic and chromosomal pattern appropriate to homo sapiens can be nothing else than a human being. No woman, to my knowledge, has ever given birth to either a carrot or an airedale.

To my utter astonishment, and I only had the privilege of sitting through one previous hearing, I have heard fellow physicians tell this subcommittee that the notion that life begins at fertilization is metaphysical and represents a religious viewpoint.

The statement that life begins at fertilization is not a religious dogma. I just checked, and it is found on page 55 of my old medical school text, "AREY'S Developmental Anatomy," and it is found in every other embryology text in use in every medical school in the United States for the last 100 years.

This biological fact may no more be repealed by a 7 to 2 decision of the U.S. Supreme Court than the law of gravity.

There is no endocrine gland that secretes an elixir of personhood to anoint the baby as it slips through the vaginal canal to the outer world.

Proabortionists who insist that a human exists only at birth speak as though personhood or ensoulment is hovering there over the delivery table ready to be zapped in with the baby's first breath of air. If this is a living human being in the light of day, this is a living human being 5 minutes before in the darkness of the womb.

IS THIS A MATTER OF RELIGIOUS BELIEF

During my last year of medical school, internship, and residency, I was an agnostic for approximately 5 years of my life. I did not know whether there was a God or not. It is interesting for me to recall that during those 5 years my opinion on both abortion and euthanasia was essentially what it is today.

I based that opinion on a pagan oath to a pagan god. After all, that is what the oath of Hippocrates is. I stood there with 50 of my fellow graduates from the University of Oregon Medical School in Portland and I swore by Apollo. I can still remember the second paragraph of that oath, although many of my colleagues have very conveniently forgotten it. I swore that I would abstain from all that

is harmful and injurious. I said I would give to no man a deadly poison even though asked, nor suggest such a counsel. In like manner, I would not give a woman an instrument to produce an abortion.

Did this come from the Vatican? No, it was written 2,404 years ago by a man who did not have the advantage of the Judeo-Christian ethic.

The Court had to do something about Hippocrates. He was an embarrassment. The U.S. Supreme Court described him as an elitist. They said he did not reflect the mores of his time. Hippocrates was worse than an elitist. He was a dangerous social activist. Of course he did not reflect the mores of his time because abortion, infanticide, and euthanasia were very prevalent in Greece.

However, Hippocrates had a dream. The dream was that the physician should not become an executioner, that no physician should kill what he could not cure, and he sought to separate killing from curing for all time.

This oath was not universally adopted initially, but for at least the last 1,000 years of what we loosely call Western civilization, the oath of Hippocrates has shaped medical ethics. To my knowledge, there is only one other time that this oath has been dropped in modern history, during the 12 years of the Third Reich. I know of no medical school in the United States that gives that oath today.

### EFFECT OF 1973 U.S. SUPREME COURT DECISION

I think possibly the most tragic consequence of the Court decision has been its effects on medical ethics. Abortion is only the tip of the iceberg. Medical ethics do not exist in a vacuum.

Our opponents say do not mix issues, that abortion will never lead to euthanasia. If you are prepared to give a woman the unrestricted right to kill her unborn daughter, you had better be prepared to give that daughter the unrestricted right to kill her aged mother. Euthanasia has followed abortion as night follows the day. There are 44 States that have either passed or are contemplating a variety of euthanasia bills.

Another consequence of the devaluation of human life has been fetal experimentation, leading to a relaxation of regulations on all human experimentation including prisoners, children, and individuals living in institutions.

The U.S. Supreme Court said that the baby, until birth, was a nonperson, "not a person in the whole sense of the word." You cannot really blame scientists when they asked if this is not then a person, why can this not be an experimental animal?

Since I have only a limited time, I am going to go right to the worst example of all those reported in medical journals. It appeared in the June 8, 1973, edition of "Medical World" exactly 6 months after the Court decision. I read in utter astonishment that at a pediatric seminar held in San Francisco, Dr. Peter Adams in Cleveland, as associate professor of pediatrics at Case Western Reserve, announced that he and colleagues from Helsinki, Finland, had decapitated 12 babies born alive by hysterotomy abortion up to 20 weeks. After cutting the heads off the immature infants, they cannulated the internal carotid artery. That is, a large tube was placed in the main artery feeding the brain. Those 12 little heads

were kept alive much like the Russians kept the dogs' head alive in the 1950's. This was done to test carbohydrate metabolism in the brain.

When certain criticism arose, Dr. Adams was quoted as saying that any law that would permit abortion on demand and yet forbid experimentation was illogical as well as unethical. He had a point.

In my own State of Arizona, there is a fine of $500 plus 3 months in jail for smashing a Gila monster egg, not the Gila monster but the egg. Ecologists know that the Gila monster is in the egg. The Gila monster is considered an endangered species, one of the two poisonous lizards existing in the world today.

In Arizona, as in every State of this Union, a physician may kill a baby up to 9 months with absolute impunity. A little girl of 32 weeks is surviving in a hospital in Phoenix. She is the product of a legal third trimester abortion. It is sad to say that a live birth is now considered a complication of an abortion.

In the neighboring State of Colorado, the Colorado Department of Health statistics announced last year that four facilities in Boulder, which is not a very large community, had reported 20 abortions done during the 8th and 9th month, 2 of which were 38 weeks.

CONCLUSION

I had come to this hearing with only a few hours of preparation. The National Right to Life Committee is holding a convention in Omaha, Nebr. When I realized I would have the privilege of testifying as to when life began and when I realized that this is still in question in the U.S. Senate and House of Representatives, I called my husband and asked him to send through Federal Express a book called "This is the Great Dane." Unfortunately the book did not arrive in time.

Our family owns a great dane named Elsa. We are trying to breed the dog. I do not know much about the dog reproductive system. They do not teach that in medical school. A veterinarian gave us this book. It is a recent book published in 1980.

On page 139, the reproductive cycle of the dog is outlined. I turned the page and on page 141, I found an interesting statement that, assuming that your dog is fertile and you have chosen the correct time of the reproductive cycle, "the sperm of the male will enter the ovum of the female and the life of the puppy begins." I thought to myself, why is it that the veterinarians know this and the Board of Trustees of the American Medical Association does not?

I would like to comment on the point that I really think is most important of all. We have five living children. I lost four children. I lost a child of pneumonia. I lost a little stillborn. I have lost two children at 3 months. The pain is more than bereavement, is more than just a loss.

People say that abortion is necessary for the sake of women. I do not think I can be that different from other women.

We hear much today of victimless crimes, I believe that abortion is not a victimless crime, but abortion is a crime with two victims. The mother is as much a victim as her unborn child.

Thank you, Senator East.

Senator EAST. Thank you, Dr. Gerster.
[The prepared statement and submissions of Dr. Gerster follow:]

PREPARED STATEMENT OF DR. CAROLYN F. GERSTER

Mr. Chairman and distinguished members of the Subcommittee - Thank you for the opportunity to speak on behalf of statutory protection of innocent human life until such time as a Human Life Amendment to the United States Constitution is passed.

I am a physician in the practice of internal medicine, co-founder and immediate past president of the National Right to Life Committee, the mother of five children, and since it curiously lends credibility - a Protestant.

The subject of abortion may be viewed from each of these aspects, but paramount to the issue is when the life of a human being begins.

There are, in actuality, only two basic questions:

1) Is the intrauterine child a living human being?

2) If so, may this individual's right to life be set aside to satisfy the social and economic needs of society?

The first question must be answered honestly. Just as there is no such thing as "a little bit pregnant" or "a little more equal" there is no such thing as a "little bit human." This is either a human being or it is not. There are no degrees of humanity.

It is generally conceded that a species reproduces its own kind. That is, horses beget horses and cats beget cats. Anyone conceived by human parents and possessing the genetic and chromosomal pattern appropriate to homo sapiens can be nothing less than human. No woman, to my knowledge, has given birth to either a carrot or an airdale.

To my utter astonishment I have heard physicians tell this Subcommittee that the notion that life begins at fertilization is metaphysical and represents a "religious viewpoint".

The statement that "life begins at conception" is not a religious dogma but a biological fact - found on page 55 of my "AREY'S Development Anatomy" text, and in every other embryology

text in use in every medical school in America for the past one hundred years.

This biological fact may no more be repealed by a seven-to-two decision of the United States Supreme Court than can the law of gravity.

There is no endocrine gland that secretes an "elixir of personhood" as the baby slips down the vaginal canal to the outer world.

Pro-abortionists who insist that a human exists only at birth speak as though "personhood" or "ensoulment" is hovering over the delivery table ready to be "zapped in" with the first breath of air.

If this is a living human being in the light of day this was a living human being a few minutes before in the darkness of the womb.

During my last year of medical school, internship and residency I was an agnostic. However, my views on abortion and euthanasia were essentially what they are today. I based these views on a pagan oath to a pagan God. I took this oath of Hippocrates with 50 of my fellow graduates at the University of Oregon Medical School. Hippocrates was a pagan. He did not have the advantage of the Judeo-Christian ethic.

Hippocrates has been dismissed by the United States Supreme Court as an "elitist". He did not, they said, express the mores of this time. Hippocrates was worse than an elitist, he was a dangerous social activist and he certainly did not express the mores of his time as abortion, infanticide and euthanasia were commonly practiced in ancient Greece.

But Hippocrates had a dream. He believed that the physician should not be the executioner. The believed that no doctor should kill what he could not cure. He tried to separate killing from curing for all time.

This oath has shaped medical ethics for at least one thousand years. No medical school in the United States, to

my knowledge, uses this oath today. In fact, in view of the U.S. Supreme Court decision legalizing abortion during the entire nine months of pregnancy and the euthanasia legislation introduced in several states, the oath would be more hippocritical than Hippocratic.

I can, however, still remember the second paragraph of that oath, even though so many of my colleagues have managed to forget it.

I swore that "I would abstain from all that is harmful and injurious". I swore that I "would give no man a deadly poison even though asked, nor would I suggest it to counsel. In like manner, I would not give a woman an instrument to induce an abortion".

These words were written two thousand four hundred years ago. They have been eliminated because it is no longer considered prudent to require a physician to promise that he or she will not purposely take a human life

Abortion is only the tip of the iceberg.

If one is prepared to give a woman the unrestricted right to kill her unborn daughter, one had better be prepared to some day give the daughter the unrestricted right to kill her aged mother. Euthanasia has followed abortion as the night follows the day.

It may well be that the decline of medical ethics is the most tragic consequence of the 1973 U.S. Supreme Court decision.

[From National Right to Life News, November 1975]

## Why Not Keep Legalized Abortion for Rape and Incest?

(By Carolyn F. Gerster, M.D., Chairman of the Board, National Right to Life Committee)

I have great empathy for those individuals who, out of a sense of compassion, wish to add rape and incest to the traditional "life of the mother" exception clause for legal abortion. At first glance, it appears calloused to impose on the innocent victim of a violent sexual assault the added humaliation of nine months of pregnancy and childbirth.

This sympathetic view was held by many Americans and reflected my own feelings prior to my involvement in the abortion controversy. In fact, an early National

Opinion Poll[1] in 1965 found that while 83 percent of the 1,484 persons polled opposed abortion on demand, 77 percent opposed abortion for the unwed mother, 80 percent for financial reasons, 56 percent of those questioned were in favor of abortion for the rape victim.

The humanitarian exception clauses appeared in the first proposed changes in the traditional abortion laws recommended by the American Law Institute.[2] This revision was the model for the 1967 Colorado statute.

The proposal of the American Law Institute[3] justified abortion in cases of (1) substantial risk to the mother's physical or mental health; (2) grave fetal deformity; (3) rape, incest and other felonious intercourse (including illicit intercourse with a girl below the age of 16).

The Colorado revised law sounded reasonable and humane. Yet, the day that the State considered an exception other than the defense of human life, abortion on demand became a foregone conclusion.

Just as there is no such thing as "a little bit pregnant" or "a little more equal" there is no such thing as "a little more human." The unborn child is either a living human being or a meaningless bit of protoplasm. There are no degrees of humanity.

### DEPARTURE FROM PRINCIPLE

In Colorado, in 1967, for the first time in our nation's modern history—since the abolition of slavery—we departed from the principle that the taking of innocent human life was permissible only as the inadvertent result of an attempt to save human life—that is, in self defense (either in a personal or collective sense). There were abuses of this principle, certainly—defensive wars that were not defensive—racial injustice—the inability of the poor to obtain legal counsel. But the intent of equal protection under the law remained constant.

In 1967 we witnessed the first subtle change. It was now permissible to take a life for a social or an economic reason. Therefore, it logically follows that this unborn child must be regarded as "less than a human being."

John Updike[4] observed that "death once invited in, leaves his muddy footprints everywhere." We opened the door to "a little killing" in Colorado. We took that first difficult step. The acceptance of de facto abortion on demand to term and, indeed, infanticide became only a matter of time.

### PREGNANCY FROM RAPE

Eliminating the cases of freely consented intercourse with a minor (statutory rape), what is the reality of pregnancy from forcible rape? Like all acts of violence, rape is increasing. There has been a 112 per cent rise in reported cases in the past twelve years.[5] Interestingly enough, as in the case of the battered child, the most rapid rise has occurred after the passage of permissive abortion laws. The problems created by rape are not solved by abortion.

It is now an historical fact that the actual objective of the proponents of the relaxation of the abortion laws was the elimination of all abortion laws. Emotional arguments such as rape and incest were used as a wedge to gain sympathy for the abortion cause.

Once abortion is regarded as an acceptable medical procedure and a solution to a social problem, there can be no logical barrier to abortion on demand.

The rationale behind relaxed laws for "certain cases" is based on the denial of the humanity of the unborn child.

By allowing abortion for rape we abandon the only principle by which we can resist abortion on demand. The unborn child is a living human being—why should he not be regarded as a legal person? Once we abandon that principle the law may be distorted and ultimately abandoned.

There are, oddly, no national statistics on the number of pregnancies from unconsented intercourse. We may, however, take a representative year, 1967. There were 27,100 assaults with rape or intent to rape reported by the FBI Crime Report.[6] Of these, 18,000 were recorded as forcible rape (labial penetration with or without emission whether interrupted or not).

The ovum can be fertilized for only 24 hours after ovulation. The sperm remain viable for only 48 hours. In reality, the possibility of fertilization, as stated by Dr.

---

[1] Abortion: the Myths, the Realities and the Arguments, Germain Grisez, page 241.
[2] Not an official organization but a voluntary society of jurists and lawyers.
[3] Moral Penal Code: Sec. 230.3—Abortion (approved May 1962)
[4] Couples, John Updike.
[5] Medical Insight, April, 1974, page 225.
[6] Uniform Crime Reports 1967 (Wash. D.C., 1968) page 13.

Guttmacher [7] (under the most optimum conditions) exists from two days prior to ovulation to one half day after (2½ days during the 28 day cycle). Statistically, the chance of rape during fertility would be 10 per cent. The rate of pregnancy from unprotected (consented) intercourse between fertile individuals has been estimated as 3 per cent.[7a]

### PERCENTAGE USE INVALID

This figure of 3 per cent (540 pregnancies) for 18,000 rape cases cannot be used for a variety of reasons: (1) Even with penetration, ejaculation may not have occurred or may have been interrupted; (2) Rape victims are in an age range from infancy to 100 years. Only an unknown per cent fall into the fertility range of 12 to 50 years of age; (3) Some victims are sterile or have had a tubal ligation; (4) An unknown number of fertile women are on contraceptive pills or have an IUD, and are thus not "unprotected"; (5) The age of the rapist has been recorded as 12 to 80 years. He may be sterile or have no emission; (6) An increasing number of rapists have had vasectomies,[8] and (7) The most important factor in the rarity of pregnancy from forcible rape is that there is very firm evidence that the severe emotional trauma prevents ovulation (or implantation).

In a macabre experiment during the Third Reich, scientists sent women about to ovulate to a mock execution in a gas chamber. An extremely high percentage of the women failed to ovulate during that cycle.[9]

The second documentation for the suppression of ovulation was the rarity of pregnancy among the young Catholic nuns and female Protestant missionaries raped by marauding soldiers in the Congo. Those about to ovulate, did not.[9]

For the above reasons, pregnancy even from untreated rape is rare. The captain of the Sex Squad of the Washington, D.C., metropolitan police, V. Edward Tate, was able to report only three pregnancies from forcible rape in fifteen years.[10]

### CORRECT MEDICAL TREATMENT

Pregnancy after correct medical treatment of rape is zero.

This is substantiated by the documentation of 3,500 cases of treated rape in Minneapolis and St. Paul over a ten-year period,[11] and 1,000 rape victims treated with diethylstilbestrol and reported in the J.A.M.A. October, 1971.[12] There were no pregnancies from the total of these 4,500 cases.

The most common mode of action of diethylstilbestrol, now the usual treatment for rape cases that are promptly reported, is to suppress ovulation, rendering fertilization impossible during that menstrual cycle. And, in view of the recent publicity given to the findings that DES has caused cancer of the vulva in daughters of women who were treated for threatened spontaneous abortion (miscarriage), it should be noted that danger exists only for the pregnancy during which the DES was given. The large dosage given rape cases prevents 100 per cent of pregnancies from rape. Since it is only the child in utero at the time the DES is given which could be affected, patients need not fear a threat of cancer to subsequent children.

Despite the availability of treatment, only an estimated 30 per cent of rape cases are reported. Much of this failure is due to to lack of public education and the improper handling of the rape victim.

### BRITISH TEST CASE

Does pregnancy, however rare, still occur among these unreported cases? Of course it does. The most celebrated case was the 1938 trial of Dr. Aleck Bourne, an eminent English gynecologist, who performed an abortion on a 14-year-old girl who had been gang raped by a number of horse-guardsmen.[13] Dr. Bourne made this a test case because he honestly believed that the law should permit those abortions in which the doctor, acting in good faith, believed that the pregnancy would result in severe mental or physical damage. This plea was made 37 years ago, before the

---

[7] Alan Guttmacher, M.D. et al, The Consumer's Union, 1962.

[7a] "Probability of Pregnancy from Single Unprotected Coitus," Fertility and Sterility, Vol. II-Oct., 1960 pages 485–88.

[8] Dr. Joseph W. Hanss, Jr., 1975, Arizona Medical Associating meeting, Arizona Republic, February, 1975.

[9] A. Hellegers, USCC Abortion Conference, Wash. D.C., October, 1967.

[10] The Abortion Decision, David Granfield, page 107.

[11] "Zero Pregnancies in 3500 Rapes" The Educator, Vol. 11, No. 4, September, 1970.

[12] L. Kuchera, "Post Coital Contraception with Diethylstilbestrol Journal of the American Medical Association, October 25, 1971.

[13] "Rev. V. Bourne," Lancet, July 30, 1938, 11:280.

medical and contraceptive advances of today. However, the so-called "Bourne Principle" was the basis for the 1967 legalization of abortion in England for a myriad of social and economic reasons amounting to de facto abortion on demand. Aleck Bourne was so appalled by the result of what he had envisioned as a provision for a very limited number of abortions for "hard cases" that he became a founding member of the Society for the Protection of the Unborn Child in 1967.

This emphasizes the wisdom of the legal adage "hard cases make bad laws."

As Dr. Jack Willke has pointed out . . . "laws must speak to the general norm. Judges have always allowed certain exceptions to laws or to punishment out of mercy for a hard or tragic case. To our knowledge, no physician has been prosecuted in recent times in the United States or Canada for doing an abortion in such a case though the law forbade it." [14]

From the so-called "humanitarian" exception clauses of the American Law Institute we have progressed to the annual killing of an estimated one million unborn children in eight short years.

### IRREFUTABLE ARGUMENTS

In the final analysis, there are two irrefutable arguments against the legalization of abortion for rape: (1) Pregnancy from reported, medically treated rape is zero—rendering the exception clause unnecessary. (2) Unreported rape—after all evidence of penetration has disappeared and without corroborating witnesses—cannot be proved rendering the law unenforceable.

If the court were to accept the statement of the mother weeks or months after the alleged assault, we would be faced with the all too frequent late abortion done now after 28 weeks for rape. A recent example is the death of a 31-32-week-old infant girl on March 19, 1974, in Pittsburgh, Pa.[15] A 27-year-old married woman, whose husband had had a vasectomy, requested an abortion, claiming to have been raped in September, 1973. The request was refused by four physicians at Magee Woman's Hospital after the gestation age of the fetus by sonography was estimated up to 31 weeks. A vaginal hysterectomy was done by Dr. Leonard Laufe, a well known abortion proponent, on March 19, 1974.

There is very substantial evidence, including a three-minute film sequence, that the baby girl was born alive and, as in the Edelin case, not resuscitated. Whether the baby was born alive or not is a moot point in the light of medical ethics. The baby was only 8 or 9 weeks premature and clearly alive a few minutes before the abortion. She would have had an excellent chance of survival in any neonatal intensive care unit. This was clearly infanticide. Dr. Laufe was acquitted by a coroner's jury and has never been brought to trial elsewhere.

### A WOMAN'S REACTION

In conclusion, I am not in any way minimizing the physical or psychological damage of rape. As a woman, I am more cognizant than any man, that rape is not a sexual act but the result of a violent and destructive compulsion to humiliate the victim.

I am angry when it is suggested that women invite the assault by their manner or dress—that women actually "enjoy" rape.

I am angry when I learn that many women will not bring charges because the past sexual history of the victim is admitted as evidence by the defense attorney or when I read that only 10 per cent of the apprehended rapists are convicted by the courts.

I am angry when I realize that most hospitals in the United States still do not follow proper procedure for collecting medico-legal evidence or when I hear of cold and unsympathetic treatment of the victim by hospital staff, police or family.

I am angry when I realize that there are too few assault centers with experienced staff to explain the need for loving support to the victim's parents or husband, or when I learn that there are almost no facilities for long term psychiatric follow-up of the victim whose symptoms of apprehension, self-doubt, guilt, disorientation, nightmares, phobic fears and inability to enjoy normal sexual relations may continue for months or years.[16]

Pregnancy from rape is rare but the other results of rape—venereal disease, loss of self esteem, physical injury, permanent neurosis and disruption of the family—are not rare.

---

[14] Handbook on Abortion, Dr. and Mrs. J. C. Willke, page 41.
[15] Journal of Legal Medicine, September, 1975, page 49.
[16] American Journal of Psychiatry, September, 1974.

Legalizing the destruction of the child will not apprehend or convict the rapist nor heal the emotional scars of violent assault.

### HOW TO HELP VICTIMS

Those who really want to decrease the incidence of rape and are sincerely interested in the welfare of the victim should consider these positive solutions:[17]

(1) Legalization should be enacted to provide severe penalties for conviction of rape with the provision for psychiatric rehabilitation so that the rapist will not be returned to society unless it can be reasonably ascertained that he will not repeat the crime. The privacy of the victim (including the details of her past sexual life) must be assured.

(2) We must provide specially trained Personal Assault Squads (including women officers) sensitive to the emotional needs of the victim and aware of the evidence necessary to document and prosecute the rape case.

(3) Crisis Assault Centers within the hospitals of all cities should be specially staffed to provide (in privacy):

(a) Immediate care of injuries and their description. A complete physical examination with assessment of the emotional state of the patient and alleviation of psychological damage.

(b) The proper medico-legal documentation for the law enforcement agency, including collection of pubic hair, identification of mobile sperm (with the realization that many rapists have vasectomies negating this evidence), slides and cultures of the cervix, vulva, anus, mouth, vaginal swab for acid phosphotase and serology.

(c) Photographs and collection of clothing to be submitted to police.

(d) Prophylactic antibiotics for syphillis and gonorrhea. Gonorrhea re-evaluation to be repeated in one week. Serology to be repeated in six weeks.

(e) Large dose of estrogen to prevent pregnancy.

(f) The collected evidence, sealed and witnessed, together with the history and physical examination to be given to the officer and delivered to the county crime lab.

(g) Counseling (on site) of family and victim by staff social workers and trained volunteers (often effectively done by a woman who has herself had the past experience of sexual assault) with additional visits scheduled at appropriate intervals.

(h) Facilities available for long term psychiatric follow-up if needed.

(i) Widespread educational programs through schools, clubs, churches and the media to alert women of the availability of the Crisis Assault Center, and instruction in avoiding physical assault.

An Assault Crisis Center has been established at the University of Arizona and a Personal Assault Squad is in operation in the Phoenix police department. This program has been well outlined by Dr. Joseph W. Hanss, Jr., at the 84th annual meeting of the Arizona Medical Association and appeared in the August 1975, issue of Arizona Medicine. Similar programs should be adopted throughout the nation.

Abortion is not a solution to a problem but the refusal of society to look for a solution.

What of the rare pregnancy from rape? I recalled an example of such a case in Ethel Waters' beautiful autobiography, "His Eye Is On The Sparrow." where she reveals that she, herself, was the result of the rape of her 13-year-old mother at a time when treatment and care were unavailable. Her mother's love and Ethel Waters' value to society were not diminished by the circumstances of her birth.

### ADDENDUM

The investigation of abortion of sexual assault was completed when I realized that incest was in no way similar to rape and the two should not be linked together in a legal or ethical sense. The only reason that they are discussed together by proponents of abortion is that both commonly arouse an emotional revulsion which diverts attention from the real issue—the killing of the unborn child.

Incest is described by Webster as "sexual intercourse of kindred within the forbidden degrees." The intercourse is with the consent of both partners or it would be defined as rape.

Some statutes have defined the "forbidden degree" as intercourse between close blood relatives, such as between remote relatives, such as second cousins and some societies have labeled as incestuous intercourse between relatives by marriage, such as between a man and his sister-in-law.

---

[17] Another Look At The Care of the Rape Victim," Joseph W. Hanss, Jr., M.D., Arizona Medicine, August 1975, page 634.

"Incestuous intercourse is seldom reported and when pregnancy does occur, it is not usually reported as being from incest."[18]

The fourth edition of the "Pharmacological Basis of Therapeutics" by Goodman and Gilman is probably the single best authoritative source. In chapter 69, "Estrogens and Progestins," it is stated that the only proven contraceptive mechanism of high dose estrogen is the inhibiting of the pituitary gland's secretion of follicle stimulating hormone (FSH) which interrupts growth of the ovarian follicle. It is presumed to inhibit luteinizing hormone (LH), also, because ovulation is prevented.

The authors state on page 1542, "Once ovulation has taken place during the menstrual cycle, the administration of estrogen, even in large amounts, has little influence on the course of events. It does not prevent the progestational changes in the endometrium, vagina, and breast; it does not seem to affect the corpus luteum in any way; and it does not alter the time of onset of the ensuing menstrual flow." No effect is seen on the implanted zygote no matter how high a dose of estrogen is given. The authors report, on page 1547, "For one or another reason huge doses of estrogen have been used with no effect whatever upon the course of gestation."

Since zero pregnancies occur from proper and immediate medical treatment of rape, and since fertility exists two days before and probably 12 hours or less after intercourse, there remains an unexplained interval after ovulation. Once mechanism is known, DES causes the watery secretion of the cervix to become thicker—impeding the sperm. This action would be contraceptive only if treatment were given almost immediately after the assault. Of other modes of action there is only speculation. Hormonal imbalance, causing unreceptive mucosa is, of course, entirely possible but, as yet, unproved.

We must keep to the main issue—(1) If no treatment is given it is rare but possible for pregnancy to result from a single episode of violent rape—including assault after ovulation. (2) The only proven action of DES, to my knowledge, in human beings is the suppression of ovulation. The two days prior to ovulation are the most fertile time in the cycle. (3) High dose estrogen is given with the intent of stopping ovulation. (4) The availability and total effectiveness of immediate medical treatment and the positive support given the victim by the Crisis Assault Center renders any exception clause for rape totally unnecessary.

(Editor's note: This paper was prepared at the request of a Member of Congress.)

Senator EAST. Ms. Judy Collins is our next witness. Ms. Collins is a singer living in New York City. She has been active in social and humanitarian causes for many years.

Ms. Collins, we welcome you this morning.

## STATEMENT OF JUDY COLLINS, NEW YORK, N.Y.

Ms. COLLINS. Thank you, Senator East, for the opportunity to appear at this hearing.

I am here for a very specific reason. I am not a scientist. I am not a theologian. I do not have initials beside my name or Latin words preceding it. I represent no single organization, hold no presidency of any institution, but I am a woman.

I am known in the world as a singer and I have a public identity, but at my root, my being, my essence, I am a woman. I have a reproductive system, a miracle bestowed upon me by the highest power there is. I choose to call this power God.

For weeks, I have listened and watched while my choices, my reproductive system, my essence has been discussed by doctors, lawyers, scientists, politicians, men and women with varying points of view. Today, I want to speak for myself and for the women who have no voice here in this room, for over half the population who has not been invited into this high-ceilinged place to discuss their reproductive systems, their lives.

My heart goes out to the women in this country. The Constitution on this day, June 18, 1981, protects my rights over my own body. If S. 158 should by some horrible circumstances become law,

[18] Handbook on Abortion; Dr. and Mrs. J. C. Willke, Page 40.

that freedom is gone. I can then be told what I must or must not do as though I was an incubator for the State, regardless of my personal, moral, and religious beliefs. I feel this bill could so profoundly affect the lives of women, their families, the very fabric of social and personal life, that its effect would put us in the dark ages as far as our constitutionally protected freedoms are concerned.

Among the possible casualities of this bill there is a particularly vulnerable group of people for whom I have come to speak today. These people are brave. In the face of statistics that tell them not to, many have chanced fate. The tragedies when they come are heartbreaking.

Let me tell you about genetic disease, of which you have heard a great deal here. It is an all-encompassing word describing many different prenatal abnormalities. They affect an estimated 3 to 5 percent of all infants born in the United States each year and they account for at least one-fifth of all infant deaths in our country. These are the bare statistics which do not include the unqualifiable social and emotional impacts created by the births of these infants. These genetic diseases can be detected through a diagnostic technique called amniocentesis.

I would like to read some excerpts of letters written by people whose testimony should be part of this record. No consideration of this bill can be complete without a full report of their side of the story. I come here in the hope that their voices will be heard along with the other voices of men and women proclaiming the unconstitutionality of this bill. There are their words.

The first letter is from Florette Koffler of Teaneck, N.J.:

On June 11, 1980, I gave birth to my first baby at the George Washington University Hospital in Washington, D.C. I had had a perfectly normal pregnancy, or so it was considered. I was truly expecting, and on that day at the hospital, both my husband and I were ecstatic with hope and plans for the future.

Yet within less than 15 minutes during delivery, the entire world turned topsy-turvy for us. What we thought would be our most wonderful moment turned into a nightmare. Our baby girl was delivered, but she came into the world doomed. She was an anencephalic and the physicians gave her hours, or at most a few days, to live.

Under no circumstances would I allow myself or my husband to live anew with the nightmare I described to you above. Those who have not lived through such tragedy cannot appreciate its magnitude and consequences for so many people, the siblings, the grandparents, the friends. Nor should anyone have the right to legislate my right to have a healthy baby. Such interference would be absurd and vicious. It would in truth tear me and my husband's lives to pieces.

I must stress again that my only chance of having the baby I so desire rests on the availability of that uncomfortable and sad alternative which is abortion.

Here is the perspective of a father:

My name is Sanford Roberts. I am 35 years old, the father of three children. I live with my family in Portsmouth, N.H. Our second child, Davita, was born April 21, 1978. She developed normally for the first 7 to 8 months of her life, at which time her development appeared to her mother and me to be very slow.

As our concern increased, we made an appointment with a neurologist at Boston's Childrens Hospital. The tests confirmed what we already knew. Davita had Tay-Sachs disease.

For the longest time after she was diagnosed, I would awake at night and find my wife sitting up in bed or standing by Davita's crib crying. The helplessness we both felt, the inability to do anything except watch, has been overwhelming and terribly depressing. My own impotence to comfort my wife, to say or do anything to help during these periods, increased my level of frustration and despondency.

I cannot believe that intelligent, sensitive members of the governing body of the greatest and most enlightened country of the world can ignore such suffering. You must deal with our tragedy when you vote on legislation that so profoundly affects us and our fellow citizens.

I spoke to Mr. Roberts on the phone. He had these words to say:

I have a 1-year old daughter who is delightful and wonderful and probably the best therapy we could have had after a Tay-Sachs child. If the choice had not been available to us, we never would have had her. What about her and her rights? How do the people who claim to hold life so dear, so precious, eliminate those children and their rights, in their thinking? Many of the children who are alive today and enjoying healthy and full lives would not be alive today if their parents did not have the right to choose, because after having experienced the birth of a Tay-Sachs child, they would have been afraid to conceive again.

Another perspective on Tay-Sachs disease is contained in the statement of Paula Span of Baltimore, Md.:

I am in my 22d week of pregnancy. I am expecting a healthy infant in October. It is a wonderful relief to be able to say so.

Our first two pregnancies, which both occurred in 1979, had ended in therapeutic abortions when we learned that, had those babies been born, they would have died of Tay-Sachs disease at the age of 3 or 4. On this third try, we were lucky.

To terminate an unwanted pregnancy is a sorrowful decision. My two abortions caused me, my husband, and our families real anguish, a lingering sense of loss. But I continue to believe that we made the right decision and I was prepared to repeat it.

There are parents, I realize, who would react differently and would bear a condemned child rather than choose abortion. I certainly grant them the right to decide for themselves. But some of them, not so tolerant, seek through bills like this one to compel me to continue pregnancies which can only result in the death of a son or daughter. I will not grant them, or you as lawmakers, that power. Only the people who will live daily with the consequences have a right to make that decision.

Another father's perspectives was contained in a recent column in the Washington Post written by Tom Braden:

A few years ago one of my daughters attended an enormous Fourth of July celebration at the Washington Monument. As my daughter strolled alone off the monument grounds and entered a side street, a car rolled up next to the sidewalk, three men emerged from it, seized her roughly, and before she could do more than utter a half-stifled cry, put her into the back seat where two men held her to the floor.

She was tied, gagged, and taken to a house, the location of which she cannot now identify. She was kept in the house for the rest of the night during which time she was repeatedly beaten and raped.

That is really the end of the story, except of course that within a very short time, my daughter knew she was pregnant.

I would like to ask Senator Helms what he would do if he had been the father of the girl. I know what I did. And I can promise the Senator and the moral majority and all of the shrill voices of the right to life movement that no matter what law they may pass and how stringent the penalty, I would do it again.

Finally, there are perspectives from Vicki Savageau from North Dakota:

The delivery was very exciting. In the exultation that followed the final push, the doctor said, with a concerned look on his face, "There is something wrong here. Don't worry."

Later, the pediatrician came into explain to us about spina bifida, which was what our daughter had. It really is still a haze to me, except for the fact that 2 hours after my daughter died, my breasts filled with milk and I felt the most acute sense of loss that I have ever felt before or since.

I oppose this bill for many reasons, but the main reason is as follows. I was the one who had to go through the experience and try to put my life back together. I was the one who had to give up a teaching position that I loved in order to be able to pay the bills. I was the one who had to pack the nursery. I was the one who somehow had to try to put my life into perspective. You were not there in the early hours of the morning to comfort me or to help me to get through the day as best as I could. If it were to happen again, I would still be there alone. Because you weren't

there, because you won't be there if there is a next time, and because I am the one who will have to suffer the consequences, I feel that it should be my decision and not yours.

I just do not want to have to go through it again. Blind faith may be enough for some of us, but for others it is not enough.

Mr. Chairman, the stories of Florette Koffler, Sanford Roberts, Paula Span, Tom Braden, and Vicki Savageau are not based on conjecture or speculation. These are real life situations which these individuals have had to directly face. No one wants to overdramatize the issues before your subcommittee, but the life situations which will be affected by S. 158 are emotionally wrenching and fraught with anguish. Although attempts may be made to analyze this bill from various academic perspectives, we ask that the human lives touched by this bill be shown compassion.

Yes, Mr. Chairman, there are other stories which could be told here. There are women who had abortions who regret that they did. There are women who have had babies with genetic diseases and loved those babies very much. There are women who contemplated abortion, decided against it, and now have healthy children whom they cherish.

Would these women honestly be telling the opposite side of the story? Other mothers and fathers would be telling the same story, the story that pregnancy, birth, and parenting involve highly intimate, personal decisions that are handled by most Americans in a manner fitting that preciousness and seriousness of the circumstances. We insist upon the right to make those decisions. We are asking for the freedom to choose, compassionately or in anguish, but to choose.

The basic question is: What would S. 158 do to help anyone facing these difficulties? Would it provide any of these affected families with comfort, strength, guidance, or assistance?

We, as a society, should be spending our time and energy finding constructive ways to aiding and assisting these families. Instead, S. 158 is being coupled with drastic reductions in the financial assistance available to handicapped people, poor mothers, and low-income families.

How can it be that you take with one hand and with the other hand also take away? The Kofflers, Spans, Roberts, Savageaus, and Bradens are simply asking the Government to continue to permit them to make their own personal decisions. They insist on their right to choose.

I came here to share these stories because individuals and groups concerned about this bill felt strongly that their stories should be told. However, primarily, as I said in the beginning, I came here as a woman. I am the mother of a 22-year-old son. I am 42 and would consider having another child. In the past, a woman of my age might not have thought it healthy. There is a high risk for a woman my age having babies with serious birth defects. With the medical tests available today, I, too, would want to have that choice. I insist on my right to choose.

I feel privileged to be a voice for the individuals whose story I told. I ask that their full statements be made a part of the subcommittee's written record. I hope that their stories will be remembered by all who consider this bill.

Today, under the Constitution, our rights as women and parents are protected. The women whose voices are ringing outside this room are free to choose. What will tomorrow's dawn bring? A nightmare of no choice? The loss of freedom? When one freedom is lost, who is to say what others may follow?

In President Reagan's state of the Union address, he said that we do not want to legislate morals. Is not S. 158 an attempt to do that very thing? Will men and women retain the freedom of their religious beliefs? For that is what the bell is tolling in this issue. The bell is tolling the loss of our intimate freedoms.

Mr. Chairman, I ask the compassion of the God we all believe in, and trust this subcommittee to come to its senses. S. 158 violates my constitutional rights and the constitutional rights of all men and women in this country.

Thank you.

Senator EAST. Thank you, Ms. Collins.

[The prepared statement and material submitted by Ms. Collins follow:]

PREPARED STATEMENT OF JUDY COLLINS

MR. CHAIRMAN, MY NAME IS JUDY COLLINS. I AM HERE TODAY FOR A VERY SPECIFIC REASON. I AM NOT A SCIENTIST, NOT A THEOLOGIAN. I DO NOT HAVE INITIALS BESIDE MY NAME NOR LATIN WORDS PRECEDING IT. I REPRESENT NO SINGLE ORGANIZATION, HOLD NO PRESIDENCY OF ANY INSTITUTION. I AM A WOMAN. I AM KNOWN IN THE WORLD AS A SINGER AND I HAVE A PUBLIC IDENTITY, BUT AT MY ROOT BEING, MY ESSENCE, I AM A WOMAN. I HAVE A REPRODUCTIVE SYSTEM, A MIRACLE BESTOWED UPON ME BY THE HIGHEST POWER THERE IS. I CHOOSE TO CALL THIS POWER GOD. FOR WEEKS I HAVE LISTENED AND WATCHED WHILE MY CHOICES, MY REPRODUCTIVE SYSTEM, MY ESSENCE HAVE BEEN DISCUSSED BY DOCTORS, BY LAWYERS, BY SCIENTISTS, BY POLITICIANS, MEN AND WOMEN WITH VARYING POINTS OF VIEW. I WANT TO SPEAK FOR THE WOMEN WHO HAVE NO VOICE HERE IN THIS ROOM, FOR OVER HALF THE POPULATION WHO HAS NOT BEEN INVITED INTO THIS HIGH CEILINGED PLACE TO DISCUSS THEIR REPRODUCTIVE SYSTEMS, THEIR LIVES. MY HEART GOES OUT TO THE WOMEN IN THIS COUNTRY. THE CONSTITUTION ON THIS DAY, JUNE 18, 1981, PROTECTS MY RIGHTS OVER MY OWN BODY. IF S. 158 SHOULD BY SOME HORRIBLE CIRCUMSTANCE BECOME LAW, THAT FREEDOM IS GONE. I CAN THEN BE TOLD WHAT I MUST OR MUST NOT DO AS THOUGH I WAS AN INCUBATOR FOR THE STATE, REGARDLESS OF MY PERSONAL, MORAL AND RELIGIOUS BELIEFS. I FEEL THIS BILL COULD SO PROFOUNDLY AFFECT THE LIVES OF WOMEN, THEIR FAMILIES, INSTITUTIONS, THE VERY FABRIC OF SOCIAL AND PERSONAL LIFE, THAT ITS EFFECT WOULD PUT US IN THE DARK AGES AS FAR AS OUR CONSTITUTIONALLY PROTECTED FREEDOMS ARE CONCERNED.

AMONG THE POSSIBLE CASUALTIES OF THIS BILL, THERE IS A PARTICULARLY VULNERABLE GROUP OF PEOPLE FOR WHOM I HAVE COME TO SPEAK TODAY. THESE PEOPLE ARE BRAVE. IN THE FACE OF STATISTICS THAT TELL THEM NOT TO, MANY HAVE CHANCED FATE. THE TRAGEDIES WHEN THEY COME ARE HEART BREAKING. I WOULD LIKE TO READ YOU A BRIEF DESCRIPTION OF GENETIC DISEASE. GENETIC

DISEASE IS A TERM THAT ENCOMPASSES SINGLE GENE DEFECTS, POLYGENIC DISEASES, THOSE INFLUENCED BY SEVERAL DIFFERENT GENES, AND CHROMOSOMAL ABNORMALITIES. THEY AFFECT AN ESTIMATED 3-5% OF ALL INFANTS BORN IN THE UNITED STATES EACH YEAR.

THEY ACCOUNT FOR AT LEAST ONE-FIFTH OF ALL INFANT DEATHS IN OUR COUNTRY. THESE ARE THE BARE STATISTICS WHICH DO NOT INCLUDE THE UNQUALIFIABLE SOCIAL AND EMOTIONAL IMPACTS CREATED BY THE BIRTH OF THESE INFANTS. TAY-SACHS IS AN INHERITED DISORDER CAUSED BY THE ABSENCE OF A VITAL ENZYME RESULTING IN THE DISFUNCTION OF THE NERVOUS SYSTEM. IT IS AN INVARIABLY FATAL DISEASE IN WHICH THE CHILD SLOWLY LOSES MUSCLE CONTROL AND BECOMES BLIND, DEAF, PARALYZED AND RETARDED, USUALLY DYING BY THE AGE OF FIVE. TO DATE, THERE IS NO CURE. SPINA BIFIDA IS A NEURO TUBE DEFECT DISORDER WHICH OCCURS IN 1 TO 2 OUT OF EVERY THOUSAND BIRTHS. INFANTS WITH SPINA BIFIDA ARE BORN WITH PART OF THE SPINE MISSING OR LYING EXPOSED OUTSIDE THE BODY. SPINA BIFIDA VICTIMS MAY BE DOOMED TO LIVE WITH A RANGE OF DISABILITIES INCLUDING RETARDATION, PARALYSIS, AND LACK OF BOWEL AND BLADDER CONTROL. ANENCEPHALY IS A COMMON FORM OF NEURAL TUBE DEFECT DISORDER IN WHICH PART OF THE BRAIN IS MISSING IN THE INFANT AT BIRTH. ANENCEPHALICS ARE STILL BORN OR DIE SHORTLY AFTER BIRTH.

THESE GENETIC DISEASES CAN BE DETECTED THROUGH A DIAGNOSTIC TECHNIQUE CALLED AMNIOCENTESIS. AMNIOCENTESIS GIVES THE FAMILY WHO WANTS TO HAVE A NORMAL CHILD THE CHANCE TO DO SO. S. 158 WOULD PUT AN END TO THE EXTRAORDINARY EFFECTS OF A TECHNIQUE DESIGNED TO ENSURE BOTH THE PHYSICAL AND EMOTIONAL HEALTH OF CHILD AND PARENT.

I WOULD LIKE TO READ SOME LETTERS WRITTEN BY THE PEOPLE WHOSE TESTIMONY SHOULD BE A PART OF THIS RECORD. NO CONSIDERATION OF THIS BILL CAN BE COMPLETE WITHOUT A FULL REPORT OF THEIR SIDE OF

THE STORY. I COME HERE IN THE HOPE THAT THEIR VOICES WILL BE HEARD ALONG WITH THE OTHER VOICES OF MEN AND WOMEN PROTESTING THE UNCONSTITUTIONALITY OF THIS BILL, THE NEEDED COUNTERPART TO THIS ENORMOUS PLAY UPON THE THEME OF FREEDOM OF CHOICE OR NO FREEDOM TO CHOOSE. HERE ARE THEIR WORDS.

THE FIRST LETTER IS FROM FLORETTE KOFFLER FROM TEANECK, NEW JERSEY.

DEAR SENATOR BAUCUS:

I AM WRITING TO YOU, WITH GREAT CONCERN, ABOUT MY PERSONAL, RECENT HISTORY. IT SHOULD TELL YOU AND OTHER CONCERNED CITIZENS AND LEGISLATORS WHY I AND, UNDOUBTEDLY, THOUSANDS OF OTHER WOMEN LIKE ME IN THIS COUNTRY, NEED TO HAVE THE RIGHT TO LAWFUL, THERAPEUTIC ABORTIONS IF OUR PHYSICAL AND PSYCHOLOGICAL CIRCUMSTANCES SO DEMAND.

ON JUNE 11, 1980, I GAVE BIRTH TO MY FIRST BABY AT THE GEORGE WASHINGTON UNIVERSITY HOSPITAL IN WASHINGTON, D.C. I HAD HAD A PERFECTLY NORMAL PREGNANCY, OR SO IT WAS CONSIDERED, NAIVELY I MIGHT ADD. I WAS TRULY EXPECTING, AND ON THAT DAY AT THE HOSPITAL, BOTH MY HUSBAND AND I WERE ECSTATIC WITH HOPE AND PLANS FOR THE FUTURE. AND YET, WITHIN LESS THAN FIFTEEN MINUTES DURING DELIVERY, THE ENTIRE WORLD TURNED TOPSY-TURVY FOR US. WHAT WE THOUGHT WOULD BE OUR MOST WONDERFUL MOMENTS TURNED INTO A NIGHTMARE. OUR BABY GIRL WAS DELIVERED, BUT SHE CAME INTO THE WORLD DOOMED. SHE WAS AN ANENCEPHALIC, AND THE PHYSICIANS GAVE HER HOURS OR AT MOST A FEW DAYS TO LIVE. (SHE DIED ON THE EIGHTH DAY). A BABY LIKE HER CANNOT SURVIVE OUTSIDE THE WOMB; OBVIOUSLY HER LIFE <u>IN UTERO</u> WAS COMPLETELY DEPENDENT ON ME. THERE NEVER, NEVER WAS, NOR IS THERE NOW, ANY CHANCE FOR SUCH BABIES TO SURVIVE INDEPENDENTLY. THEY HAVE THE MOST ACUTE FORM OF NEURAL TUBE DEFECTS, WHICH DEVELOP SOMETIME DURING THE FIRST TWO TO SIX WEEKS OF EMBRYONIC LIFE. THERE IS NO CURE AT PRESENT AND THE

CAUSES FOR SUCH OCCURRANCES ARE NOT KNOWN. BUT, THESE DEFECTS CAN BE DETECTED THROUGH A SERIES OF TESTS INCLUDING AMNIOCENTESIS, PERFORMED DURING THE 16TH WEEK OF PREGNANCY AND NOT BEFORE. IF BORN ALIVE -- BECAUSE SOME ARE MISCARRIED OR STILLBORN -- THESE INFANTS CANNOT SURVIVE EVEN AS VEGETABLES.

IT HAS BEEN ALMOST A YEAR SINCE MY SAD, INDEED TRAGIC, EXPERIENCE TOOK PLACE. MY HUSBAND AND I SHALL NEVER COMPLETELY RECOVER, BUT WE WANT AND HOPE TO HAVE ANOTHER, HEALTHY BABY, OR MORE THAN ONE. I AM A PERFECTLY HEALTHY WOMAN AND THERE IS NO PREVIOUS GENETIC DEFECT KNOWN IN THE RESPECTIVE FAMILIES.

THE ONLY WAY FOR ME TO HAVE A LIVE, SURVIVING BABY, INDEED MY TRUE "RIGHT TO LIFE" LIES IN BEING ALLOWED TO UNDERGO GENETIC SCREENING AFTER I CONCEIVE, AND IN BEING ASSURED THAT IF THERE WERE ANY CHANCES THAT THE SAME PROBLEM WHICH HAPPENED WITH MY FIRST BABY COULD HAPPEN AGAIN -- AND THE ODDS ARE NOW OBVIOUSLY INCREASED -- I WOULD BE ALLOWED TO TERMINATE THE PREGNANCY. BECAUSE UNDER NO CIRCUMSTANCES WOULD I OR MY HUSBAND ALLOW OURSELVES TO LIVE ANEW THE NIGHTMARE I DESCRIBED TO YOU ABOVE.

THOSE WHO HAVE NOT LIVED THROUGH SUCH A TRAGEDY CANNOT APPRECIATE ITS MAGNITUDE AND CONSEQUENCES FOR SO MANY PEOPLE -- SIBLINGS, GRANDPARENTS, ETC. NOR SHOULD ANYONE HAVE THE RIGHT TO LEGISLATE MY RIGHT TO HAVING A HEALTHY BABY. SUCH INTERFERENCE WOULD BE ABSURD AND VICIOUS. IT WOULD IN TRUTH TEAR MY AND MY HUSBAND'S LIVES TO PIECES. I MUST STRESS AGAIN, MY ONLY CHANCE OF HAVING THE BABY I SO DESIRE RESTS ON THE AVAILABILITY OF THAT (UNCOMFORTABLE AND SAD) ALTERNATIVE WHICH IS ABORTION.

AND HERE IS THE PERSPECTIVE OF A FATHER.

MY NAME IS SANFORD ROBERTS. I AM 35 YEARS OLD, THE FATHER OF THREE CHILDREN, AND LIVE WITH MY FAMILY IN PORTSMOUTH, NEW

HAMPSHIRE. OUR SECOND CHILD, DAVITA, WAS BORN APRIL 21, 1978. SHE DEVELOPED NORMALLY FOR THE FIRST SEVEN TO EIGHT MONTHS OF HER LIFE, AT WHICH TIME HER DEVELOPMENT APPEARED TO HER MOTHER AND ME TO BE VERY SLOW.

AS OUR CONCERN INCREASED, WE MADE AN APPOINTMENT WITH A NEUROLOGIST AT BOSTON'S CHILDRENS HOSPITAL. THE TESTS CONFIRMED WHAT WE ALREADY KNEW -- DAVITA HAD TAY-SACHS DISEASE: A TERMINAL GENETIC DISORDER CHARACTERIZED BY DETERIORATION OF THE CENTRAL NERVOUS SYSTEM.

AS TERRIBLE AS THOSE SEVERAL DAYS WERE, WHAT FOLLOWED WAS WORSE. SHE BEGAN TO DETERIORATE -- SHE COULD NO LONGER PICK UP FOOD AND OVER THE NEXT YEAR-AND-A-HALF, GRADUALLY LOST ALL MOTOR CONTROL. BY HER SECOND BIRTHDAY, SHE COULD NO LONGER LIFT HER HEAD, OR MOVE HER LEGS. FEEDING BECAME DIFFICULT AND LABORIOUS. SHE WAS CONSTANTLY CHOKING AND COUGHING FOOD UP THROUGH HER NOSE. SHE BEGAN TO LOSE WEIGHT.

ALONG WITH THE SEIZURES, SHE DEVELOPED SEVERELY INCREASED SENSITIVITY TO SOUND SUCH THAT HER WHOLE BODY WOULD JUMP IF A GLASS WAS PLACED ON A BARE TABLE WITH ANYTHING BUT THE GENTLEST TOUCH.

FOR THE LONGEST TIME AFTER SHE WAS DIAGNOSED, I WOULD WAKE AT NIGHT AND FIND MY WIFE SITTING UP IN BED OR STANDING BY HER CRIB CRYING. THE HELPLESSNESS WE BOTH FELT -- THE INABILITY TO DO ANYTHING EXCEPT WATCH -- HAS BEEN OVERWHELMING AND TERRIBLY DEPRESSING. MY OWN IMPOTENCE TO COMFORT MY WIFE, TO SAY OR DO ANYTHING TO HELP DURING THOSE EPISODES, INCREASED MY LEVEL OF FRUSTRATION AND DESPONDENCY.

TO UNDERSTAND THE PURPOSE OF THIS GRAPHIC DESCRIPTION, YOU MUST KNOW THAT A SIMPLE BLOOD TEST OF PROSPECTIVE PARENTS WILL DISCLOSE THE DEFECTIVE GENE. ONCE AWARE THAT THE PARENTS ARE CARRIERS, THE FETUS CAN BE TESTED BY AMNIOCENTESIS PRIOR TO

BIRTH. IF THE FETUS HAS THE DISEASE, PREGNANCY CAN BE TERMINATED.

TAY-SACHS IS RECESSIVE; IT CAN ONLY PRODUCE A DEFECTIVE FETUS IF BOTH PARENTS TRANSMIT IT TO THE FETUS. THERE IS A FIFTY PERCENT CHANCE THAT ANY ONE OF OUR CHILDREN WILL CARRY THE GENE, AND A TWENTY-FIVE PERCENT CHANCE THAT A FETUS WILL HAVE THE DISEASE. OUR FIRST CHILD WAS NORMAL, AND AMNIOCENTESIS CONFIRMED A NORMAL FETUS FOR MY WIFE'S THIRD PREGNANCY. WE HAVE A BEAUTIFUL, HEALTHY ONE-YEAR-OLD DAUGHTER AS A REUSLT OF THAT NORMAL PREGNANCY.

THE "HUMAN LIFE" BILL OR CONSTITUTIONAL AMENDMENT BANNING ABORTION WILL FORCE US AND PEOPLE LIKE US WHO ARE UNFORTUNATE ENOUGH TO HAVE SIMILAR PROBLEMS, TO CHOOSE EITHER NOT TO HAVE CHILDREN OR RISK LIVING THROUGH THE HEARTACHE AND ANGUISH I HAVE DESCRIBED. THERE ARE NUMEROUS OTHER SIMILAR GENETIC DEFECTS AFFECTING THOUSANDS OF PEOPLE IN THIS COUNTRY (SOME WITH MORE SEVERE SYMPTOMS) THAT ARE DETECTIBLE PRIOR TO BIRTH. IT IS IRRESPONSIBLE AND INHUMANE TO FORCE THESE PEOPLE NOT TO HAVE A CHOICE.

I CANNOT BELIEVE THAT INTELLIGENT, SENSITIVE MEMBERS OF THE GOVERNING BODY OF THE GREATEST, MOST ENLIGHTENED COUNTRY IN THE WORD CAN IGNORE SUCH SUFFERING. YOU MUST DEAL WITH OUR TRAGEDY WHEN YOU VOTE ON LEGISLATION THAT SO PROFOUNDLY AFFECTS US AND OUR FELLOW CITIZENS.

I SPOKE TO MR. ROBERTS WHO HAD THESE WORDS TO ADD:

"I HAVE A ONE YEAR OLD DAUGHTER WHO IS DELIGHTFUL AND WONDERFUL AND PROBABLY THE BEST THERAPY THAT WE COULD HAVE AFTER HAVING HAD A TAY-SACHS CHILD. IF THE CHOICE HAD NOT BEEN AVAILABLE TO US, WE NEVER WOULD HAVE HAD HER. WHAT ABOUT HER, AND

HER RIGHTS? IF THE CHOICE HAD NOT BEEN AVAILABLE TO US, WE NEVER WOULD HAVE RISKED ANOTHER PREGNANCY, THE POSSIBILITY OF BRINGING ANOTHER TAY-SACHS BABY INTO THE WORLD... HOW DO PEOPLE WHO CLAIM TO HOLD LIFE SO DEAR, SO PRECIOUS, ELIMINATE THOSE CHILDREN AND THEIR RIGHTS IN THEIR THINKING?.. MANY OF THE CHILDREN WHO ARE ALIVE TODAY, AND ENJOYING HEALTHY AND FULL LIVES WOULD NOT BE ALIVE TODAY IF THEIR PARENTS DIDN'T HAVE THE RIGHT TO CHOOSE, BECAUSE AFTER HAVING EXPERIENCED THE BIRTH OF A TAY-SACHS CHILD, THEY WOULD HAVE BEEN AFRAID TO CONCEIVE AGAIN...

ANOTHER PERSPECTIVE ON TAY-SACHS DISEASE IS CONTAINED IN THE STATEMENT OF PAULA SPAN OF BALTIMORE, MARYLAND.

I AM IN MY TWENTY-SECOND WEEK OF PREGNANCY AND EXPECTING A HEALTHY INFANT IN OCTOBER. IT IS A WONDERFUL RELIEF TO BE ABLE TO SAY SO.

UNTIL TWO WEEKS AGO, MY HUSBAND AND I WERE TENSELY AWAITING THE RESULTS OF OUR MOST RECENT AMNIOSCENTESIS AT JOHNS HOPKINS HOSPITAL. AS TAY-SACHS CARRIERS, WE KNEW THAT THERE WAS A 25 PERCENT CHANCE THAT THE FETUS ALREADY WAS A VICTIM OF THAT INCURABLE GENETIC DISEASE. OUR FIRST TWO PREGNANCIES, WHICH BOTH OCCURRED IN 1979, HAD ENDED IN THERAPEUTIC ABORTIONS WHEN WE LEARNED THAT, HAD THOSE BABIES BEEN BORN, THEY WOULD HAVE DIED OF TAY-SACHS AT THE AGE OF THREE OR FOUR. ON THIS THIRD TRY, WE WERE LUCKY.

TO TERMINATE AN UNWANTED PREGNANCY IS A SORROWFUL DECISION, AN OCCASION FOR GRIEF AS SURELY AS THE DEATH OF A LOVED ONE WOULD BE. MY TWO ABORTIONS CAUSED ME, MY HUSBAND, AND OUR FAMILIES REAL ANGUISH, A LINGERING SENSE OF LOSS. BUT, I CONTINUE TO BELIEVE THAT WE MADE THE RIGHT DECISION AND I WAS PREPARED TO REPEAT IT.

84-581 O—81——63

I HAVE WONDERED, AS THE ASSAULT ON LEGAL ABORTION INTENSIFIES, WHAT I WOULD DO IF ABORTION WERE OUTLAWED. PERHAPS I WOULD BE ABLE TO FIND A PHYSICIAN WILLING TO RISK A HOMICIDE CHARGE TO HELP ME, THOUGH I MIGHT ENDANGER MY OWN HEALTH BY UNDERGOING A MID-TRIMESTER ABORTION OUTSIDE A HOSPITAL. PERHAPS I COULD AFFORD TO ARRANGE AN ABORTION IN SOME OTHER, MORE COMPASSIONATE COUNTRY. IF AMNIOSCENTESIS WERE ILLEGAL AS WELL, MY HUSBAND AND I MIGHT NOT DARE TO GAMBLE ON A PREGNANCY AT ALL BECAUSE OF THE TERRIBLE PENALTY TO WHICH OUR GENETIC ODDS MIGHT SUBJECT US. MERCIFULLY, WE ARE NOT YET FACED WITH SUCH FRIGHTENING ALTERNATIVES.

THERE ARE PARENTS, I REALIZE, WHO WOULD REACT DIFFERENTLY AND WOULD BEAR A CONDEMNED CHILD RATHER THAN CHOOSE ABORTION. I CERTAINLY GRANT THEM THE RIGHT TO DECIDE FOR THEMSELVES. BUT, SOME OF THEM ARE NOT SO TOLERANT AND SEEK, THROUGH BILLS LIKE THIS ONE, TO COMPEL ME TO CONTINUE PREGNANCIES WHICH CAN ONLY RESULT IN THE DEATH OF A SON OR DAUGHTER. I WILL NOT GRANT THEM,OR YOU AS LAWMAKERS, THAT POWER. ONLY THE PEOPLE WHO WILL LIVE DAILY WITH THE CONSEQUENCES HAVE THE RIGHT TO MAKE THAT DECISION.

I SPOKE TO PAULA SPAN ON THE TELEPHONE AND RECEIVED THESE FURTHER COMMENTS FROM HER.

"ABORTION IS A SORROWFUL DECISION, A PAINFUL DECISION... YOU DON'T HAVE TO BE A TEENAGER AND PROMISCUOUS AND ON WELFARE TO CHOOSE AN ABORTION. YOU CAN BE MARRIED AND RESPONSIBLE AND STILL MAKE THAT CHOICE... IF YOU REMOVE THAT CHOICE YOU ARE DOOMING PARENTS TO BE AFRAID TO HAVE CHILDREN, OR TO HAVING THEM AND WATCH THEM DIE SLOWLY AND PAINFULLY... WHY HAVE THE TECHNOLOGY AND THEN NOT HAVE THE OPTION TO REACT TO THE INFORMATION GIVEN TO YOU?.. ESPECIALLY WITH MANY WOMEN DELAYING THEIR CHILD BEARING INTO THEIR THIRTIES... I AM CONCERNED ABOUT TAKING THE

DECISION AWAY FROM THE PEOPLE WHO HAVE TO LIVE WITH IT. WE WOULD NEVER IMPOSE AN ABORTION ON SOMEONE WHO DIDN'T WANT ONE, WHY SHOULD ANYONE HAVE THE RIGHT TO DENY ME MY CHOICE... THE PEOPLE CONCERNED WITH THE FETUS WON'T BE THERE TO HELP THE FAMILIES DEAL WITH THE EMOTIONAL TRAUMA, PHYSICAL DEMANDS, AND THE FINANCIAL RESPONSIBILITIES... WE ARE NOT CAVALIER ABOUT IT. BUT I FEEL THAT IT IS THE BEST DECISION AND I WOULD DO IT AGAIN IF NECESSARY."

ANOTHER FATHER'S PERSPECTIVE WAS CONTAINED IN A RECENT COLUMN IN THE WASHINGTON POST WRITTEN BY TOM BRADEN.

A FEW YEARS AGO ONE OF MY DAUGHTERS ATTENDED AN ENORMOUS FOURTH OF JULY CELEBRATION AT THE WASHINGTON MONUMENT. IT WAS A FREE SHOW WITH FIREWORKS AND FLAGS AND ENTERTAINMENT, AND ACCORDING TO THE NEWSPAPER ACCOUNT, THE LARGE CROWD BEHAVED WELL.

BUT AS MY DAUGHTER STROLLED ALONE OFF THE MONUMENT GROUNDS AND ENTERED A SIDE STREET, A CAR ROLLED UP NEXT TO THE SIDEWALK. THREE MEN EMERGED FROM IT, SEIZED HER ROUGHLY AND, BEFORE SHE COULD DO MORE THAN UTTER A HALF-STIFLED CRY, PUT HER INTO THE BACK SEAT WHERE TWO MORE MEN HELD HER TO THE FLOOR.

SHE WAS TIED, GAGGED, AND TAKEN TO A HOUSE, THE LOCATION OF WHICH SHE CANNOT NOW IDENTIFY. SHE WAS KEPT IN THE HOUSE FOR THE REST OF THE NIGHT DURING WHICH TIME SHE WAS REPEATEDLY BEATEN AND RAPED.

THE NEXT MORNING SHE WAS BLINDFOLDED, DRIVEN BACK TO THE MONUMENT GROUNDS AND SHOVED OUT OF THE CAR. EVENTUALLY, SOMETIME ABOUT MIDDAY, SHE MADE HER WAY HOME.

DURING THE TIME SHE WAS GONE, THERE WAS OF COURSE, A GREAT DEAL OF WORRY AND ANXIETY AT HOME. AND I MUST CONFESS, ANGER.

HER ARRIVAL WAS FOLLOWED BY VARIOUS INTERVIEWS WITH POLICEMEN

WHO TRIED TO BE HELPFUL TO A HYSTERICAL GIRL. BUT COULDN'T BE. BECAUSE THE HYSTERICAL GIRL COULD ONLY ESTIMATE THE TIME SHE HAD BEEN IN THE CAR, DESCRIBE THE INSIDE OF THE HOUSE AND SOB OUT SOME MEANGINGLES FIRST NAMES.

THAT'S REALLY THE END OF THE STORY. EXCEPT, OF COURSE, THAT WITHIN A VERY SHORT TIME, MY DAUGHTER KNEW SHE WAS PREGNANT.

NOW I WOULD LIKE TO ASK SENATOR HELMS WHAT HE WOULD DO IF HE HAD BEEN THE FATHER OF THE GIRL. I KNOW WHAT I DID. AND I CAN PROMISE THE SENATOR AND THE MORAL MAJORITY AND ALL THE SHRILL VOICES OF THE RIGHT TO LIFE MOVEMENT, THAT NO MATTER WHAT LAW THEY MAY PASS AND HOW STRINGENT THE PENALTY, I WOULD DO IT AGAIN.

THEN THERE IS THE STORY OF ANDREA MARKS, A PEDIATRICIAN FROM NEW YORK.

LAST WEEK, I VOLUNTARILY TERMINATED MY PREGNANCY AT 18 WEEKS. MY HUSBAND, WHO IS 38 YEARS OLD, AND I, ALMOST 34, HAVE NO CHILDREN AS YET, AND ARE EXTREMELY, EVEN PAINFULLY, EAGER TO BECOME PARENTS. A PREVIOUS PREGNANCY PREMATURELY TERMINATED SPONTANEOUSLY LAST AUGUST AND PRODUCED A PERFECTLY-FORMED BABY WHOSE GESTATIONAL AGE WAS 25 WEEKS; THE INFANT DIED AT TWO-AND-A-HALF DAYS OLD. I AM A PEDIATRICIAN, AND SPECIALIZE IN THE CARE OF ADOLESCENTS. I HAVE WANTED TO BE A MOTHER FOR MANY, MANY YEARS. MY HUSBAND IS A LAWYER, BUT HAS A WAY WITH KIDS THAT ANY PEDIATRICIAN MIGHT EMULATE. HE, TOO, HAS HAD A PATERNAL INSTINCT FOR A VERY LONG TIME.

THE ABORTION WAS PERFORMED BECAUSE WE LEARNED, ONE WEEK EARLIER, THAT HAD WE CONTINUED WITH THE PREGNANCY, IT WOULD HAVE PRODUCED A FULL-TERM INFANT WITH ONLY A PARTIALLY FORMED BRAIN AND SKULL, WHO, WITH ABSOLUTE CERTAINTY, WOULD HAVE DIED WITHIN ONE WEEK OF LIFE. AS PAINFUL, DISAPPOINTING AND ENTIRELY CONTRARY TO OUR WISHES AND NEEDS AS HUMAN BEINGS EAGER FOR PARENTHOOD AS IT WAS, WE CHOSE TO TERMINATE THIS PREGNANCY. MODERN MEDICINE HAS REACHED A POINT WHERE ABNORMALITIES

SUCH AS OUR BABY'S CAN BE DETECTED EARLY ENOUGH TO SAFELY TERMINATE A PREGNANCY, WHICH, HAD IT CONTINUED WOULD HAVE RESULTED IN NOT ONLY ANGUISH, BUT NO VIABLE HUMAN LIFE. TO HAVE HAD THIS INFORMATION AND NOT BEEN ALLOWED TO TERMINATE, WOULD HAVE BEEN "CRUEL AND UNUSUAL" PUNISHMENT FOR INNOCENT AND WELL-MEANING PARENTS-TO-BE, NOT TO MENTION THE MALFORMED INFANT.

FINALLY, THERE ARE THESE PERSPECTIVES FROM VICKI SAVAGEAU FROM NORTH DAKOTA.

THREE YEARS AGO IN MARCH I WAS NINE MONTHS PREGNANT. I WAS, I THOUGHT, VERY AWKWARD, TOO HEAVY, UNCOMFORTABLE, AND I MOVED MUCH TOO SLOWLY. BUT I WAS HAPPY. MY FRIENDS WERE HAVING BABY SHOWERS FOR ME, I WAS COMPLETING THE FINISHING TOUCHES ON THE NURSERY AND WAS FINALLY ORGANIZING LESSON PLANS FOR A SUBSTITUTE TEACHER TO TAKE OVER MY ENGLISH CLASSES DURING THE TIME I WOULD BE GONE.

THE DELIVERY WAS VERY EXCITING. NO MATTER HOW PREPARED YOU ARE, YOU WILL NEVER KNOW UNTIL YOU EXPERIENCE IT HOW THRILLING IT IS TO WATCH YOUR OWN CHILD BEING BORN. IN THE EXULTATION THAT FOLLOWED THE FINAL PUSH, THE DOCTOR SAID, WITH A CONCERNED LOOK ON HIS FACE, "THERE'S SOMETHING WRONG HERE. DON'T WORRY, THEY'LL BRING THE BABY RIGHT BACK." THEY TOOK OUR DAUGHTER OVER TO THE OTHER SIDE OF THE DELIVERY ROOM AND TALKED IN VERY HUSHED TONES.

LATER, THE PEDIATRICIAN CAME IN TO EXPLAIN TO US ABOUT SPINA BIFIDA, WHICH WAS WHAT OUR DAUGHTER HAD. IT WAS TRUE THAT SOME CASES WERE WORSE THAN OTHERS, BUT IT LOOKED LIKE THIS WOULD BE ONE OF THE WORST. SHE WOULD NEVER WALK OR CONTROL HER BOWELS OR BLADDER. THEY ANTICIPATED THAT THERE WOULD BE SEVERE MENTAL RETARDATION, ALTHOUGH A NEUROLOGIST WAS STILL COMPLETING TESTS. AT THIS POINT, THEY FINALLY BROUGHT OUR DAUGHTER INTO THE ROOM AND I HAD A CHANCE TO REALLY SEE HER. I EXAMINED HER INCH BY INCH AND THE ONLY OUTWARD EVIDENCE I COULD SEE OF THESE TERRIBLE PROBLEMS WERE THE OPENING IN HER SPINE

AND ONE SOMEWHAT DEFORMED AND TWISTED LEG. I THOUGHT SHE WAS GORGEOUS.

WE DID WHAT EVERY OTHER FAMILY DOES WHEN SOMEONE THEY LOVE DIES. WE WENT HOME, AND FAMILY AND FRIENDS GATHERED AROUND TO TALK AND TO SHARE FEELINGS. IT REALLY IS STILL A HAZE TO ME, EXCEPT FOR THE FACT THAT TWO HOURS AFTER MY DAUGHTER DIED, MY BREASTS FILLED WITH MILK AND I FELT THE MOST ACUTE SENSE OF LOSS THAT I'D EVER FELT BEFORE OR SINCE.

AS LONG AS THE NORM IS A PERFECT, HEALTHY BABY, THERE MAY BE THOUSANDS OF PEOPLE WHO FEEL THE WAY THAT I HAVE FELT. IF YOU PRODUCE ANYTHING LESS, YOU'VE FAILED. IF THERE IS SOMETHING WRONG WITH YOUR CHILD THAT MEANS THERE IS SOMETHING WRONG WITH YOU. NO MATTER HOW MANY EXPERTS TELL YOU DIFFERENTLY, THAT FEELING WILL PERSIST.

WELL IT MAY HAVE BEEN EASIER IF IT HAD BEEN SOMETHING THAT I DID OR DID NOT DO, BECAUSE THE AMOUNT OF GUILT WOULD HAVE BEEN THE SAME EITHER WAY.

IF I LOOK BACK ON THE PAST THREE YEARS I CAN SEE THAT I HAVE TRIED TO MAKE UP FOR MY FAILURE.

I DON'T THINK THAT I COULD COPE MENTALLY, EMOTIONALLY, OR PHYSICALLY WITH HAVING ANOTHER CHILD DIE SO SOON AFTER BIRTH. I DO BELIEVE THAT SOMEONE ELSE MIGHT HAVE THE STRENGTH OF CHARACTER, FAITH OR WHATEVER ELSE IT IS THAT IS REQUIRED TO COPE WITH THIS 10 TIMES IF NECESSARY. WE ARE NOT ALL ALIKE AND I SEEM TO HAVE DISCOVERED MY OWN LIMITATIONS. I'VE FOUND MYSELF SO CLOSE TO THE EDGE OF MY LIMITATIONS THAT I WAS TERRIFIED. I'VE SPENT THE PAST THREE YEARS FIGHTING MY WAY AWAY FROM THAT EDGE AND I DON'T WANT TO GO BACK THERE AGAIN, NO MATTER HOW MUCH I WOULD LIKE TO HAVE A CHILD.

DURING THIS WHOLE ORDEAL IT NEVER OCCURRED TO ME THAT IT MIGHT POSSIBLY HAPPEN AGAIN. MY DOCTORS TOLD ME THAT EVERYONE HAS APPROXI-

MATELY A 3 PERCENT CHANCE OF HAVING A BABY WITH SPINA BIFIDA. NOW THAT I'VE HAD ONE, MY CHANCES DOUBLE TO APPROXIMATELY 6 PERCENT. BUT, THEY ASSURED ME THAT THERE WAS A TEST THAT COULD BE DONE, WITH AMNIOCENTESIS, WHICH COULD DETERMINE WHETHER OR NOT THAT FETUS WAS ALSO AFFECTED WITH SPINA BIFIDA. IF NOT, THEN I COULD ENJOY A RELATIVELY CAREFREE PREGNANCY. BUT, IF SO, THEN I COULD EITHER PREPARE MYSELF FOR THE INEVITABLE HEARTACHE OR I COULD HAVE AN ABORTION

I CAN'T SAY RIGHT NOW WHAT I WOULD DO. I DON'T THINK THAT I COULD MAKE ANY DECISION UNTIL THE TIME CAME. FOR THE MOMENT, I HAVE CHOSEN TO NOT DECIDE ANYTHING BY PREVENTING PREGNANCY UNTIL I FEEL BETTER ABLE TO FACE MY ALTERNATIVES. I DO, HOWEVER, FEEL THAT WHATEVER THE DECISION, IT MUST BE MINE AND MY HUSBAND'S TO MAKE.

I OPPOSE THIS BILL FOR MANY DIFFERENT REASONS, BUT THE MAIN REASON IS AS FOLLOWS. I WAS THE ONE WHO HAD TO GO THROUGH THIS EXPERIENCE AND TRY TO PUT MY LIFE BACK TOGETHER AGAIN. I WAS THE ONE THAT HAD TO GIVE UP A TEACHING POSITION THAT I LOVED IN ORDER TO BE ABLE TO PAY THE BILLS, I WAS THE ONE THAT HAD TO PACK UP THE NURSERY, I WAS THE ONE THAT HAD TO SOMEHOW TRY TO PUT MY LIFE BACK INTO PERSPECTIVE AGAIN. MY SUBCONSCIOUS TOOK A WHILE TO CATCH UP WITH REALITY. I'D HAVE DREAMS OF BEING PREGNANT AND WHEN I WOKE UP TO REALIZE THAT I WAS NOT AND THAT THERE WAS NO BABY IN THE NEXT ROOM, THERE WERE TEARS STREAMING DOWN MY FACE. YOU WEREN'T THERE IN THE EARLY HOURS OF THE MORNING TO COMFORT ME OR TO HELP ME GET THROUGH THE DAY AS BEST I COULD. AND IF IT WERE TO HAPPEN AGAIN, I WOULD STILL BE THERE ALONE. BECAUSE YOU WEREN'T THERE, BECAUSE YOU WON'T BE THERE IF THERE IS A NEXT TIME, AND BECAUSE I AM THE ONE THAT WILL HAVE TO SUFFER THE CONSEQUENCES, I FEEL THAT IT SHOULD BE MY DECISION, NOT YOURS.

WHAT I WOULD LIKE YOU TO DO BEFORE YOU MAKE YOUR DECISION IS TO PERSONALIZE MY SITUATION. TAKE IT INTO YOUR OWN LIVES AND ASK YOURSELVES IF YOU WOULD WANT SOMEONE ELSE TO MAKE ANY DECISION LIKE THIS FOR YOU.

WOULD YOU, HAVING GONE THROUGH THIS ONCE, PURPOSELY GO THROUGH IT AGAIN? WOULD YOU WANT THE PEOPLE YOU LOVE THE MOST TO BE SUBJECTED TO THIS? WOULD YOU WANT ANYONE ELSE TO TELL YOU THAT YOU HAD NO CHOICE IN THE MATTER?

TO CHOOSE AN ABORTION WHEN YOU DESPERATELY WANT A CHILD MUST BE VERY PAINFUL. TO CHOOSE TO HAVE A CHILD THAT WILL BE SEVERELY HANDICAPPED OR WILL LIVE A VERY SHORT TIME MUST ALSO BE VERY PAINFUL. TO GO THROUGH ANOTHER PREGNANCY WITHOUT KNOWING EITHER WAY WOULD BE TERRIFYING. LAST TIME I HAD NO CHOICE -- NEXT TIME I WILL. I DON'T KNOW WHAT MY DECISION WOULD BE, BUT IF I CHOSE TO HAVE AN ABORTION, I WOULD WANT THAT DECISION TO BE A LEGAL CHOICE. THE IDEA OF COMMITTING WHAT WOULD BE A CRIMINAL ACT WOULD BE AN ADDED PAIN TO BE DEALT WITH.

IF ABORTION WERE NOT A LEGAL ALTERNATIVE AND ABORTION WERE MY CHOICE, IT REALLY WOULD MAKE NO DIFFERENCE. I WOULD HAVE THE ABORTION ANYWAY. MY CONCERN WOULD BE THAT THE ABORTION WAS SAFE. AND, WHEN I CONSIDER THE FACT THAT THERE WERE DAYS I WOULD RATHER HAVE BEEN DEAD THAN TO FACE ALL THAT PAIN AND DEPRESSION, I'M NOT EVEN SURE THAT SAFE WOULD HAVE TO BE A CONSIDERATION.

I FEEL SAFE IN SAYING THAT I REPRESENT AN OVERWHELMING MAJORITY OF AMERICANS WHO BELIEVE THAT THE MATTER OF ABORTION SHOULD BE A PERSONAL DECISION. MOST OF US BELIEVE THAT WE ARE NOT ANTI-LIFE ANY MORE THAN THOSE WHO BELIEVE DIFFERENTLY ARE PRO-LIFE. THE ENTIRE MATTER HAS COME DOWN TO TWO OPPOSING POSITIONS. ONE POSITION IS THAT THIS IS A MATTER OF INDIVIDUAL CHOICE AND THE OTHER POSITION IS THAT IT IS NOT A MATTER OF INDIVIDUAL CHOICE. THE ISSUE BECOMES EVEN MORE DISTORTED WHEN THESE VIEWS ARE LABLED ANYTHING OTHER THAN "PRO-CHOICE" AND "ANTI-CHOICE."

THERE HAVE ALWAYS BEEN AND ALWAYS WILL BE ABORTIONS. I THINK IT IS THE UNQUALIFIED RIGHT OF EVERY AMERICAN WOMEN TO MAKE HER OWN CHOICE, WHETHER IT BE IN CONSULTATION WITH HER FAMILY, HER DOCTOR OR HER GOD.

THE LAST PERSON I WOULD EVER CONSIDER CONSULTING WITH IS MY U.S. SENATOR OR REPRESENTATIVE. I CAN'T EVEN IMAGINE THAT THEY WOULD ATTEMPT TO COUNSEL ME EITHER WAY, SINCE THEY WOULD PROBABLY SAY THEY WERE NOT INVOLVED.

WHEN PEOPLE WHO BELIEVE IN GOD HAVE DIFFICULT DECISIONS TO MAKE, THEY ASK FOR HELP IN MAKING THOSE DECISION AND COUNT ON THE FACT THAT HE WILL GET HIS MESSAGE ACROSS TO THEM ONE WAY OR ANOTHER. MY PERSONAL BELIEF IS THAT I DO NOT NEED YOUR HELP IN MAKING A DECISION OF THIS NATURE, NOR DOES THE LORD NEED THE HELP OF CONGRESS TO INTERPRET HIS WISHES. IF I DON'T BELIEVE IN THE POPE OR ANY OTHER RELIGIOUS LEADER, WHY SHOULD I HAVE TO LIVE ACCORDING TO THEIR INTERPRETATIONS? THOSE PEOPLE IN THIS COUNTRY THAT DO NOT BELIEV IN GOD IN ANY SHAPE OR FORM DON'T DESERVE TO HAVE TO LIVE WITH A DECISION BASED ON <u>ANY</u> RELIGIOUS BELIEF.

I AM ASKING YOU FOR COMPASSION, FOR MYSELF AND FOR THE OTHER HUNDREDS OF THOUSANDS OF AMERICANS WHO DO NOT HAVE THE OPPORTUNITY TO SHARE THEIR PERSONAL TRAGEDIES WITH YOU.

WHEN I SPOKE TO VICKI, SHE ADDED THESE WORDS:

I DON'T WANT TO SOUND LIKE I FEEL SORRY FOR MYSELF. BECAUSE I DON'T. BUT I HAVE TO SHARE THE PAIN WITH THE COMMITTEE IN ORDER TO RELATE MY EXPERIENCES IN THE PROPER PERSPECTIVE.. I DON'T WANT TO HAVE TO GO THROUGH IT AGAIN (THE BIRTH OF A SPINA-BIFIDA CHILD), AND WITH AN LUCK I WON'T HAVE TO...IT HAPPENED THREE YEARS AGO...EVERYONE IS SO INDIVIDUAL IN THE WAY THEY DEAL WITH A SITUATION...WHERE BLIND FAITH MAY BE ENOUGH FOR ONE PERSON, IT JUST ISN'T ENOUGH FOR SOME OF US.

MR. CHAIRMAN, THE STORIES OF FLORETTE KOFFLER, SANFORD ROBERTS, PAULA SPAN, TOM BRADEN, ANDREA MARKS AND VICKI SAVAGEAU ARE NOT BASED ON CONJECTURE OR SPECULATION. THESE ARE REAL LIFE SITUATIONS WHICH THESE INDIVIDUALS HAVE HAD TO DIRECTLY FACE. NO ONE WANTS TO OVER

DRAMATIZE THE ISSUES BEFORE YOUR SUBCOMMITTEE, BUT THE LIFE SITUATIONS THAT WILL BE EFFECTED BY S. 158 ARE EMOTIONALLY WRENCHING AND FRAUGHT WITH ANGUISH. THOUGH ATTEMPTS MAY BE MADE TO ANALYZE THIS BILL FROM VARIOUS ACADEMIC PERSPECTIVES, WE ASK THAT THE HUMAN LIVES TOUCHED BY THIS BILL BE SHOWN COMPASSION. AND YES, MR. CHAIRMAN, THERE ARE OTH STORIES WHICH COULD BE TOLD HERE. THERE ARE WOMEN WHO HAVE HAD ABORTIO WHO REGRET THAT THEY DID. THERE ARE WOMEN WHO HAD BABIES WITH GENETIC DISEASES AND LOVE THOSE BABIES VERY MUCH. THERE ARE WOMEN WHO CONTEMPLATED ABORTION, DECIDED AGAINST IT, AND NOW HAVE HEALTHY CHILDRE THAT THEY CHERISH. WOULD THESE WOMEN HONESTLY BE TELLING THE OPPOSITE SIDE OF THE STORY? OTHER MOTHERS AND FATHERS WOULD BE TELLING THE SAME STORY. THE STORY THAT PREGNANCY, BIRTH AND PARENTING INVOLVE HIGHLY INTIMATE, PERSONAL DECISIONS THAT ARE HANDLED BY MOST AMERICANS IN A MANNER FITTING THE PRECIOUSNESS AND SERIOUSNESS OF THE CIRCUMSTANCES. WE INSIST UPON THE RIGHT TO MAKE THOSE DECISIONS. WE ARE ASKING FOR THE FREEDOM TO CHOOSE, COMPASSIONATELY OR IN ANGUISH, BUT TO CHOOSE.

THE BASIC QUESTION IS, "WHAT WOULD S. 158 DO TO HELP ANYONE FACING THESE DIFFICULT ISSUES?" WOULD IT PROVIDE ANY OF THESE AFFECTEI FAMILIES WITH COMFORT, STRENGTH, GUIDANCE OR ASSISTANCE? WE AS A SOCIETY SHOULD BE SPENDING OUR TIME AND ENERGY FINDING CONSTRUCTIVE WAYS OF AIDING AND ASSISTING THESE FAMILIES. INSTEAD, S. 158 IS BEING COUPLED WITH DRASTIC REDUCTIONS IN THE FINANCIAL ASSISTANCE AVAILABLE TO HANDICAPPED PEOPLE, POOR MOTHERS, AND LOW INCOME FAMILIES

HOW CAN IT BE THAT YOU TAKE WITH ONE HAND AND WITH THE OTHER ALSO TAKE AWAY? AS A SOCIETY WE SHOULD BE STANDING BY THESE FAMILIES OFFERING THEM COMFORT AND SUPPORT, NOT TYING THEIR HANDS, DENYING OPTIONS AND MAKING EACH DILEMMA WORSE. THE KOFFLERS, SPANS, ROBERTS, SAVAGEAUS AND BRADENS ARE SIMPLY ASKING THE GOVERNMENT TO CONTINUE TO PERMIT THEM TO MAKE THEIR OWN PERSONAL DECISIONS. THEY INSIST ON THEIR RIGHT TO CHOOSE.

I CAME HERE TO SHARE THEIR STORIES BECAUSE INDIVIDUALS AND GROUPS CONCERNED ABOUT THIS BILL FELT STRONGLY THAT THEIR STORIES SHOULD BE TOLD. BUT PRIMARILY I AM HERE AS I SAID IN THE BEGINNING, AS A WOMAN. I'M THE MOTHER OF A 22 YEAR OLD SON. I AM 42 AND WOULD CONSIDER HAVING ANOTHER CHILD. IN THE PAST, A WOMAN MY AGE MIGHT NOT HAVE THOUGHT IT HEALTHY. THERE IS A HIGH RISK FOR A WOMAN MY AGE HAVING BABIES WITH SERIOUS BIRTH DEFECTS. WITH THE MEDICAL TESTS AVAILABLE TODAY, I, TOO, WOULD WANT TO HAVE THE CHOICE. I INSIST ON MY RIGHT TO CHOOSE.

I VERY MUCH APPRECIATE BEING ASKED TO TESTIFY TODAY. I FEEL PRIVILEGED TO BE A VOICE FOR THE INDIVIDUALS WHOSE STORIES I TOLD. I ASK THAT THEIR FULL STATEMENTS BE MADE A PART OF THE SUBCOMMITTEE'S WRITTEN RECORD AND I HOPE THAT THEIR STORIES WILL BE REMEMBERED BY ALL WHO CONSIDER THIS BILL.

TODAY UNDER THE CONSTITUTION, OUR RIGHTS AS WOMEN AND PARENTS ARE PROTECTED. THE WOMEN WHOSE VOICES ARE RINGING OUTSIDE THIS ROOM ARE FREE TO CHOOSE. WHAT WILL TOMORROW'S DAWN BRING? A NIGHTMARE OF NO CHOICE? THE LOSS OF FREEDOM? AND WHEN ONE FREEDOM IS LOST WHO IS TO SAY WHAT OTHER LOSSES MAY FOLLOW? IN PRESIDENT REAGAN'S STATE OF THE UNION ADDRESS, HE SAID THAT WE DO NOT WANT TO LEGISLATE MORALS. IS NOT S. 158 THE ATTEMPT TO DO THAT VERY THING? WILL MEN AND WOMEN RETAIN THE FREEDOM OF THEIR RELIGIOUS BELIEFS?

FOR THAT IS WHAT THE BELL IS TOLLING IN THIS ISSUE. THE BELL IS TOLLING "THE LOSS OF OUR INTIMATE FREEDOMS."

MR. CHAIRMAN, I ASK THE COMPASSION OF THE, GOD WE ALL BELIEVE IN, AND TRUST THIS COMMITTEE TO COME TO ITS SENSES. S. 158 VIOLATES MY CONSTITUTIONAL RIGHTS AND THE CONSTITUTIONAL RIGHTS OF ALL MEN AND WOMEN IN THIS COUNTRY.

THANK YOU.

May 22, 1981

706 Ogden Avenue
Teaneck, N.J. 07666

Senator Max Baucus
1107 Dirksen Building
The Capitol
Washington, D.C. 20510

Re: the proposed "human life statute"

Dear Senator Baucus:

I am writing to you, with great concern, about my personal, recent history. It should tell you and other concerned citizens and legislators why I and, undoubtedly, thousands of other women like me in this country, need to have the right to lawful, therapeutic abortions if our physical and psychological circumstances so demand.

On June 11, 1980, I gave birth to my first baby at the George Washington University Hospital in Washington, D.C. I had had a perfectly normal pregnancy, or so it was considered, naïvely I might add. I was truly expecting, and on that day at the hospital, both my husband and I were ecstatic with hope and plans for the future. And yet, within less than fifteen minutes during delivery, the entire world turned topsy-turvy for us. What we thought would be our most wonderful moments turned into a nightmare. Our baby girl was delivered, but she came into the world doomed. She was an anencephalic, and the physicians gave her hours or at most a few days to live. (She died on the eighth day.) A baby like her cannot survive outside the womb; obviously her life <u>in utero</u> was completely dependent on me. There never, <u>never</u> was, nor is there now, any chance for such babies to survive independently. They have the most acute form of neural tube defects, which develop sometime during the first two to six weeks of embrionic life. There is no cure at present and the causes for such occurrences are not known. But these defects can be detected through a series of tests, including amniocentesis, performed during the 16th week of pregnancy and not before. If born alive - because some are miscarried or stillborn - these infants cannot survive even as vegetables.

It has been almost a year since my sad, indeed tragic experience took place. My husband and I shall never completely recover, but we want and hope to have another, healthy baby, or more than one. I am a perfectly healthy woman and there is no previous genetic defect known in the respective families. I have the right to have a healthy child, indeed I demand that right. Nature and God can give it to me, and current medical advances in genetics help. No one else should even dare to interfere. Because the only way for me to have a live, surviving baby, indeed my true "right to life" lies in being allowed to undergo genetic screening after I conceive, and in being assured that if there were any chances that the same problem which happened with

my first baby could happen again - and the odds are now obviously increased - I would be allowed to terminate the pregnancy. Because under no circumstances would I or my husband allow ourselves to live anew the nightmare I described to you above.

Indeed, I believe that genetic screening is absolutely crucial for a larger part of the population than now submit to it. I wish that in the future no couple would have to experience what my husband and I did with our first child. As of now, too many do.

Those who have not lived through such a tragedy cannot appreciate its magnitude and consequences for so many people - siblings, grandparents, etc. Nor should anyone have the right to legislate my right to having a healthy baby. Such interference would be absurd and vicious. It would in truth tear my and my husband's lives to pieces. I must stress again, my only chance of having the baby I so desire rests on the availability of that (uncomfortable and sad) alternative which is abortion.

I now end these lines, thanking you for your attention. I hope that my very personal letter serves to demonstrate the inhumanity of a so-called "human life statute" that would deny me and others the right to have children.

Please let me know if I may be of further assistance.

Sincerely yours,

Florette R. Koffler

Florette R. Koffler
(201) 836-4712

---

## PREPARED STATEMENT OF ANDREA MARKS, M.D.

Submitted to the Senate Subcommittee on the

Separation of Powers.

Mr. Chairman and members of the Subcommittee on the Separation of Powers.

I was originally scheduled to appear before you on June 15, 1981 but the session was cancelled. I offer this written testimony to you on Bill S.158 because I am immensely concerned about the effect its passage will have on women and families. I wish to give you the benefit of several professional and personal perspectives I have on the subjects of abortion and prenatal diagnosis.

I am presently Chief of Adolescent Medicine at North Shore University Hospital, a teaching affiliate of Cornell University Medical College, and Assistant Professor of Pediatrics in the Department of Pediatrics of Cornell University Medical College.

My expertise is in the medical and biosocial care of individuals aged approximately twelve through twenty-one, and in this connection have for the past seven years been heavily involved in the health care of adolescents, many of whose health care requirements are attributable to sexual activity.

My training and education include a bachelor of arts degree from Bryn Mawr College and a medical degree from the Medical School of the University of Pennsylvania.

Following an internship and residency in general pediatrics at the Children's Hospital Medical Center in Boston, I completed post-graduate training as a Fellow in Adolescent Medicine. During the past seven years I have served as a teacher, clinician, and clinical researcher in the field of Adolescent Medicine in various academic medical settings. I am a member of the American Academy of Pediatrics, the Ambulatory Pediatric Association, and the Society of Adolescent Medicine.

You have already heard ample and eloquent testimony on the "human life" issue. On this point I can only whole-heartedly agree with those who find the question of when human life begins to be one which has no "answer" and consequently one which can not be defined by scientific evidence or legislative fiat. When life begins has always been, and will always remain, a religious, mystical, cultural, and/or moral issue, which will be open to a multitude of opinions, not answers. And so be it!

With this in mind, I would like to suggest to you several devastating ramifications which passage of S.158 will create. As a woman and a physician I would like to address the problems which passage must cause from four distinct perspectives, with particular emphasis on the issue of prenatal diagnosis.

Firstly, as a woman, I can empathize with all women and their male partners, but the women especially, who would be forced to return to the days of endless fear and dangers caused by unwanted pregnancies. My womanhood, as well as my professional experiences, amply and universally demonstrate that this fear and anxiety is present among all women from menarche to menapause, regardless of age or marital status, and despite the responsible and regular use of any and all methods of contraception, all of which methods are imperfect. The dangers, mental as well as physical, of unwanted pregnancies (and their "back-alley" terminations) are all too well documented and gruesome to repeat now.

Secondly, as a specialist in the care of adolescent patients, almost daily I am called upon to examine and counsel a pregnant teenage girl. All of these teenagers are frightened, and with good cause. Many are bright, good students, come from supportive families, are healthy mentally and physically, and have ambitions for the future. Others are less well off. All of them, in conjunction with responsible adults, (as opposed to underground abortionists) should be offered the possibility of having an abortion. If not, many potentially productive lives will be stifled before these youngsters have had a chance to even begin to explore their options. Being compelled to mother an infant is "cruel and inhumane" punishment for an immature "mistake". It should not surprise anyone that my professional and personal experiences have demonstrated that the best adjusted, happiest and healthiest adolescents were "wanted" from conception.

Thirdly, as a pediatrician, I have cared for babies, children and adolescents with birth defects which have resulted in tortured lives for themselves and their families. I am not saying that these children should not be spared because they are the weakest and most defenseless members of our society; rather their families should be allowed a choice, if an avoidable catastrophe presents itself and if the parents so choose, to spare themselves and the offspring suffering, alienation and isolation.

Not all birth defects are detectable prior to birth. Not all birth defects result in death shortly after birth. Many weak and defenseless children are still being born, and the medical profession is committed to caring for them, helping them and their families to cope, and in some instances to grow into productive adults. But if a choice exists to avoid such

pain, it is not the role of government to ban such an important option to its entire constituency. To legislatively reverse and undo the progress and advances that medical science has achieved in detecting "problem" pregnancies is counter productive. To eliminate the physician's ability to use tests and methods of detecting and treating pregnancies which are life threatening to the mother or infant is antilife, not prolife!

Finally, I wish to share with you a very personal event, which gives rise to my fourth perspective. On April 24, 1981 I voluntarily chose to terminate my pregnancy at eighteen weeks. My husband, who is 38 years old, and I age 34, have no children as yet, and are extremely, even painfully, eager to become parents, and equally aware that the "biological clock" is counting down against us. Our first pregnancy prematurely terminated spontaneously last August and produced a perfectly-formed baby whose gestational age was 25 weeks. The infant died at two and a half days old. I have wanted to be a mother for many, many years. My husband is a lawyer, but has a way with kids that any pediatrician should admire, even emulate. He too has had a paternal instinct for a very long time.

The abortion was performed because we learned one week earlier, following sonography and amniocentesis (tests whose functions would be legislatively demolished by passage of S.158), that had we continued with the pregnancy, it must have produced a full-term infant with only a partially formed brain and skull, who, with absolute certainty, would have died within one week of life. As painfully disappointing, and entirely contrary to our wishes and needs as human beings eager for parenthood as it was, we chose to terminate this pregnancy. Modern medicine has reached a point where abnormalities such as our baby's can be detected early enough to safely terminate a pregnancy, which had it continued would have resulted in not only anguish and potential danger to my health, but no viable human life. To have had this information and not been allowed to terminate, would have been "cruel and unusual" punishment for innocent and well-meaning parents-to-be, not to mention the malformed infant.

There is a 5% chance of this or a similar anomaly appearing in subsequent pregnancies of mine. It is forever reasurring to my husband and me to know that amniocentesis and the option of termination exist were this problem to recur.

For all these reasons, it appears to me that opposition to S.158 is a simple and straight forward matter. By attempting to manipulate the definition of human life, its supporters ironically wish to reverse the remarkable social progress and medical break-throughs of the last few decades which have provided greater security and sense of well-being to all human life. No longer must sexually active women live in fear. No longer are as many unwanted pregnancies continuing, and later abused or neglected children being born. No longer must tragedies which are avoidable be heaped upon families, frequently already raising one or more handicapped children.

We must not let semantics and conjecture blind us to these truths. As a woman, a specialist in adolescent medicine, a pediatrician and a human being who has survived two un-successful and much wanted pregnancies, I implore you not to pass this Bill!

May 11, 1981

Senator Max Baucus
Ranking Minority Member
Sub-Committee on Separation of Powers
United States Senate
Washington, D.C.

Dear Mr. Baucus:

Last week I voluntarily terminated my pregnancy at eighteen weeks. My husband, who is 38 years old, and I, almost 34, have no children as yet, and are extremely, even painfully, eager to become parents. A previous pregnancy prematurely terminated spontaneously last August and produced a perfectly-formed baby whose gestational age was 25 weeks; the infant died at two and a half days old. I am a pediatrician, and specialize in the care of adolescents. I have wanted to be a mother for many, many years. My husband is a lawyer, but has a way with kids that any pediatrician might emulate. He, too, has had a paternal instinct for a very long time.

The abortion was performed because we learned, one week earlier, that had we continued with the pregnancy, it would have produced a full-term infant with only a partially formed brain and skull, who, with absolute certainty, would have died within one week of life. As painful, disappointing, and entirely contrary to our wishes and needs as human beings eager for parenthood as it was, we chose to terminate this pregnancy. Modern medicine has reached a point where abnormalities such as our baby's can be detected early enough to safely terminate a pregnancy, which, had it continued would have resulted in not only anguish, but no viable human life. To have had this information and not been allowed to terminate, would have been "cruel and unusual" punishment for innocent and well-meaning parents-to-be, not to mention the malformed infant.

As a pediatrician, I have cared for babies and children and adolescents with birth defects which have resulted in tortured lives for themselves and their families. I am <u>not</u> saying that these children should <u>not</u> be spared because they are the weakest and most defenseless members of our society; rather their families should be allowed a choice, <u>if an avoidable catastrophe presents itself and if the parents so choose</u>, to spare themselves and the offspring suffering, alienation and isolation.

Not all birth defects are detectable prior to birth. Not all birth defects result in death shortly after birth. Many weak and defenseless children are still being born, and the medical profession is committed to caring for them, helping them and their families to cope, and in some instances to grow into productive adults. But if a choice exists to avoid such pain, it is not the role of government to ban such an important option to its entire constituency.

As a woman, and as a physician involved exclusively right now in the care of adolescent patients, I can only reiterate what you no doubt have already heard. Abortion should remain a right, must remain a right, cannot constitutionally be denied as a right to women of all ages, starting perhaps as young as 12, who cannot in a fully positive fashion fulfill the role of mother. There are too many unwanted, and mentally, as well as physically, infirm children in this country. Let us not add to their numbers, and to the burden they place on humanity as well as on our government, by limiting FREE CHOICE.

Most powerfully felt,

ANDREA MARKS, M.D.

---

## PREPARED STATEMENT OF SANFORD ROBERTS

My name is Sanford Roberts. I am 35 years old, the father of three children, and live with my family in Portsmouth, New Hampshire. Our second child, Davida, was born April 21, 1978. She developed normally for the first seven to eight months of her life, at which time her development appeared to her mother and me to be very slow. She was having difficulty sitting and had not even attempted to crawl. We were not concerned initially since our first child had been slow in his motor development. Eventually, we became concerned enough to take her to a local child development clinic for an evaluation. We were told she was slow but there was nothing obvious that indicated serious problems. Several more months passed with little progress. As our concern increased, we made an appointment with a neurologist at Boston's Children's Hospital. The events of the next three days are as vivid in my mind as the print on this page. The neurologist examined her while we watched, expecting him to tell us she had a minor motor problem. After the exam, he sat down and said: "There's no point in beating around the bush, we have a serious problem." My wife, who for several weeks had been distressed and who had tearfully told me a week prior to this examination that she knew Davida was going to die, asked the unthinkable - was she going to die. You cannot imagine the feeling in your chest and stomach, sitting there holding that beautiful little baby as the doctor, with a solemn expression, said that was a possibility but knowing from his face and voice that it was a certainty. It was April 18, 1979, three days before her first birthday. She was admitted to the hospital to confirm the diagnosis. That helpless, pitiful cry during those next two-and-a-half days will ring in my ears forever. The tests confirmed what we already knew -

84-581 O—81——64

Davida had Tay-Sachs disease: a terminal genetic disorder characterized by deterioration of the central nervous system.

As terrible as those several days were, what followed was worse. She began to deteriorate - she could no longer pick up food and over the next year-and-a-half gradually lost all motor control. By her second birthday, she could no longer lift her head, or move her legs. Feeding became difficult and laborious. She was constantly choking and coughing food up through her nose. She began to lose weight. Her fingers gradually tightened up into a fist from which they did not relax. I hated that and constantly opened her fingers, knowing they would be clenched a few minutes later. She lost the ability to move her bowels unless physically stimulated by my wife or me with either a Q-tip or a finger. She developed daily epileptic-type seizures involving all of her extremities and grotesque contortions of her face. She frequently bit her tongue or lips during a seizure and regularly clenched and ground her teeth, sometimes for several minutes. Along with the seizures, she developed severely increased sensitivity to sound such that her whole body would jump if a glass was placed on a bare table with anything but the gentlest touch. We had to be careful not to speak above a low conversational tone when near her, gently close doors, and were constantly reminding our 5-year-old son to play quietly. And if these symptoms were not horrible enough to watch, she frequently screamed during them - in pain? from fright? an involuntary vocal response? only God, if there is a God, knows the answer.

But of all the hideous symptoms she suffered and continues to endure, her wandering, unseeing eyes are the most devastating to us. Those beautiful brown eyes with her long curling lashes; those eyes that never stop moving and never focus on anyone or anything; those blind eyes that have not recognized us for so long and through which nothing penetrates to whatever is left of her brain.

Somewhere between 18 months and 26 months we lost her. She was alive, but there was no doubt that she was no longer cognizant of her surroundings nor of our presence. We refused to accept this for a while, telling ourselves and each other that she knew us and that our holding her and feeding her made a difference. It might have for us, but it didn't matter to her. We finally had to place her in a nursing home this past September. Seeing that little baby lying in that big bed and having to

walk away tore my heart out. She has now passed her third birthday and lingers on - she continues to have seizures, is fed through a plastic tube inserted into her nose, and her eyes still wander.

For the longest time after she was diagnosed, I would wake at night and find my wife sitting up in bed or standing by her crib crying. The helplessness we both felt - the inability to do anything except watch - has been overwhelming and terribly depressing. My own impotence to comfort my wife, to say or do anything to help during those episodes, increased my level of frustration and despondency.

We can only guess at the impact all of this has had on our son who is now 6-1/2. He has stopped asking us when Davida is going to die, and seems to have accepted the tragedy in his own way. We find ourselves and each other snapping at him when our level of anxiety over Davida increases at various times. This generates a good deal of guilt for both of us, and we only hope he will not be scarred for life.

To understand the purpose of this graphic description, you must know that a simple blood test of prospective parents will disclose the defective gene. Once aware that the parents are carriers, the fetus can be tested by amniocentesis prior to birth. If the fetus has the disease, pregnancy can be terminated.

Publicity by concerned organizations and mass-screening of potential carriers has substantially reduced the risk of couples having such children.

Tay-Sachs is recessive; it can only produce a defective fetus if both parents transmit it to the fetus. There is a fifty per cent chance that any one of our children will carry the gene, and a twenty-five per cent chance that a fetus will have the disease. Our first child was normal, and amniocentesis confirmed a normal fetus for my wife's third pregnancy. We have a beautiful, healthy one-year-old daughter.

The "human life" bill or constitutional amendment banning abortion will force us and people like us who are unfortunate enough to have similar problems, to choose either not to have children or risk living through the heartache and anguish I have described. There are numerous other similar genetic defects

affecting thousands of people in this country (some with more severe symptoms) that are detectible prior to birth. It is irresponsible and inhumane to force those people to make such a choice.

I cannot believe that intelligent, sensitive members of the governing body of the greatest, most enlightened country in the world can ignore such suffering. You must deal with our tragedy when you vote on legislation that so profoundly affects us and our fellow citizens.

We thank you for taking the time to consider this testimony and the message it contains.

Sanford & Helaine Roberts
208 Highland Street
Portsmouth, NH

---

## Prepared Statement of Vicki Smith Savageau

Three years ago in March I was nine months pregnant. I was, I thought, very awkward, too heavy, uncomfortable and I moved much too slowly. But, I was happy. My friends were having baby showers for me, I was completing the finishing touches on the nursery and was finally organizing lesson plans for a substitute teacher to take over my English classes during the time I would be gone.

The previous summer I'd been concerned. I'd been seasick on a sedate riverboat ride and was having very unusual dreams about babies and tiny little clothes. When I was diagnosed as simply being pregnant I was very relived, excited and more than a little apprehensive.

My apprehensions dealt with how we could financially cope with having a baby at that time. Mark and I had been married only ten months and he had begun selling real estate only eight months before. It is said that when you start selling real estate you should have either six months income in the bank to live on or you should have a working wife. Well, Mark had a somewhat working wife. I was teaching two English classes per day at a private high school for a grand total guaranteed income of $220.00 per month. If Mark sold a house in December he might get paid in June. Sometimes we brought in $25.00 per month above my salary and other times we brought in $3,000. Budgeting was very difficult.

The other financial worry that I had was that we had no health insurance to cover the pregnancy and delivery. The probable minimum of that expense was $1,500.00 and I had no idea where we would find that money either.

In spite of these concerns we were happy and excited. Our financial condition never once prompted us to consider terminating the pregnancy because the timing was bad and it might be a little inconvenient. We figured that some way we would manage to pay for everything and to provide for all our child's needs.

My husband,Mark,is the youngest of eleven children and at that point we had 32 healthy nieces and nephews (we now have 35). At family gatherings there were children of all ages and we were looking forward to adding our own to the crew.

Our families, too, were excited. Mark's was happy that their youngest brother had started a family and my family was thrilled at the prospect of the first grandchild.

My pregnancy, though very uneventful medically, was a little traumatic for me. The emotional and physical changes that occur during pregnancy are dramatic. I found myself to be very tired and extremely emotional. I seemed to cry over everything. After the fifth month of my pregnancy I developed a severe pain in my lower back, which was probably a pinched nerve, that made it very difficult for me to walk or to even get out of bed. For the first time in my life my ankles seemed to have completely disappeared from sight. Had I been able to bend down far enough to see them, they still weren't there, since I retained so much water. Through all of this it seemed that the rewards at the end of the pregnancy would be well worth any discomfort I was feeling at the time.

My doctor was wonderful. He spent the time with me that I needed to talk with me, answer my questions and to assure me that everything was fine.

I think that every prospective mother worries about her child. A good friend of ours had just had a baby whose hand was deformed and that bothered me. When I look back on the things that I said and thought, I wonder if I had some sort of premonition or if those things are typical of a pregnant woman.

My moments of concern were, however, overshadowed by all the preparations that were necessary. We moved into a new house, across the street from an elementary school, that would give us more room and a safer environment for a child. I started fixing up a room for the baby, buying clothes and diapers and every book I could find on pregnancy and childcare. I intended to be the perfect mother, raising the perfect child.

My junior and senior high school students were thrilled to watch me grow larger each day. I was teaching writing classes and when they could choose their own subjects, they often wrote about my pregnancy or about what they thought the baby would be like. A small parochial high school is very intimate and this child had become as much theirs as it was mine. They were waiting and actually hoping for the moment I would go into labor during class so that they could all take me to the hospital. They didn't want to miss anything.

At this time I was also the alumnae adviser for my sorority chapter and these girls too decided that this was their baby. I couldn't walk into that house without having everyone wanting to feel for the baby to kick.

I once said that if all the people who seemed to be so actively interested in the birth of this baby could be there, I would have to rent a football stadium. It's no wonder that I began to think that this was the biggest event since the discovery of America.

Mark and I went to all the Lamaze classes and learned the techniques that would make labor easier. We practice d, probably not as much as we should have, since it was too painful for me to get down on the floor very often. As my due date approached, the third of April, I felt as ready as I could ever be to have this baby.

Friday night, March 31st, I thought I might be in labor. I knew that I certainly didn't feel normal. By the time it hurt enough for me to realize that it definitely was labor, it was early in the morning on April 1st. I was in actual hard labor for only four hours. As Mark and I left to go to the hospital I said,"Well, it looks like this is the last evening that you and I will spend at home, alone." As it turned out, it wasn't.

The delivery was very exciting. No matter how prepared you are, you will never know until you experience it how thrilling it is to watch your own child being born. In the exultation that followed the final push my doctor said, with a concerned look on his face, "There's something wrong here. Don't worry, they'll bring the baby right back." Theytook our daughter over to the other side of the delivery room and talked in very hushed tones. What followed is something that neither Mark nor I can be very specific about. The main thing that I remember is feeling a pit in the bottom of my stomach and that horrible feeling that scares you to death when you know that there is something that is very seriously wrong.

It was decided that it would be best to put me into a private room rather than into the double I'd requested. They wheeled me down the hall to the room, leaving our daughter behind in the nursery. I was totally confused and still did not know what had happened. There were kindly comments about how some cases are more severe than others and not to worry until they could do some more tests.

I wanted to call my parents to tell them that they had a beautiful new granddaughter, but I couldn't summon up the courage to tell them everything, so Mark did it. The most difficult part for him was to hear my father cry. They said they would be there as soon as they could. We asked them to call our close friends and relatives. Mark also called his family and then we sat and waited. I can still picture that room in my mind, because I stared at every space of wall and ceiling while I prayed that somehow this was all a mistake...or at worst a very bad April Fool's joke.

Later the pediatrician came in to explain to us about spina bifida, which was what our daughter had. It was true that some cases were worse than others, but it looked like this would be one of the worst. She would never walk or control her bowels or bladder. They anticipated that there would be severe mental retardation, although a neurologist was still completing tests. At this point they finally brought our daughter in to the room and I had a chance to really see her. I examined her inch by inch and the only outward evidence I could see of these terrible problems were the opening in her spine and one somewhat deformed and twisted leg. I thought she was gorgeous.

We were advised to have Jessica baptised as soon as possible. It was all done in such a rush that I really didn't have a chance to enjoy the service, or to even think of anything except that now the church would consider that her soul was saved, if she were to die.

Our sad news spread quickly to all our friends and we had more visitors than I could handle at that time, who just wanted us to know that they loved us and were praying for us. One visitor was a friend who was just completing his medical training. He was of invaluable help to us in explaining things in more common terms and just discussing the how's and why's of this type of birth defect. He also brought his camera and took pictures of her and of us with her, that I will always treasure.

One of the most difficult things for me to face was the way my parents were hurting. They tried to hide it, but it was easy to see how concerned they were for us, and how badly they felt themselves. Their anticipation had been as great as ours and I wanted to be able to do something to make it easier for them.

Until things were more conclusive they decided to put Jessica into pediatrics, rather than to keep her in the nursery. If I were to check myself out of the hospital I would be able to spend as much time as I could with her, rather than to wait for the nurses to bring her in to visit me every four hours. I am so glad that they did this, because I had a chance to feel like a mother for the period of time that she was in pediatrics.

Mark and I were sitting with her late in the afternoon of April 4th. My parents had come up to see her, and my sister and Mark's sister were both there. Everyone had a chance to hold her and to cuddle her like you would a normal baby. We noticed later that she seemed to be having a difficult time breathing, so the nurse came in to wrap her tightly and to elevate her head. Another nurse came in to feed her with a tube, since she was no longer sucking at the bottle. She asked me to watch, since I would have to learn how to do it. It really wasn't a very pleasant thing to see and I cried.

The hospital social worker had come into the room to talk with us about the financial aid that was available, since our expenses would be astronomical. We were talking with him when I heard Jessica begin to choke. She couldn't breathe and the formula she had just been given began to run out her nose. The social worker ran for a doctor and the room was soon filled with several doctors and nurses. I tried to get out of the way and the social worker stood next to me and said "Don't worry, it will be alright." All I could do was to stand there with tears running down my face and shake my head. As I stood there and watched my daughter die, I knew that it would never be alright again.

They let me touch her again. I could probably have held her in my arms one more time, but I felt that would only make it worse. Our families rushed to the hospital, along with the priest, and we just walked out of that room and shut the door. That was probably the most difficult part of the entire four days. I felt that she still needed me, that I couldn't just walk away. It took everyone a while to convince me otherwise.

And so, we did what every other family does when someone they love dies. We went home, and family and friends gathered around to talk and to share feelings. It really is still a haze to me, except for the fact that two hours after my daughter died, my breasts filled with milk and I felt the most acute sense of loss that I'd ever felt before or since.

We planned the memorial service. I picked out clothes for Jessica to be buried in and took them to the funeral home. Mark couldn't bear to go to the funeral home to see her, and I couldn't seem to stay away. We were swamped with flowers, food and memorials...each one moved me to tears. It seems as though the death of an infant hits people in their most tender spot. Strangers wrote and called, and the memorial service, which was to have been private, had to be moved at the last minute to accommodate everyone who had come. The most lasting thought I have from that service is that the casket was so tiny that when the man from the funeral home came to carry it out of the church it looked like he was carrying a cooler.

Somehow I managed to pack away the baby clothes and nursery furniture.

I went back to school and faced my classes, something that I'd dreaded, yet found they made very easy for me to do. It was necessary to discuss it a little bit, at least to put us at ease with each other again. When we finished talking that day my eyes were not the only wet ones in the room. Yet, for the first time, I felt that I had not gone through all of this for nothing. I felt that if someone could learn to care, to hope and to love, then an important lesson had been learned.

Everyone has marveled at how well I coped. That I could talk about it without crying, that I could go to the same hospital immediately to visit my friends and their new babies, that I could face the world as though nothing had happened was very admirable to them. To take nothing away from them and their concern for me, I'm sure it was a relief to not have to deal face to face with my grief on a continuing basis. It was easier for everyone else to cope as long as I appeared to be coping well. No one, not even my husband, knows what that effort cost me. If I could wait to cry until after he was asleep or could get up at 5:00 a.m. to release my grief, the I could face each day as a productive person. I learned to make myself numb, to not think or feel the painful things when the subject of children came up or when a friend asked if I wanted to hold their baby.

As long as the norm is a perfect, healthy baby, there may be thousands of people who feel the way that I have felt. If you produce anything less, you've failed. If there is something wrong with your child that means there is something wrong with you. No matter how many experts tell you differently, that feeling will persist. The doctors told me that they didn't know why my daughter was born with spina bifida. It wasn't because I drank, smoked or went out dancing, or because I didn't drink, smoke or go out dancing. These things just happen.

Well, it may have been easier if it had been something that I did or did not do, because the amount of guilt would have been the same either way. But this way I know that there is nothing to be done differently. And I feel, even though I've been told that I'm wrong, that there is something wrong with me. You wonder how you could have screwed up something so simple as producing a child - and then you begin to doubt your total capabilities.

If I look back on the past three years I can see that I have tried to make up for my failure. I've held down a demanding job, served as a telephone conseling service volunteer, performed other volunteer services and held several offices in different organizations. I've worked hard to prove to myself that I am a capable, organized, dependable, successful person.

Although I am not a psychologist I can see what my subconscious is hoping to do. At a certain point my self-image will be improved to a point where I can allow myself to try again. Next time I will know that having a child is not as deceptively simple as it appears to be. And I want to be able to do what little I can to be certain that the same thing does not happen.

I don't think that I could cope mentally, emotionally or physically with having another child die so soon after birth. I do believe that someone else might have the strength of character, faith or whatever else it is that is required to cope with this ten times if necessary. We are not all alike and I seem to have discovered my own limitations. I've found myself so close to the edge of my limitations that I was terrified. I've spent the past three years fighting my way away from that edge and I don't want to go back there again, no matter how much I would like to have a child.

The fact that Mark's cousin delivered a baby with spina bifida this past January has not helped much. So far he is still alive and everything that can be done is being done for him, but he is far from safe. I know that there are some members of Mark's family that must feel that I am cold and indifferent because I have not contacted her to offer her support and encouragement, but I find that beyond my capabilities at this point, even after all this time has passed.

During this whole ordeal it never occurred to me that it might possibly happen again. My doctor's told me that everyone has approximately a 3% chance of having a baby with spina bifida. Now that I've had one, my chances double to approximately 6%. But, they assured me that there was a test that could be done, with amniocentesis, which could determine whether or not that fetus was also affected with spina bifida. If not, then I could enjoy a relatively carefree pregnancy. But, if so, then I could either prepare myself for the inevitable heartache or I could have an abortion.

I can't say right now what I would do. I don't think that I could make any decision until the time came. For the moment I have chosen to not decide anything by preventing pregnancy until I feel better able to face my alternatives. I do, however, feel that whatever the decision, it must be mine and my husband's to make.

I oppose this bill for many different reasons, but the main reason is as follows. I was the one who had to go through this experience and try to put my life back together again. I was the one that had to give up a teaching position that I loved in order to be able to pay the bills, I was the one that had to pack up the nursery, I was the one that had to somehow try to put my life back into perspective again. My subconscious took a while to catch up with reality. I'd have dreams of being pregnant and when I woke up to realize that I was not and that there was no baby in the next room, there were tears streaming down my face. You weren't there in the early hours of the morning to comfort me or to help me get through the day as best I could. And if it were to happen again, I would still be there alone. Because you weren't there, because you won't be there if there is a next time and because I am the one that will have to suffer the consequences, I feel that it should be my decision, not yours.

What I would like you to do before you make your decision is to personalize my situation. Take it into your own lives and ask yourselves if you would want someone else to make any decision like this for you. Would you, having gone through this once, purposely go through it again? Would you want the people you love the most to be subjected to this? Would you want anyone else to tell you that you had no choice in the matter?

To choose an abortion when you desperatly want a child must be very painful. To choose to have a child that will be severely handicapped or will live a very short time must also be very painful. To go through another pregnancy without knowing either way would be terrifying. Last time I had no choice - next time I will. I don't know what my decision would be, but if I chose to have an abortion, I would want that decision to be a legal choice. The idea of committing what would be a criminal act would be an added pain to be dealt with.

If abortion were not a legal alternative and abortion were my choice, it really would make no difference. I would have the abortion anyway. My concern would be that the abortion were safe. And, when I consider the fact that there were days I would rather have been dead than to face all that pain and depression, I'm not even sure that safe would have to be a consideration.

Before the Supreme Court decision in 1973 I went along with two different friends for abortions. Neither were legal, one was safe and the other turned out to be safe. In neither case was it difficult to find someone to perform the abortion. An abortion in a woman's bedroom with her husband peering out the curtains, watching for the police,does not inspire confidence, but it appeared to be a better choice than a coat hanger. Once a woman decides that she wants an abortion, there is little that can prevent her from that, short of locking her in a room under constant observation for the duration of her pregnancy.

I've begun to ask myself why I am preparing this testimony. To share with you all my feelings, to relive in more detail than I'd like the memory of my daughter's birth and death, and to open myself up to criticism for not being as strong as others might like me to be is very painful to me. I wonder why I don't just wrap myself in my pain and go about my business. Afterall, if you do pass this law and the situation arises where I might desire an abortion, I know where to go and I have the resources available to get me there.

I can't do that, however. There has been a little voice inside of me saying that you might listen, that you might care. That you might empathize with me enough to say that you believe that I should have every available opportunity to have a healthy child. I still believe in that old fashioned idea of social consciousness and the responsibility of every American to their government.

Yet, I think that I may be foolish. There have been doctors, lawyers, and constitutional experts urging you not to pass this bill for a variety of excellent reasons. I wonder why I think that you might listen to me when you will not listen to them. I am no threat to your re-election hopes nor am I pressuring you in any way. What I am asking you to do is to listen to what I have to say about my own life and to care.

I feel safe in saying that I represent an overwhelming majority of Americans who believe that the matter of abortion should be a personal decision. Most of us believe that we are not anti-life any more than those who believe differently are pro-life. The entire matter has come down to two opposing positions. One position is that this is a matter of individual choice and the other position is that it is not a matter of individual choice. The issue becomes even more distorted when these views are labeled anything other than "pro-choice" and "anti-choice."

I also feel the same way that a majority of Americans do about the governmental interference in personal lives. This is, I believe, a moral and religious matter, not a governmental matter. A decision has been made by the Supreme Court and I firmly believe that just because a minority of Americans is not happy with that decision, the government has not been given license to spend countless hours and tax dollars beating this issue to death.

I am still naive enough to believe that a United States Senator or Representative has been elected to represent the majority of their constituents rather than to use that office to serve special interest groups. There is not one person representing their state in Washington D.C. who has been elected to office because of their position on abortion. In fact, I imagine that many have been elected in spite of their position.

There have always been and will always be abortions. I think that it is the unqualified right of every American woman to make her own choice, whether it be in consultation with her family, her doctor or her God. The last person I would ever consider consulting with is my U.S. Senator or Representative. I can't even imagine that they would attempt to

counsel me either way, since they would probably say they were not involved.

I believed at the time that I went with these friends for abortions that if it was not the right thing to do, the Lord would let me know in some way or another. When people who believe in God have difficult decisions to make, they ask for help in making those decision and count on the fact that He will get His message across to them one way or another. My personal belief is that I do not need your help in making a decision of this nature, nor does the Lord need the help of Congress to interpret His wishes. If I don't believe in the Pope or any other religious leader, why should I have to live according to their interpretations? Those people in this country that do not believe in God in any shape or form don't deserve to have to live with a decision based on any religious belief.

I am asking you for compassion, for myself and for the other hundreds of thousands of Americans who do not have an opportunity to share their personal tragedies with you. Although I would rather have shared mine with you in person as originally planned I appreciate the opportunity to share mine at all and hope that it will give you a fresh perspective on this matter.

---

## Prepared Statement of Paula Span

I am in my twenty-second week of pregnancy and expecting a healthy infant in October. It is a wonderful relief to be able to say so.

Until two weeks ago, my husband and I were tensely awaiting the results of our most recent amnioscentesis at Johns Hopkins Hospital. As Tay-Sachs carriers, we knew that there was a 25 percent chance that the fetus already was a victim of that incurable genetic disease. Our first two pregnancies, which both occurred in 1979, had ended in therapeutic abortions when we learned that, had those babies been born, they would have died of Tay-Sachs at the age of three or four. On this third try, we were lucky.

To terminate a wanted pregnancy is a sorrowful decision, an occasion for grief as surely as the death of a loved one would be. My two abortions caused me, my husband, and our families real anguish, a lingering sense of loss. But I

continue to believe that we made the right decision and I was prepared to repeat it.

By now, the baby I would have had almost two years ago would, if he had survived this long, be too ill to care for at home. My husband and I would be making our sad pilgrimages to see him in a hospital, as he steadily lost the ability to know or respond to us. We would watch doctors attach an expanding collection of life-support machinery, and we would know that the effort was futile. This is the fate to which S158 would doom me and other parents no longer able to prevent the birth of a severely diseased or deformed child. There is nothing pro-life about it.

I have wondered, as the assault on legal abortion intensifies, what I would do if abortion were outlawed. Perhaps I would be able to find a physician willing to risk a homicide charge to help me, though I might endanger my own health by undergoing a mid-trimester abortion outside a hospital. Perhaps I could afford to arrange an abortion in some other, more compassionate country. If amnioscentesis were illegal as well, my husband and I might not dare to gamble on a pregnancy at all because of the terrible penalty to which our genetic odds might subject us. Mercifully, we are not yet faced with such frightening alternatives.

There are parents, I realize, who would react differently and would bear a condemned child rather than choose abortion. I certainly grant them the right to decide for themselves. But some of them are not so tolerant and seek, through bills like this one, to compel me to continue pregnancies which can

only result in the death of a son or daughter. I will not grant them, or you as lawmakers, that power. Only the people who will live daily with the consequences have the right to make that decision.

It is a cruel bill you are considering. By banning abortion, and possibly amnioscentesis, you will force couples at risk to either forgo parenthood or to helplessly await the births of growing numbers of severely deformed and incurably ill infants. By outlawing certain effective means of contraception, you will heighten the risk that such couples may conceive accidentally and give them no remedy. As the hearings proceed, the Congress is about to reduce the very programs that help the handicapped and their families, whose numbers this bill will serve to increase. The so-called Human Life Statute puts the government squarely and brutally on the backs of the people.

After many fearful weeks, I am able to look forward now to a full-term pregnancy and a baby. My husband and I can arrange a nursery, think about names, do all the things that other expectant parents do. I would have preferred to have begun these happy undertakings two years ago; I wish my abortions had been unnecessary. But we tell ourselves now what we told ourselves then: the alternative would have been so much more painful, for everyone. I am asking you not to inflict the suffering that S158 would cause parents and their children.

[From the Washington Post, Friday, June 5, 1981]

A FATHER AND SENATOR HELMS

(By Tom Braden)

I have been wondering whether to tell you a personal story that seems to me to have general implications. This is one of those sad family stories that normally you don't find fathers talking about in public, or even very much with close friends.

But I picked up the newspaper the other day to read that a Senate committee had voted to abolish payments for abortions for the poor, even when the pregnancies are the result of rape.

Now this was not a question of cutting the budget. Abortion costs for poor women who are raped do not amount to a large sum. Rather it was a question of morality. Republican Sen. Jesse Helms of North Carolina, and the Moral Majority, which follows him around, are convinced that abortion is wrong even when the woman who wants one wants it because she has been raped.

So I don't think it will be very long before Jesse and his friends are going to come after the unpoor.

In this instance, I am not very comfortable about being unpoor. I object to what the Senate committee did. But I have the human instinct to object even more strenuously when I reason that, by the same standard with which the senators dealt with the poor, they will shortly deal with me.

So let me tell you my story.

A few years ago one of my daughters attended an enormous Fourth of July celebration at the Washington Monument. It was a free show with fireworks and flags and entertainment, and, according to the newspaper account, the large crowd behaved well.

But as my daughter strolled alone off the Monument grounds and entered a side street, a car rolled up next to the sidewalk. Three men merged from it, seized her roughly and, before she could do more than utter a half-stifled cry, put her into the back seat where two more men held her to the floor.

She was tied, gagged and taken to a house, the location of which she cannot now identify. She was kept in the house for the rest of the night during which time she was repeatedly beaten and raped.

The next morning she was blindfolded, driven back to the Monument grounds and shoved out of the car. Eventually, sometime about midday, she made her way home.

During the time she was gone, there was, of course, a great deal of worry and anxiety at that home. And I must confess, anger.

Her arrival was followed by various interviews with policemen who tried to be helpful to a hysterical girl. But couldn't be. Because the hysterical girl could only estimate the time she had been in the car, describe the inside of a house and sob out some meaningless first names.

That's really the end of the story. Except, of course, that within a very short time, my daughter knew that she was pregnant.

Now I would like to ask Sen. Helms what he would do it he had been the father of the girl. I know what I did. And I can promise the senator and the Moral Majority and all the shrill voices of the Right to Life Movement, that no matter what law they may pass and how stringent the penalty, I would do it again.

Senator EAST. Ms. Meehan, we welcome you this morning to our gathering.

Ms. Mary Meehan has been active in the peace movement for many years and is a member of the Pro-Lifers for Survival and Feminists for Life. Her articles on the abortion issue have appeared in the Progressive, the Washington Post, the New York Times, Commonweal, and other publications.

Ms. Meehan, we welcome you.

## STATEMENT OF MARY MEEHAN, WASHINGTON, D.C.

Ms. MEEHAN. Thank you, Mr. Chairman.

I am speaking as an individual today because I wanted that type of freedom.

In large part because I share Ms. Collins' commitment to civil rights and nonviolence, causes to which she has been most gener-

ous in her donation of time and talent over the years, I must oppose her on this issue.

I disagree, for many reasons, with the use of amniocentesis for abortion of the handicapped. Time limits do not permit me to list all of the reasons, so I will note just two.

The medical literature on amniocentesis reports mistakes in diagnosis, cases of perfectly normal children aborted because they were thought to be handicapped.

Even if we admitted a right to abort an unborn human who is handicapped, something I do not admit, we would still be faced with the fact that there is no way to remedy such mistakes.

Even if there were no mistakes, where do we draw the line? It is not just the seemingly hopeless cases, such as children with Tay-Sachs disease, who are aborted. Amniocentesis is often used to find and abort children with Down's syndrome and children with other handicaps which, although serious, by no means preclude them from living happy lives. Many children with spinal bifida, with proper medical care can also lead happy and worthwhile lives. Who are we to say—what gives us the right to say—that these children should not live?

The overwhelming majority of the unborn who are aborted are not handicapped in any way. I ask you to keep this in mind as I urge you to support S. 158, the human life bill, for the following reasons.

First, the right to life underlies and sustains every other right that we have. The right to exist, to be free from assault by others, is our first and strongest guarantee of equality. Without it, other rights are meaningless and human society becomes a type of warfare in which force decides all major questions. There is no quality because one person's wish takes precedence over another's life, provided only that the first person has more power.

Thomas Jefferson recognized the bedrock nature of the right to life, not only in the Declaration of Independence, but also later when he said:

> The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government.

Second, government has a special obligation to protect the weak and helpless from assault by the strong. This is a basic belief of the political left, which has long sought to aid the very young and the very old, the poor, the persecuted, the handicapped, and the dispossessed. Who is younger, weaker, poorer, or more helpless than the unborn?

For reasons I do no fully understand, the largest civil liberties group in our country, which traditionally has championed the defenseless, has turned against the unborn. So has the largest and most powerful medical association, even though the first rule for doctors is supposed to be, "Do no harm."

Leading members of the bar have lent their prestige and their talents to the effort to strip the unborn of all legal protection. Major portions of the national media have supported that effort, as have wealthy foundations.

At other important points in our national history, our Government has supported other established powers against minorities, especially against black people and American Indians. Those are

among the most shameful parts of our history. If we have learned anything from them, this time we will insure governmental protection for the most helpless of all minorities.

Third, abortion is clearly a life-and-death issue. If anything justifies government intervention, certainly threats to human life justify it. Many wrongs can be remedied, but there is no remedy for the taking of human life, no way of making up for it.

Supporters of legalized abortion often assail prolifers because, they say, we are trying to impose our moral views on the country. Yet imposing morality, in the sense of defining one person's obligation to another, is what the law is largely about.

We impose morality when we pass laws against assault and battery, against rape, and against discrimination based on race, sex, or age. And these laws do not depend on religion for their authority. If religion disappeared from this country tonight, we would still need the laws tomorrow. A society cannot exist as a truly human enterprise unless it imposes morality by protecting its members, especially its weakest members, from assault and injustice.

Fourth, commitment to women's rights should be the generous kind of commitment that leads to concern about the rights of others. We cannot advance the rights of women by denying the rights of the unborn.

As one feminist has said, "Human rights are not exclusive. Any claim to a superior or exceptional right inevitably infringes on the rights of someone else. To ignore the rights of others in an effort to assert our own is to compound injustice rather than reduce it."

I would like to state as clearly and strongly as possible that one need not support abortion in order to be a feminist. Support of abortion is not a logical or necessary part of feminism. Rather it is, I believe, a tragic mistake, but one that can be remedied without tearing down the philosophical structure of feminism. That structure is, in fact, stronger when it includes commitment to the rights of all. It is stronger when it avoids placing women in an adversary relationship with their children.

Fifth, abortion often involves exploitation of women. It provides another easy way out for men who want to avoid responsibility for their actions. Abortion is often called a great convenience for women, a characterization that makes many women bitter. It is a far greater convenience for men.

Certainly $150 or $200 is a cheap price to pay when a man wants to buy his way out of any commitment to a woman or to a child conceived through their union. It is no coincidence that the Playboy Foundation is a leading financial supporter of the effort to keep abortion legal. Pregnancy and children interfere with the Playboy lifestyle.

Sixth, until the Supreme Court struck them down, laws protecting the unborn in a sense protected all of us. By refusing to make nonpersons of the most vulnerable, the States served notice that human life is not cheap. To knock down the legal barriers protecting the unborn, the Court had to accept the idea that some lives are less valuable than others. It then licensed the powerful to decide whose lives are valuable and whose are not.

The handicapped, of course, were among the first to go. First, in abortion and now in infanticide. Withdrawal of medical treatment—and even of food—from handicapped infants had become a frequent occurrence in some American hospitals. The only unusual thing about the recently reported case of the alleged effort to starve to death the Siamese twins in Illinois is that it was discovered in time to prevent their death.

We should all remember, keenly, that any of us may become helpless through age, or sickness, or accident. The wealthy may lose their riches. The powerful may be deprived of their power. The famous may suddenly be without importance in the eyes of society.

Those who have eagerly overturned laws protecting the unborn should remember a scene from the play, "A Man for All Seasons," in which Sir Thomas More's son-in-law, William Roper, said that he would cut down every law in England in order to attack the Devil.

Sir Thomas responded:

> Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then?

Seventh, abortion involves violence, the major plague of our time and one not easily contained. What happens to the conscience of a society that looks the other way while many of its youngest members die by violence? I fear one of the answers is that the same society long ago accepted the individual violence of the death penalty and the truly genocidal violence of nuclear weapons.

For nearly 36 years we have been conditioned to accept weapons that threaten the right to life, not only of the unborn, but of every person on this Earth. That conditioning has greatly devalued human life. It helped lead us to the abortion culture, which is now taking 1.5 million lives each year in our country.

Abortion, in turn, reinforces the other pressures toward violence. What all of this is doing to our minds and hearts, and to those of innocent children everywhere, is something many of us would rather not think about.

Twenty or thirty years from now, I hope, people will look back on these hearings and say that they helped turn this country around on the issue of violence. In voting on the human life bill and on similar issues that come before you, whether abortion or the death penalty or the terrible weapons that threaten us all, I urge you to give life a chance.

Thank you.

Senator EAST. Thank you, Ms. Meehan.

[The prepared statement of Ms. Meehan follows:]

## Prepared Statement of Mary Meehan

Mr. Chairman and Members of the Subcommittee:

Believing that commitment to human rights requires opposition to all forms of violence against persons, I urge you to support S. 158, the Human Life Bill, for the following reasons:

First, the right to life underlies and sustains every other right that we have. Logically, as well as in our Declaration of Independence, it comes before the right to liberty and the right to property. It comes before the right to privacy. The right to exist, to be free from assault by others, is our first and strongest guarantee of equality. Without it, the other rights are meaningless, and human society becomes a type of warfare in which force decides all major questions. There is no equality, because one person's wish takes precedence over another's life, provided only that the first person has more power.

Thomas Jefferson recognized the bedrock nature of the right to life, not only in the Declaration of Independence, but also in a later statement in which he said: "The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government."[1]

Second, government, has a special obligation to protect the weak and helpless from assault by the strong. This is a basic belief of the political left, which has long sought to aid the very young and the very old, the poor, the persecuted, the handicapped, and the dispossessed. And who is younger, weaker, more helpless, or poorer than the unborn? They cannot hire obstetricians to guard their interests, lawyers to defend them in the courts, or writers to defend them in the media.

For reasons I do not fully understand, the largest civil liberties group in our country, which traditionally has championed the defenseless, has turned against the unborn. So has the

1. Thomas Jefferson, Letter to the Republican Citizens of Washington County, Maryland, March 31, 1809.

largest and most powerful medical association, even though the first rule for doctors is supposed to be "Do no harm." Leading members of the bar have lent their prestige and their talents to the effort to strip the unborn of all legal protection. Major portions of the national media have supported that effort, as have wealthy foundations.

At important points in our national history, our government has supported other established powers against minorities--especially against black people and American Indians. Those are among the most shameful parts of our history. If we have learned anything from them, this time we will ensure that the government protects the most helpless of all minorities.

Third, abortion is clearly a life-and-death issue. If anything justifies government intervention, certainly threats to human life justify it. Many wrongs can be remedied, but there is no remedy for the taking of human life. No way of making up for it. There are no second chances on this earth for the person whose life is taken. Many religious people, of course, believe that there is life after death. Atheists and agnostics do not have the comfort of that belief; thus many of them view death with a special keenness that religious people do not feel. This is one reason why a number of atheists and agnostics are active in the right-to-life movement.

Supporters of legalized abortion often assail pro-lifers because, they say, we are trying to impose our moral views on the country. Some of them have a rather limited idea of morality; they think that it has to do mainly with drugs, sex, or liquor; and they mistakenly classify abortion with those topics instead of with the more serious moral issues of war, the death penalty, and euthanasia. Some of them also confuse morality with religion; they do not understand that one can exist without the other. And they fail to understand that government is deeply involved in morality and that it probably could not exist unless based on some

notion of morality. Imposing morality, in the sense of defining one person's obligation to another, is what the law is largely about. We impose morality when we outlaw assault and battery, rape, and discrimination based on race or sex or age. These laws do not depend on religion for their authority; if religion disappeared from this country tonight, we would still need the laws tomorrow. A society cannot exist as a truly human enterprise unless it "imposes morality" by protecting its members from assault and injustice.

Fourth, commitment to women's rights should be the generous kind of commitment that leads to concern about the rights of others. We cannot advance the rights of women by denying the rights of the unborn. As one feminist has said, "Human rights are not exclusive. Any claim to a superior or exceptional right inevitably infringes on the rights of someone else. To ignore the rights of others in an effort to assert our own is to compound injustice, rather than reduce it."[2]

I would like to state as clearly and strongly as possible that one need not support abortion in order to be a feminist. Support of abortion is not a logical or necessary part of feminism. Rather it is, I believe, a tragic mistake--but one that can be remedied without tearing down the philosophical structure of feminism. That structure is, in fact, stronger when it includes commitment to the rights of all. It is stronger when it avoids placing women in an adversary relationship with their children.

Fifth, abortion often involves exploitation of women. It provides another easy way out for men who want to avoid responsibility for their actions. Abortion is often called a great convenience for women--a characterization that makes many women bitter. It is a far greater convenience for men. Certainly $150 or $200 is a cheap price to pay when a man wants to buy his way out of any emotional, moral or legal commitment to a woman or to

2. Daphne de Jong, "The Feminist Sell-Out," NZ Listener, January 14, 1978, p. 18.

a child conceived through their union. It is no coincidence that the Playboy Foundation is a leading financial supporter of the effort to keep abortion legal.[3] Pregnancy and children interfere with the Playboy lifestyle.

The literature on abortion often includes cases of women heavily pressured--by husbands, boyfriends or parents--to have abortions they do not want. As demonstrated by such pro-choice writers as Magda Denes and Linda Bird Francke, abortion results in great misery for many couples and families. There are stories of broken romances, broken marriages, guilt, bitterness, and hatred resulting from abortions.[4] Instead of solving social problems, abortion is creating many new ones.

Sixth, until the Supreme Court struck them down, laws protecting the unborn in a sense protected all of us. By refusing to make non-persons of the most vulnerable, the states served notice that human life is not cheap. To knock down the legal barriers protecting the unborn, the courts had to accept the idea that some lives are less valuable than others, and that some are very cheap indeed. The courts then licensed the powerful to decide whose lives are valuable and whose are not.

So pervasive is the undermining of equality that it now accompanies some good court decisions. Thus in the recent Illinois case involving alleged efforts to starve Siamese twins to death, a judge gave temporary custody to the state so that the twins could be properly cared for. So far, so good. But in explaining his action, the judge said that his court "must follow the

3. The Playboy Foundation, a division of Playboy Enterprises, has given financial support to: ACLU Campaign for Choice, Abortion Rights Mobilization, Catholics for a Free Choice, Ms. Foundation for Women/Pro-Choice Project, National Abortion Federation, National Abortion Rights Action League, Religious Coalition for Abortion Rights, and other pro-abortion groups. See "The Playboy Foundation," (a brochure on file at the Foundation Center, Washington, DC), pp. 2, 9, 10, 16, 17, 20, & 21; Playboy, May, 1977, pp. 194-195; and Ann Marie Lipinski, "Playboy's Strange Playmates," Chicago Tribune, March 30, 1980, Sec. 12, pp. 1 & 4.

4. Magda Denes, In Necessity and Sorrow: Life and Death in an Abortion Hospital (New York, 1976); and Linda Bird Francke, The Ambivalence of Abortion (New York, 1978).

Constitution of Illinois and the United States, each of which contains a Bill of Rights. These bills of rights give even to newborn Siamese twins with severe abnormalities the inalienable right to life."[5] The state and national bills of rights to not "give" us our rights. Human rights are ours by virtue of our existence; they are not due to the generosity of the state. The state should guarantee and protect those rights, but it does not create or "give" them. And what did the judge mean when he said "even to newborn Siamese twins..."? There is a note of condescension in that statement that I find disturbing. I doubt very much that the judge intended it; probably he was influenced by reading too many opinions written by other judges, especially in abortion cases.

Many of the arguments used to support abortion can also be used to support infanticide. They not only can be; they have been--and by serious philosophers and medical professionals. And the arguments have long since passed from theory to practice. The only unusual thing about the alleged treatment of the Siamese twins in Illinois is that it was discovered in time to prevent their death.[6]

And if the handicapped newborn today, why not handicapped children or adults tomorrow? Why not anyone who is "unwanted"? As Graciela Olivarez said some years ago, in dissenting from a presidential commission's support of legalized abortion: "I believe that, in a society that permits the life of even one individual (born or unborn) to be dependent on whether that life

---

5. Judge John P. Meyer, as quoted in The Washington Post, June 12, 1981, p. A9.

6. Marvin Kohl, ed., Infanticide and the Value of Life (New York, 1978); Raymond S. Duff and A. G. M. Campbell, "Moral and Ethical Dilemmas in the Special-Care Nursery," The New England Journal of Medicine, October 25, 1973, pp. 890-894; John A. Robertson and Norman Fost, "Passive Euthanasia of Defective Newborn Infants: Legal Considerations," The Journal of Pediatrics, May, 1976, pp. 883-889; and Jane Gassner Patrick, "Little Murders," New Times, April 3, 1978, p. 32 ff.

is 'wanted' or not, all its citizens stand in danger."[7]

We should all remember, keenly, the fact that any of us can become helpless through age, sickness or accident. Those who have eagerly overturned laws protecting the unborn should remember a scene from "A Man for All Seasons" in which Sir Thomas More's son-in-law, William Roper, said that he would cut down every law in England in order to attack the Devil. Sir Thomas responded: "Oh? And when the last law was down, and the Devil turned round on you--where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast--man's laws, not God's--and if you cut them down--and you're just the man to do it--d'you really think you could stand upright in the winds that would blow then?"[8]

Seventh, abortion involves violence, and violence cannot be easily contained or neatly compartmentalized. The violence of abortion might be called a quiet violence: The victims seldom cry--most are too young to cry--but they die just as surely as older persons do. People who support abortion but oppose other types of violence generally deal with the contradiction by denying that the victims of abortion are human, or by persuading themselves that violence in this one area will not spill over into others. They are not convincing on either count.

What happens to the conscience of a society that looks the other way while many of its youngest members die by violence? I fear one of the answers is that the same society long ago accepted the individual violence of the death penalty and the truly genocidal violence of nuclear weapons. For nearly 36 years we have been conditioned to accept the reality of weapons that threaten the right to life, not only of the unborn, but of every person on this earth.

---

7. Graciela (Grace) Olivarez, Separate Statement, in U.S. Commission on Population Growth and the American Future, Population and the American Future (Washington, 1972), p. 163. Ms. Olivarez later served as Director of the Community Services Administration under President Carter.

8. Robert Bolt, "A Man for All Seasons," Act I.

That conditioning has led to a great cheapening of the value of human life. If countless millions of people have been killed by conventional warfare in this century, and if nuclear warfare can wipe us all out in short order, what difference does another life or two make? What difference does another one or two million make?

That conditioning helped lead us to the abortion culture, which is taking one and one-half million lives each year in our country. And abortion, in turn, reinforces the other pressures toward violence. What all of this violence is doing to our minds and hearts, and to those of innocent children everywhere, is something many of us would rather not think about.

Twenty or 30 years from now, people may look back on these hearings and say that they provided a major thrust in turning this country around on the issue of violence. I certainly hope that will be the case.

On the Human Life Bill and on every other life-and-death issue that comes before you--whether abortion or the death penalty or the terrible weapons that threaten us all--I urge you: Give life a chance.

Thank you.

Senator EAST. I welcome Senator Baucus back. I had explained earlier his unfortunate conflicts with the Finance Committee meetings. He has been a great and faithful follower of our hearings here and deeply interested in them.

I welcome you back for the length of time you can spend. Would you like to make a statement?

Senator BAUCUS. I have no statement. Thank you.

Senator EAST. Thank you, Senator.

I again thank all four of you for coming. I shall keep my questions as brief as I can and then of course let Senator Baucus come in.

I think we have much good food for thought from the four of you. I regret again that time will not allow us to explore it all in detail.

Ms. Weddington, I would like to ask you a question if I could, please. You of course have a very distinguished background in law and politics. You argued this case of *Roe* v. *Wade.*

I appreciate that reasonable minds can differ over things, but it strikes me that to contend that life does not begin at conception is simply contending that which will not hold up. To me, if I might just pursue my point, it is like contending the earth is not round because I am troubled with the implications that might come out of

conceding that it is round. Therefore, I insist that it is flat. That is my story and I am going to stick with it.

Dr. Gerster has pointed out, and there is ample evidence it seems to me, that medically, biologically, and in every other way, at the time of conception, the first cell is formed. You and I were formed at that time. If that cell is allowed to develop, it will become a mature person, a grown human being, our adult life, all of those things.

It seems to me we could almost take judicial notice of that, if we might use a courtroom term. We would not have to prove the obvious. It is like proving fire is hot. So life begins at conception.

Just let me pursue my point and I would like to get your response to it. I am assuming it begins at conception and that it ends at death. I am curious as to why is it that perhaps the weakest link in the life chain, perhaps comparable only to the disabled, the retarded, the senile, the aged—there might be competitors there, but I doubt it—should not be entitled to protection under the U.S. Constitution prior to birth?

After all, the right to life, the sanctity of life is the ultimate value in the Western political heritage. To make that right tentative, to make it dependent upon the choice, whim, caprice, subjectivity of others is chilling to me.

As a lawyer and obviously a very accomplished person, I gather you see a fallacy in my argument and I would be interested in your response to it.

Ms. WEDDINGTON. I do not believe the correct issue is the issue of whether there is life at conception. Certainly there is something living when you have a sperm traveling toward conception or when you have an ovum moving toward the same event.

The issue is one of at what point should legal personhood be established. The founders of the Constitution said all persons born or naturalized are citizens of the United States.

This body, the Senate and the Congress of the United States, have on numerous occasions chosen to attach full legal rights at the moment of birth, as for example in our income tax law. The States have done the same in tort law, property law, all kinds of law.

If you look in history, there have been many different points prior to birth suggested by religious groups, by the statutes that the Court points out, the English common law, and others for the establishment of various rights. In other words, I think the issue is not when does life begin. The issue is when is a legal person established.

The Court, in essence, said that the Constitution through the right of privacy extends to protect women in being able to make the choice about a pregnancy, whether to continue or terminate that pregnancy.

In essence, it said that nobody can really answer for you, except yourself, the answer to the question that you pose. However, the fact is that you have one answer and thousands and millions of people in this country and in others chose a different answer.

The question is: Should Government impose your answer? I submit the answer is no.

Senator EAST. Of course Government is imposing your answer, you see, by *Roe* v. *Wade*. We are all agreeing that Government will make a decision. We are just quarreling over what decision.

Ms. WEDDINGTON. That is incorrect, Senator East, because what the Supreme Court did was say that Government had no right to impose any answer and instead left that to the individual to decide in consultation with her physician and her moral guidance.

It also left the States free, if they wished to do so, to regulate in a number of ways: In the first trimester by establishing the kind of certification and training the person must have to do an abortion, in the second trimester by regulating where procedures can legally be done, and in the third trimester by going even further and circumscribing the circumstances under which abortion may be done.

The Court recognized the increased potential for life as well as the medical problems for the woman involved as pregnancy progresses. The States can regulate abortion within the Court's guidelines.

Senator EAST. You say it nicely and concisely, but the fact remains that the right to life, from the time of conception to birth, does not exist. It is negotiable. There is no other link in the human chain where that is the case. It is not true with aging parents. It is not true with the physically disabled. It is not true with the retarded.

This idea that at the point from conception to birth there is a hiatus in terms of the right to live seems to me the essence of this argument. *Roe* v. *Wade* denies it as a matter of law. It is subject to the decision of others.

I might just shift focus here for a moment to get your reaction to a point that Ms. Collins is making on amniocentesis and the physically disabled. I am obviously personally troubled with that, being in a wheelchair. I put a couple of questions to one of the physicians who was here before arguing the virtues of amniocentesis. I would like to repeat one.

I have working in my office a very beautiful deaf girl, congenitally deaf, who gets a great joy out of life. If amniocentesis had been perfected at that time and they had told her parents they were going to have a child who is stone deaf and who will have to live in a totally different world, it would have presented them with a very difficult choice. More important is poor Karen, bless her heart, who is a beautiful child and very creative and productive. That would have given someone else the option to have eliminated her.

If I might get quite personal about it in my own case, I have been paralyzed from the waist down from polio since I was the age of 24. I am now 50.

This is not purely monkeyshines, but what if amniocentesis could have told my mother in 1931 that she was going to have a boy child, the likelihood of his having polio at the age of 24 is 100 percent, he will be paralyzed from the waist down for the rest of his life, he will have residual weakness in his right shoulder, and he will have residual weakness in the left side of his face.

Now, mother, bless her, I think would have gone through with it. I appreciate her doing that. You are saying she should have had the option. In case mother might have weakened for a moment

there, I would have hoped the law would have said to go ahead with the pregnancy and carry that child to term. Let us try it. He might accomplish something. You do not know. Let us just risk it.

I am troubled with the idea that Karen Chapman and I should have had the decision of whether we ought to be allowed to come into this world and live, be dependent upon this vague thing of convenience or, as Ms. Collins is suggesting, that the disabled are unattractive people. They are sometimes, but this has brave-new-world overtones to it, does it not? It even begins to smack of the Nazi mentality: The disabled will be eliminated, and the retarded and this and that and the other thing.

I do not mean to overreact to it, but Ms. Collins is bringing all of this into it. I do not think the point I raise is a totally frivolous one. I am back to this fundamental point: The right to life is not negotiable. I would not want mine to be negotiated away. I would not want Karen's to be. Still, I gather you think I am wrong.

Ms. WEDDINGTON. Senator, Ms. Collins can speak for herself, but as I listened to her testimony, I did not hear her say in any way that handicapped people were unattractive nor did she make negative conclusions about them.

The founders of the Constitution declared that at birth full legal rights attach. The Supreme Court has interpreted that provision to say that prior to birth there are others who should make the decision than the Government.

I appreciate that we can sit here today and talk about your personal situation, or Karen's, or many others, but I can also appreciate the role of a pastor who sits with a woman across the desk who cannot afford a pregnancy, or who is young, or who has been raped, or who has mental problems. It is difficult for us to think about what he must go through in this chamber when he has a person in front of him making that choice, or what the consulting physician must go through in those same cases.

I am simply saying that there is no consensus that there is a right to life prior to birth, not in law, not in science, not in morals, and not in religion. This Senate body cannot change the current law through the vehicle of a bill. It should not do so even through a constitutional amendment, which is the only appropriate way to amend what the founders of the Constitution declared to be the law and which the Supreme Court has interpreted.

Senator EAST. Let me make a final observation. Then I will turn it over to Senator Baucus.

You say there is not a consensus. There is divided opinion on this issue and what we are trying to do is build some sort of consensus. I would not think though that the right to life would be one that is dependent upon a poll in the Washington Post, as someone pointed out earlier.

In the right to life, we are talking about the ultimate right, the sanctity of human life. I would not care what a Washington Post poll showed, even if it showed everybody said they ought to do them in. I would say we ought to try to change the opinion of the people that the Washington Post is polling, or maybe the ought to change the pollsters at the Washington Post. I do not know.

However, I am troubled by the idea that the right to life is a negotiable item depending upon consensus, polls, opinions, privacy,

convenience, and so on and so forth. It is relativism run amuck. I think it would do great mischief in the land if that were allowed to continue to grow as a legitimate constitutional concept.

Euthanasia is next, and maybe the whole question of what to do with a child after it is born and it is retarded and disabled. Once we let the genie out of the bottle, and *Roe* v. *Wade*, let it out—we are trying to get it back in and it is hard to get it back in—there is always going to be continued resistance to the idea that the right to life is negotiable depending upon circumstances, time, place, other people's opinions, and so forth.

Ms. WEDDINGTON. May I respond, Senator, just briefly?

Senator East, I would say that I come not as a relativist but an absolute defender of the Constitution and the rights contained in the Constitution. The Constitution provides the women of this country the right early in pregnancy to make the decision of whether to continue or terminate a pregnancy.

Abortion has been practiced for centuries. I do not feel that the *Roe* v. *Wade*, decision has or will lead to the kind of results you indicate.

Senator EAST. Thank you.

Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

I want to thank the panel for coming today. I regret that I was unable to hear most of your testimony. I had the opportunity to page through some of it. In listening to the responses to Senator East's questions, I can tell I missed very articulate and well-presented testimony.

I would like to make one point before having to return to another committee hearing. I think the issues presented by the bill are very difficult. It is an area in which there are not only differences of opinion, but it is an area where all of us as individuals, men and women, have to make very difficult choices. Certainly there are instances where a fetus might be aborted under circumstances that most Americans would consider tragic. Nevertheless, I think, women who are faced with such a decision agonize very deeply in their own conscience and soul and in their own religion. And I believe they do want to make their own decision. I think in its wisdom the Supreme Court did not permit Government to interfere with that decision in the first trimester because there is no agreement in our society on moral, religious, theological, or medical grounds of when personhood should begin.

Additionally, I have a deep reverance for our constitutional processes. I think all of us do. I was struck by Ms. Meehan's statement when she quoted Sir Thomas More. It struck me because if we follow Sir Thomas More's admonition, I think we should follow the letter and spirit of the Constitution carefully.

In that statement, he is essentially saying that it is the law that protects society, and we should not whimsically follow our desires and ignore the law.

Under our constitutional form of government, the proper way to alter the constitutional decisions of the Supreme Court is by constitutional amendment.

On an issue such as this, when it is so deeply felt by so many people and in so many ways, it seems to me it should be generally

resolved by the standard, traditional means of amending the Constitution.

Ms. MEEHAN. Senator, could I just say one thing to that?

Senator BAUCUS. Certainly.

Ms. MEEHAN. I think Sir Thomas was in a sense speaking about the right to life, since his own life was at stake at that point. His quotation should really be considered more by those who have worked so hard to strike down the laws protecting the unborn, particularly by the Supreme Court.

Senator BAUCUS. His quote was a general quote.

Ms. MEEHAN. About the most basic protections of life and liberty in England.

Senator BAUCUS. Without debating the point further, the 14th amendment refers to "all persons born or naturalized."

Ms. MEEHAN. Are citizens.

Senator BAUCUS. If the drafters of that amendment had some other view in mind, they could very easily have chosen other words, too.

Ms. MEEHAN. Senator, I believe it has been pointed out by Mr. Witherspoon in his testimony here, and certainly by Justice Rehnquist in his dissent in 1973, that when the 14th amendment was passed, the overwhelming majority of States in this country had laws banning abortion. They were passed because the American Medical Association, among others, were a leader in saying that the unborn are persons and deserve the protection of the law.

Senator BAUCUS. The question is really what the Congress intended in drafting the 14th amendment. It has also been pointed out in these hearings, as you may know, that when the Congress debated and voted on the 14th amendment, there is not one reference anywhere in the Congressional Globe to the right of the fetus or the right of the unborn.

Ms. MEEHAN. But there was no statement excluding them, and those laws were on the books. Surely Members of Congress knew about them, as well as members of State legislatures which ratified the amendment. Many of them had passed the laws.

### EARLIER POLICY ON ABORTION EXPLAINED

Dr. GERSTER. I am sorry, but may I add something? It is terribly frustrating for a physician to sit here silently. We are not talking about philosophy or theology really. We are talking about when biological life begins.

Physicians did not have electron microscopes or ultra sound or know anything about the hidden world of the womb at the time the Constitution was written Certainly abortion was only a felony from the time of quickening because this was the only evidence that the child existed. We know now that the child in the womb begins moving at 6½ weeks.

The fertilization of a rabbit ovum by a rabbit sperm was first viewed in 1843. With the knowledge that life began at fertilization, science moved out of the dark ages into the dawn of enlightenment.

There is not a text, not a single text—I have searched a variety of medical libraries—written in the last hundred years that states anything other than that life begins at fertilization.

We are not talking about theology but about who lives, who dies, and who decides. To hear Ms. Weddington say that we may all define when life begins as we choose is frightening.

I am always reminded of a Peanuts cartoon in which Lucy and Charlie are talking. A black beetle walks across the sidewalk. Lucy very deliberately steps on it. Charlie is shocked. He says, "I thought your motto was live and let live." Lucy lifts up her foot, looks down, and replies, "He was not really living."

Our opponents have redefined life. The power to define is the power to destroy. I am also very deeply troubled by the references to the handicapped. The willingness to destroy the handicapped in the womb cannot help but affect our attitude toward handicapped after birth.

As one final statement, there is a story told to me by Dr. LeJeune, who I understand testified during the first hearing. He is the man who discovered the 47th chromosome for Down's syndrome. He was speaking at Northwestern University. A man came to him after the lecture and said he was a Jewish physician whose father practiced in Brannau, Austria.

One night his father delivered two children. The parents of the little boy were very happy. He was a healthy, normal child. The parents of the little girl were saddened because she had Down's syndrome. He had followed both their lives. Her father was killed in the war. Her mother had a stroke. The retarded child was educatable, remained at home, and was the sole support of her mother after the war. He did not remember her name, but he never forgot the name of the little boy. He died in a bunker in Berlin after causing the death of millions. His name was Adolph Hitler.

It is a true story. There were only two children delivered that night: A child born with Down's syndrome and Adolph Hitler. Ask yourself who was the greater threat to the world, that handicapped child or that healthy, intelligent little boy?

I do not believe that the license to live should be given only to the perfect, to the wanted, and to the useful to society.

Senator BAUCUS. What we are trying to do is establish proper public policy. I am sure you will agree that it is a little dangerous and probably not wise to try to establish public policy based on some remote coincidence that occurred some time in history.

Dr. GERSTER. Oh, no. I think we should establish it on biological fact.

Senator BAUCUS. The question here is not when does the unique genetic complement begin. Life begins, in a certain sense, earlier than fertilization. Sperm is life. The egg is life.

As I understand the position of most geneticists, conception is the moment at which a unique genetic complement exists. Also, after conception and before birth, about 60 to 65 percent of the fertilized eggs spontaneously abort for one reason or another. Mother Nature may decide something has not worked out properly and for that reason there is a spontaneous abortion.

I do not know that we want to force all of those fertilized eggs to be born, that is those that otherwise spontaneously abort. I do not know, but it seems that because of Mother Nature or God roughly 60 to 65 percent of fertilized eggs do spontaneously abort. At the

very least, we must ask ourselves why? What implications does that have?

The real question is when should legal personhood begin? The sperm is life. The egg is life. The fertilized egg is life. The question is when should legal personhood begin?

The polls should not determine the outcome of this question, but it is interesting to note that two-thirds of the American public do not favor the approach taken by this bill. Certainly the vote in Italy is an expression that this is a very complicated issue. This is an area where I think every individual searches deep down into his or her heart and soul. It is a very wrenching and very agonizing question. It is one that does not lend to simplistic answers.

For that reason, I think the Supreme court was wise in saying, certainly in the first stages of pregnancy, that they did not think it was proper for Government to dictate a solution.

Dr. GERSTER. May I address myself just briefly to the two things you brought up?

Senator BAUCUS. Certainly.

Dr. GERSTER. I think there is only one valid poll. That is the ballot box, as Mr. Dewey found out. Polls can be manipulated in many ways depending on how the question is asked. The ballot box is a reliable poll.

The last defeat that the prolife forces experienced was November 1970 in the State of Washington where we lost the referendum by less than 1 percent of the electoral vote.

In the intervening 2 years, until the Supreme Court acted, 34 States introduced abortion legislation and it was defeated in 34 States by the elected representatives of the people. The only two States to hold direct referendums were the State of Michigan and the State of North Dakota. The referendum was passed by 63 percent in Michigan and 72 percent in North Dakota. These States are overwhelmingly Protestant. Nobody's religious view was being imposed. The State assembly and senate of New York reversed their 2-year abortion law, only to have it repealed by one man, Gov. Nelson Rockefeller.

Our opponents had a majority in one place. They had a 7 or 2 majority in the Supreme Court. That is a very important place to have the majority. The laws of all 50 States were struck down in 1973.

The prolife movement is trying to give the people of America the right to choose. The bill is not our final goal of course. The human-life amendment must have a two-thirds majority in Congress and go through a ratification process. Perhaps we can save some lives in the interim.

### AREN'T THE SPERM AND THE OVUM LIVING

The second part of your statement is that there is life in the ovum and sperm. Of course there is. In a debate, many people will tell me that the appendix is after all, alive and appendectomies are performed legally. There are people confusing organs and organisms. A human being and other mammals are organisms containing a neurological system, gastric system, and cardiovascular system, and so forth. The appendix is an organ. Certainly it is

living, but its cells are adapted for one use only. Appendices do not grow up, get married, and produce other little appendices.

I am sorry to be so simplistic, but I think this is so important. The ovum is the gamete, the reproductive cell of the woman, and mirrors her genetic pattern. The ovum will someday be as identifiable as her fingerprint.

The sperm is the reproductive cell of the male. The two sex cells divide. The sperm and ovum now only contain 23 chromosomes each. At the moment of fertilization—not a moment, really, but a period of 12 hours—there is a genetic explosion and rearrangement into a human being that has never before existed and will never exist again.

Whether you want to call this a giant lottery or whether you see the hand of God in it, is altogether up to a person's viewpoint. However, the scientific facts remain that a human being comes into existence—as certainly Louise Brown proved in the media of the petri dish, at that time of fertilization.

### VIEW ON PROSECUTION PRESENTED

Senator BAUCUS. I am curious as to your own personal view as to whether a woman who aborts a child should be subject to criminal prosecution?

Dr. GERSTER. Certainly not. I am sorry you were not here a little earlier. That was my closing statement. I think the woman is as much a victim as the unborn child. I think women are being exploited by abortion.

We did do a lot of searching, and even though a few States did have the law on the books, no woman has ever been sentenced for an abortion in the United States prior to 1973.

Senator BAUCUS. That is not my question. As a matter of public policy, should States pass criminal statutes?

Dr. GERSTER. Regarding a woman, no. I think the woman is also a victim.

Senator BAUCUS. Assuming this bill passes or the right to life amendment passes, and assuming that the full force of the amendment is that personhood begins at conception, the question is whether you think that then either the Congress or the States should pass any criminal sanctions against those women who have abortions?

Dr. GERSTER. Not at all. The State certainly has the option to do that. Attempted suicide is actually attempted homicide. Yet no attempted suicide has ever been prosecuted to my knowledge. The only time that that suicide is punishable by death is when it is successful.

Senator BAUCUS. Assuming this bill or amendment passes, would a woman be taking life when she has an abortion after 2 months?

Dr. GERSTER. It would be taking a life. The abortionist should be prosecuted, not the woman. That has always been the policy in these United States during the 100 years in which this was the law.

Senator BAUCUS. What happens if there is some kind of self-induced abortion, that is a woman is somehow able to abort the child without the services of an abortionist?

Dr. GERSTER. I do not believe that any State legislature would pass such a law. It occurred before and was never prosecuted.

Senator BAUCUS. I am trying to find out the logic.

Dr. GERSTER. I do not think women should be prosecuted. I do not think State legislatures would pass such a law. As they reflect the will of the people in the State.

Senator BAUCUS. It is your view that even though abortion might occur and even though it is the taking of life, that the person who takes a life should not be subject to any criminal prosecution?

Dr. GERSTER. Only if it is a third person. I do believe the physician should be prosecuted, yes.

Senator BAUCUS. Even though it is the taking of a life?

Dr. GERSTER. That is right. That is why I used the simile of suicide. I think there is a certain unique relationship between child and mother. Abortion is almost a self-destructive act.

Senator BAUCUS. Do you think a person who takes the life of a child who is born should be subject to criminal prosecution?

Dr. GERSTER. Yes, with certain modifications. We modify the penalty in our States.

Senator BAUCUS. After a child is born, let us say someone takes the life of that child. Should the person who takes that life be subject to criminal prosecution and be guilty of murder?

Dr. GERSTER. Guilty of homicide, yes. Infanticide is a special kind of homicide.

Senator BAUCUS. Are you saying there is a difference in the status of life between the fetus and the life that is born?

Dr. GERSTER. It is a difference in the circumstances. That is why I believe the perfect simile is suicide. A person's own life is very precious, as precious as any other life.

Senator BAUCUS. I am not trying to be argumentative. I am just trying to see where you are going here. It is not the fetus who commits suicide.

Dr. GERSTER. No, but I am saying that the State has had the prerogative to treat attempted suicide much differently than they do attempted homicide of another person. The State is also able to levy a different penalty for the killing of different individuals. Some States have a mandatory death penalty if an officer of the law is killed in the line of duty. This does not mean that an officer's life is more precious than another citizen's but the State has that prerogative to treat lives differently as far as prosecution for homicide.

Senator BAUCUS. I am just curious as to why in your mind there should be criminal prosecution for the taking of a born life but no criminal prosecution for the taking of an unborn life.

Dr. GERSTER. Because I do not think the woman has the visual awareness of the child. I think when the child can be viewed by her, she then definitely realizes what has been destroyed.

I can give you a very graphic personal example, Senator Baucus. I just said in my statement that I have lost four children, one in the first weeks of birth of pneumonia, one stillborn, and two at 3 months.

The last of those miscarriages probably had more to do with my going into this movement than any other single event. We had only one receptionist in the office in 1958. My husband and I are part-

ners in the practice of internal medicine and cardiology in Phoenix.

When my husband went to read EKG's at the hospital at noon, our receptionist went to lunch and the office was closed. At approximately 12:30 in the afternoon a few years ago, I began to cramp. I was approximately 13½ weeks pregnant. I went into the bathroom There was a lot of pain and what our opponents like to call a "clot" or "protoplasmic mass" fell to the floor.

I will be absolutely truthful with you. My first emotion was disappointment because we were leaving the next day for San Diego with the children and I thought I would have to go into a hospital and have a D and C. It was going to ruin the family's vacation.

You see, embryology was a very poorly taught course at the University of Oregon Medical School when I went there. It was the only exam I ever had to take twice. If my professor were alive today, he would be very proud of my knowledge of embryology at this point.

Having all boys, I wondered if it was possible to tell sex at that age. I did not know that it is possible to see the external appearance of the genitalia at nine weeks. I also thought that if the placenta were intact, I could take it to my obstetrician and a D and C would not be necessary and we need not postpone our vacation.

I let the water run over this "mass" in my hand. About from here to here, about 3½ inches from crown to rump, was a perfectly formed little boy. I turned his hand and I could see the lines of his palm. I could see his fingernails.

I stood there like a fool, all alone, with tears running down my face because for the first time I had realized that I had lost a baby. I thought to myself if I as a physician and mature woman had no idea what I had lost, how on earth could those poor teenage girls know?

No, I do not believe the woman should be prosecuted, Senator Baucus.

Senator BAUCUS. Thank you very much.

I want to thank you all for coming today. It has been very helpful.

Thank you, Mr. Chairman.

Senator EAST. Thank you, Senator Baucus.

Senator BAUCUS. Mr. Chairman, I have some material that I would like to place in the record.

First is a letter from Congressman Louis Stokes. I would like to read it. It is just one sentence.

Senator EAST. Go right ahead.

Senator BAUCUS. "Senator Baucus: I am unable to attend today's hearings. However, the congressional black caucus wishes to go on record as opposed to S. 158. We will at a later date submit a statement for the record."

I also have a series of other letters from other individuals that I would like to place in the record.

Senator EAST. So ordered. Thank you, Senator.

[Numerous letters and statements submitted by Senator Baucus appear in the appendix, which is volume 2.]

Senator EAST. Again, I wish to thank the panelists for coming and for their very fine contributions.

I would like for the next group to please come forward. I wish to welcome our next series of panelists. We welcome Dr. Joseph Boyle, Dr. Bernard Nathanson, Dr. Goldstein, and Dr. John Willke.

Before we proceed with this panel, we have just heard the signal for a vote, which I had said earlier unfortunately would disrupt us from time to time. That has occurred. I am going to propose that we not proceed any further. I shall go over and vote and return at the earliest possible time. It works that way. I am sorry.

We shall stand in recess until I return.

[The subcommittee recessed at 12:10 p.m.]

Senator EAST. I would like to reconvene our hearings. With a little luck, it looks like we will possibly have no more rollcalls for some time, although there is never a guarantee about that around here. It looks fairly good at the moment.

We will press ahead. I again welcome the panelists. As we have been doing before, I would like to let all of them speak. Then we can come back for questions and answers. I would like to encourage them to summarize their remarks. Time is vital to us. Your written remarks will be made a part of the record. By summarizing, it gives us more time for discussion. I would appreciate your being sensitive to our time limitations here.

The first witness is Dr. Joseph Boyle. He is appearing to represent the American Medical Association. Dr. Boyle is chairman of the board of trustees of the AMA and is immediate past president of the California Medical Association. He practices internal medicine in Los Angeles.

Dr. Boyle, we welcome you this morning.

**STATEMENT OF JOSEPH BOYLE, M.D., AMERICAN MEDICAL ASSOCIATION, ACCOMPANIED BY HARRY N. PETERSON, DIRECTOR, DIVISION OF LEGISLATIVE ACTIVITIES**

Dr. BOYLE. Thank you, Mr. Chairman.

I am Dr. Joseph Boyle. I am in medical practice in Los Angeles, Calif. I am chairman of the board of trustees of the American Medical Association. With me is Harry Peterson, director of the American Medical Association's legislative activity.

Mr. Chairman, I will do my best to summarize my statement. I request that our full statement be included in the record.

We are pleased to have an opportunity to present our views on S. 158. It is a bill that would statutorily declare as national policy that human life begins at conception for the purpose of certain constitutional protections guaranteed by the 14th amendment in the U.S. Constitution.

The bill, having made these assumptions, is designed to prohibit State governments from enacting laws that would deprive a fetus of life without due process of law from the time of conception.

The operative portion of this legislation states "for the purpose of enforcing the obligation of the States under the 14th amendment not to deprive persons of life without due process of law, human life shall be deemed to exist from conception."

The central assumption contained in the legislation, Mr. Chairman, is the finding in the bill that there is scientific consensus in support of that view. In our opinion, this assumption is not correct.

In asserting this lack of scientific consensus, we join many medical and scientific witnesses, who hold a similar view. While the prestigious National Academy of Sciences has not testified here, that body has reacted to this bill and has strongly objected to the statement that present-day scientific evidence indicates a significant likelihood that actual human life exists from conception.

We would also add to the record a reprint from the Congressional Record of June 8, 1981, which indicates that a large number, in excess of 200 physicians, and now in another article in another publication (Science, June 19, 1981, p. 1372), in excess of 1,300 physicians from the Boston area join the national academy in that objection.

The issues that are raised in this bill as to when human life begins go far beyond the realm of medical science and into social, religious, philosophical, ethical, and moral concerns. The issue is unsolvable solely from a medical and scientific view.

Based on current scientific knowledge, the point in time when qualities of a human person attach to a fetus cannot be stated as a settled scientific matter. Although science cannot say when the status of a person or a human life attaches to a fetus, this is not to say that the medical profession does not have insights to offer those in society who may consider the enormous complex and sensitive social issues being examined by this committee.

The practical effects of this proposed legislation are staggering. Passage of this bill would have an adverse impact on critical physician/patient relationships and would create endless medical, ethical, and legal difficulties for the people of this Nation.

A physician could face serious dilemmas in advising pregnant patients. Women would be faced with critical personal decisions affecting their health and the entire course of their lives, decisions difficult to make today that would be even more painful by the elevation of the law of a fetus to a legal person.

There are numerous circumstances presenting such dilemmas. Included would be those which present an extreme or high risk to the life of the woman. An ectopic pregnancy is one example, which is a pregnancy existing outside the uterus and which because of hemorrhage threatens the life of the woman. There is one ectopic pregnancy for every 20 deliveries.

There are also incomplete abortions, which occur in 10 percent of all pregnancies. In the course of this, the women's life may be threatened by hemorrhage. The only treatment is to remove the products of conception to prevent the bleeding.

Another example is the malignant embryo, a malignant change in the fetus, which will usually metastasize to the woman or produce local destruction, also a life-threatening condition.

Cardiovascular conditions and infectious diseases made substantially worse through pregnancy may result in the death of the woman.

The results of the damage from medical conditions which are aggravated by pregnancy, such as neurologic damage which is caused in patients with multiple sclerosis or collagen damage in

patients with systemic lupus erythematosis, is not reversed by termination of the pregnancy at term.

In prescription drug intervention, patients with mania where lithium is the preferred drug or patients with epilepsy maintained on phenytoin present circumstances of drug use involving possible or known teratogens in a fetus.

Then there are circumstances presenting relatively low-risk conditions, but limit a woman's and physician's ability to maintain the woman's health status. Two primary examples would be the IUD and the morning-after pill, and included would be the whole question of genetic diagnosis and medical intervention.

The effectiveness of counseling of patients regarding genetic disorders would be substantially diminished because some essential diagnostic procedures such as amniocentesis, which has a predictable fetal mortality, would be limited or unavailable.

It follows that medical intervention following such diagnosis would also be unavailable or restricted. Such circumstances could have serious adverse effects on the woman if the pregnancy could not be terminated. You are familiar with some of the genetic anomalies that we allude to.

Mr. Chairman, the legislation does not address these physician dilemmas or provide answers to physicians who must deal with these critical situations on a daily basis. We concur with the American College of Obstetricians and Gynecologists that this legislation, should it become effective, would create extreme dilemmas for the practicing physician and severe health problems for women. In our view, in fact, there is total chaos that one could anticipate. We have just cited several life-threatening situations where effective medical intervention would be prohibited.

Those who have had to deal with the consequences, both physical and mental, caused by illegal abortionists and self-help efforts cannot understand any action which would permit a return to that state of affairs.

Mr. Chairman, this legislation would improperly interfere with one of the most delicate aspects of the physician/patient relationship. The social implications for our society of ever-tightening rules to restrict prenatal medical intervention would be substantial.

In summary, Mr. Chairman, we see no end to the negative medical, legal, social, ethical, and other moral repercussions of a national policy that this bill would adopt in establishing that human life begins at the time of conception.

The medical profession and medical science cannot define for this committee when human life attaches to incipient fetal life. However, we cannot stand silently by while others suggest that science or medicine can or should do so.

We urge that this committee reject this legislation on its merits.

Senator EAST. Dr. Boyle, I appreciate your statement. I again thank you for you conciseness. Your whole statement and any other materials you would like to add will be made a part of our permanent record here.

[The prepared statement and submissions of Dr. Boyle follow:]

## Prepared Statement of Dr. Joseph F. Boyle

Mr. Chairman and Members of the Committee:

I am Joseph F. Boyle, M.D., a physician in the practice of medicine in Los Angeles, California. I am currently Chairman of the Board of Trustees of the American Medical Association. Accompanying me today is Harry N. Peterson, Director of AMA's Division of Legislative Activities.

The American Medical Association is pleased to respond to an invitation to present its views on S. 158, a bill that would statutorily declare as national policy that "human" life begins at conception for the purpose of certain constitutional protections guaranteed by the 14th Amendment to the U. S. Constitution. This bill, having assumed that human life begins at conception, is designed to prohibit state governments from enacting laws that would deprive a fetus "of life without due process of law" from the time of conception. One of the intended purposes of this legislation would be to prohibit states from allowing abortions, without regard to the circumstances of the pregnancy. More specifically, it seeks to deprive women of rights the Supreme Court found were guaranteed under the Constitution.

The operative portion of the legislation states that "for the purpose of enforcing the obligation of the States under the 14th Amendment not to deprive persons of life without due process of law, human life shall be deemed to exist from conception, without regard to race, sex, age, health, defect, or condition of dependency; and for this purpose 'person' shall include all human life as defined herein."

The central assumption contained in the legislation, Mr. Chairman, is the proposed Congressional finding in the bill that "present day scientific evidence indicates a significant likelihood that actual human life exists from conception." Implicit in the bill is the assumption that there is a "scientific consensus" in support of that

view. In our opinion this assumption is not correct.

In asserting the lack of a "scientific consensus," we join the many medical and scientific witnesses that hold a similar view. In addition, while the prestigious National Academy of Sciences has not testified here, that body has reacted to this bill and has strongly objected that the statement that "present day scientific evidence indicates a significant likelihood that actual human life exists from conception" cannot stand up to the scrutiny of science.

Mr. Chairman, the American Medical Association speaks today in opposition to S. 158.

The issues raised by this bill as to when human life begins go far beyond the realm of medical science and into social, religious, philosophical, ethical and moral concerns. The issue is unsolvable solely from a medical and scientific view. Based on current scientific knowledge, the point in time when qualities of a human "person" attach to a fetus cannot be stated as a settled scientific matter. Moreover, while technologic and scientific advances have greatly expanded our ability to determine the various stages of fetal development, one point central to the proposal—the moment of conception in vivo—cannot be established. Not even the pregnant woman is aware when that moment has occurred.

Though medical science cannot say when the status of "person" or "human life" attaches to a fetus, this is not to say that the medical profession does not have insights to offer to those in society who may consider the enormously complex and sensitive social issues being examined by this Committee.

The practical effects of the proposed legislation are staggering. One fact is inescapably clear: passage of this bill would have an adverse impact on critical physician-patient relationships and would create endless medical, ethical and legal difficulties for the people

of this nation. A physician could face serious dilemmas in advising pregnant patients. Under the bill, the physician would be responsible for the welfare of every fetus whose legal and health interest would, in the eyes of the law, be equal to, but may be in conflict with, those of the woman.

Women would be faced with critical personal decisions affecting their health and the entire course of their lives, decisions difficult to make today that would be made even more painful by the elevation by law of a fetus to a legal person. Would the law allow a woman to continue to consent on behalf of the fetus?

Mr. Chairman, there are numerous specific circumstances that physicians would face, including life-threatening emergencies, in treating women who might be pregnant:

Circumstances presenting an extreme or high risk to the life of the woman:

| | |
|---|---|
| Ectopic pregnancy | A pregnancy with implantation in the tubes rather than in the body of the uterus. If untreated, this usually results in the death of the woman. There is one ectopic pregnancy for every 120 deliveries.<br><br>Does the physician "protect" the usually unsavable fetus and watch the almost certain demise of the woman who goes untreated? How is the physician to proceed, and on whose directives? |
| Miscarriage (Incomplete spontaneous abortion) | Ten percent of all pregnancies end in spontaneous abortion. In the course of this, the woman's life may be threatened by uncontrolled hemorrhage.<br><br>Given that 20% of all women have some bleeding early in a pregnancy, how is the physician to determine those instances that warrant an emptying of the uterus, the indicated procedure, to end bleeding? Are those judgments and actions forbidden by the proposed statutory scheme? |
| Malignant embryo | Any type of malignant change in the embryo. It will usually metastasize to the woman or produce local destruction--a life-threatening condition. |

| | |
|---|---|
| Cardiovascular conditions | In women with significant cardiac disease, such as rheumatic heart disease, pregnancy can frequently lead to heart failure and death. Death of the woman results in approximately 50% of the cases. |
| Medical conditions which are aggravated by pregnancy | Pregnancy causes severe adverse effects in a woman's underlying illness, effects which often do not regress after termination of the pregnancy (for example, neurologic damage with patients with multiple sclerosis or collagen damage in patients with systemic lupus erythematosis). |
| Prescription drug intervention | In treating women with mania, lithium is the preferred drug (well evaluated and more effective than others available), but it is also a possible teratogen in a fetus.<br><br>Similarly, women with severe epilepsy are frequently maintained on phenytoin, a known teratogen in a fetus. |

Circumstances presenting relatively low risk conditions, but limiting a woman's and physician's ability to maintain the woman's health status:

| | |
|---|---|
| Mechanisms that interfere with implantation | Two primary examples would be the IUD and the morning-after pill. |
| Genetic diagnosis and medical intervention | Effectiveness of counseling of parents regarding genetic disorders would be substantially diminished because essential diagnostic procedures, such as amniocentesis, which has a predictable fetal mortality, would be limited or unavailable.<br><br>It follows that medical intervention, following diagnosis of a genetic disorder, would also be limited or unavailable. Such circumstances could have serious adverse effects on a woman if the pregnancy could not be terminated. The types of genetic anomalies that physicians must deal with include: anencephaly, spina bifida, and mongolism. Is medical intervention and further study to be forbidden in these cases? |

Mr. Chairman, the legislation does not address these physician dilemmas or provide answers to physicians who must deal on a daily basis with these critical situations. We concur with the views of the American College of Obstetricians and Gynecologists that this legisla-

tion, should it become effective, would create extreme dilemmas for the practicing physician and severe health problems for women. We have just cited several life-threatening situations where effective medical intervention would be prohibited. The American College of Obstetricians and Gynecologists similarly opposes S. 158.

A woman who has determined that she cannot carry a pregnancy to term will still seek an abortion. Those who have had to deal with the consequences, both physical and mental, caused by illegal abortionists and self-help efforts cannot understand any action which would permit a return to that state of affairs.

Mr. Chairman, this legislation would improperly interfere with one of the most delicate aspects of the physician-patient relationship. The social implications for our society of ever-tightening rules to restrict prenatal medical intervention would be substantial. A "national policy" that gives legal status as a person to a fetus could severely limit research and advancement of the art and science of prenatal diagnosis and medical intervention.

Conclusion

In sum, we see no end to the negative medical, legal, social, ethical, and moral repercussions of a national policy that declares that "human life" begins at the time of conception.

Mr. Chairman, the medical profession and medical science cannot define for this Committee when "human life" attaches to incipient fetal life. We also cannot stand silently by, however, while others suggest that science or medicine can or should do so.

We urge that this Committee reject this legislation on its merits.

[From Science, Vol. 212, June 19, 1981]

## HUMAN LIFE BILL AROUSES MORE OPPOSITION

(By R. Jeffrey Smith)

Nearly 1300 scientists and researchers from Harvard, MIT, Brandeis, and Tufts have joined the growing chorus of those opposed to the controversial "Human Life" bill (S. 158) now being considered in the Senate (Science, 8 May, p. 648). The bill attempts to bar abortion by declaring that protected human life begins at the moment of conception, an idea the bill claims is supported by "present day scientific evidence."

This premise is "a misuse and a misunderstanding of science," according to the petition signed by 1283 scientist, including 147 faculty members and six Nobel laureates. Taking a cue from a resolution passed recently by the National Academy of Sciences, the petition states that "science cannot define the moment at which 'actual human life' begins." The signers also deplored Congress's attempt to undermine what they said are reproductive rights of women guaranteed by the Supreme Court.

The petition was written by a newly formed group calling itself Harvard Scientists for Reproductive Health. The six Nobelists who signed were David Baltimore and Salvador Luria of MIT, and Walter Gilbert, William Lipscomb, George Wald, and Konrad Bloch of Harvard. Also signing were the chairmen of the Harvard, Tufts, and Brandeis biology departments.

Similiar opposition has been expressed by the American Medical Association (AMA), whose board of trustees recently voted to lobby actively against the bill. An AMA spokesman says the bill raises a possibility that a fetus has legal rights that would compete with a need to protect a mother's health.

The Reagan Administration has thus far avoided comment on the bill, and there are signs that it wants to avoid becoming embroiled in the controversy. In recent testimony before the Senate Judiciary subcommittee, the Department of Health and Human Services deliberately downplayed statistics showing a sharp decline in mortality from abortion since its legalization in 1973.

These and other data showing that abortion poses less health risk than childbirth were scheduled for presentation on 20 May by Ward Cates, chief of the abortion surveillance branch of the Centers of Disease Control in Atlanta. Cates was told at the last minute that his boss, Carl Tyler, head of CDC's family planning division, would present the testimony in abbreviated fashion instead. Cates was told that CDC was acting on direct orders from the office of HHS Secretary Richard Schweiker, an avowed foe of abortion.

The statistics that made the department uneasy showed, among other things, that the abortion rate has not increased since its legalization—that legal abortions have merely substituted for previously illegal ones. Cates's testimony also claimed that legalized abortion policies have provided teenagers with alternatives to entering high-risk marriages, and that outpatient abortion services provide a model for convenient, low-cost services related to family planning and sex.

Science was unable to get an explanation from HHS for its decision on the testimony and thus could not determine if it was caused by Schweiker's opposition to the message or merely by a desire to avoid making CDC, a fact-gathering agency, a target for politicians, Cates says he hopes to publish his testimony in a scientific journal.

---

[From the Congressional Record—House, June 8, 1981]

## CAN CONGRESS, BY LAW, ESTABLISH WHEN LIFE BEGINS?

(Mr. DANIELSON asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. DANIELSON. Mr. Speaker, a few days ago I received a petition in writing signed by several hundred scientists and supporting a resolution passed on April 26, 1981, by the National Academy of Scientists. The petition opposed and denies the concept that—

Present-day scientific evidence indicates a significant likelihood that actual human life exists from conception.

The petition goes on to say—

Defining the time at which the developing embryo becomes a "person" must remain a matter of moral or religious values.

The petition was signed by scientists from Harvard University, Brandeis University, Tufts University, and the Massachusetts Institute of Technology. I have not taken the time to count the number of scientists who signed the petition, but it is a modest statement to say that they were in the hundreds. A vast majority of them were in the fields of biology and related fields. A number of them were Nobel laureates. The petitions are in my office if anyone wishes to inspect them.

All of the petitions are identical except for the designation of the university with which the signatories are affiliated. I am setting forth only one; namely, the face sheet of the petition from Harvard University.

We, the undersigned scientists at Harvard University, support the resolution passed on April 28, 1981, by the National Academy of Sciences, which states:

"It is the view of the National Academy of Sciences that the statement of Chapter 101, section 1, of U.S. Senate Bill S158, 1981, cannot stand up to the scrutiny of science. This section reads 'the Congress finds that present-day scientific evidence indicates a significant likelihood that actual human life exists from conception'. This statement purports to derive its conclusions from science, but it deals with a question to which science can provide no answer. The proposal in S158 that the term 'person' shall include 'all human life' has no basis within our scientific understanding. Defining the time at which the developing embryo becomes a 'person' must remain a matter of moral or religious values."

As biologists, we agree that science cannot define the moment at which "actual human life" begins and consider that the attempt to reach a scientific resolution of this question represents a misuse and misunderstanding of science. As individuals, we feel that the reproductive rights of women guaranteed by the Supreme Court should be preserved and we deplore the current efforts of Congress to undermine these rights.

Konrad Bloch, Higgins Professor of Biochemistry, Professor of Science (Public Health), Nobel laureate; Walter Gilbert, American Cancer Society, Professor of Moleculear Biology and Chemistry, Nobel laureate; William N. Lipscomb, Abbott and James Lawrence Professor of Chemistry, Nobel laureate; Professor George Wald, Nobel laureate, Biological Laboratories, Harvard University; Mark Ptashne, Professor of Biochemistry and Molecular Biology, Department Chairman.

By coincidence I have noted that this morning's Washington Post, Monday, June 8, 1981, carries a report of a Washington Post-ABC News poll reflecting that the American public, by a wide majority, supports legalized abortion and that more than two out of three Americans oppose any law that would make abortion murder. According to the poll, 40 percent approve of abortion on demand and an additional 34 percent approve of abortion in most circumstances, making a total of 74 percent.

As a further coincidence, this morning's newspaper carries a story that the American Medical Association is sending two spokesmen to oppose pending legislation through which Congress would by law establish that human life begins at conception.

Senator EAST. I have been advised that this hearing room at 2 is needed for another hearing, although we are going to see if we cannot find another room if we do have to run over. I do not want to unduly restrict what we are doing, but that is a slight limitation that we now have on this room so I appreciate your conciseness on this matter.

We welcome Dr. Bernard Nathanson as our next witness. He is a board certified obstetrician and gynecologist practicing in New York City. In 1968, he was a cofounder of the National Abortion Rights Action League and an activist in the proabortion cause. For 2 years, he was the director of the largest abortion clinic in the world and has had personal experience with 75,000 abortions.

In 1974, he published an article in the New England Journal of Medicine indicating that he had changed his views on abortion. His book "Aborting America" followed in 1979.

Dr. Nathanson, we welcome you this morning.

## STATEMENT OF BERNARD H. NATHANSON, M.D., COFOUNDER OF NATIONAL ABORTION RIGHTS ACTION LEAGUE, NEW YORK, N.Y.

Dr. NATHANSON. Thank you, Mr. Chairman.

Practicing at the southern borders of life, the obstetrician has traditionally been pledged to the dictum primum non nocere, first do no harm. Whether in treating the dying fetus in utero or in resuscitating the profoundly depressed newborn in the delivery room, the deontology of obstetrical practice has cleaved unswervingly to the undiscriminating and unshakable resove to first do no harm, to preserve and protect life in all of its manifestations, actual, probable, and even potential.

In 1968, I and a group of equally concerned and indignant citizens who had been outspoken on the subject of legalized abortion organized a political action group known as NARAL, then standing for National Association for Repeal of Abortion Laws, now known as the National Abortion Rights Action League.

We were outspokingly militant on this matter and we enlisted the women's movement and the Protestant clergy into our ranks. We used every device available to political action groups such as pamphleteering, public demonstrations, exploitation of the media, and lobbying in the appropriate legislative chambers.

In late 1969, we mounted a demonstration outside one of the major university hospitals in New York that had refused to perform even therapeutic abortions. Largely as a result of this and a few similar groups, the monumental New York State Abortion Statute of 1970 was passed and signed into law by Governor Rockefeller.

Out next goal was to assure ourselves that low-cost, safe, and human abortions were available to all. To that end, I established the Center for Reproductive and Sexual Health, which was the first and the largest abortion clinic in the Western World.

After a tenure of a year and a half, I resigned as director for the Center of Reproductive and Sexual Health. The center had performed 60,000 abortions with no maternal deaths, an outstanding record of which we were proud. However, I was deeply troubled by my own increasing certainty that I had in fact presided over 60,000 deaths.

There is no longer serious doubt in my mind that human life exists within the womb from the very onset of pregnancy, from conception, despite the fact that the nature of the intrauterine life has been the subject of considerable dispute in the past.

Electrocardiographic evidence of heart function has been established in embryos as early as 6 weeks. Electroencephalographic recordings of human brain activity have been noted in embryos at 8 weeks.

Our capacity to measure the signs of life is daily becoming more sophisticated as our technology develops, and as time goes by, we will doubtless be able to isolate life signs at earlier and earlier stages of fetal development.

The Harvard criteria for the pronouncement of death assert that if the subject is unresponsive to external stimuli such as pain, if the deep reflexes are absent, if there are no spontaneous move-

ments of respiratory effort, if the electroencephalogram reveals no activity of the brain, one may then conclude the patient is dead.

If any or all of these criteria are absent, and the fetus does respond to pain, makes respiratory efforts, moves spontaneously, and has electroencephalographic activity, then life must be present.

To those who state that nothing can be human life that cannot exist independently, I ask if the patient totally dependent for his life on treatments by the artificial kidney is alive? Is the person with chronic cardiac disease, solely dependent for his life on the tiny batteries in his pacemaker, alive? Would my life be safe in New York City without my eyeglasses?

Life is an interdependent phenomenon for us all. It is a continuous spectrum which begins in utero and ends at death. The bands of that spectrum are designated by words such as fetus, infant, child, adolescent, adult, and aged.

We must courageously face the fact finally that human life of a special order is being taken. Since the vast majority of pregnancies are carried successfully to term, abortion must be seen as the interruption of a process that would otherwise have produced a citizen of the world. Denial of this reality is the crassest kind of moral evasiveness.

An unconscionable amount of sententious fustian has been thundered on the impact of the reimposition of restrictive abortion laws on the medical practice. It is as if the medical community had never before practiced under such regulations.

Let me remind you that we physicians practiced under such laws in New York State from 1829 until 1970. We found no significant impediment to our work in that span of 140 years merely because an ethically unacceptable practice, permissive abortion, remained sequestered from the corpus of medically legal procedures.

Please keep this in mind. The impetus for the legalization of abortion did not come from an aroused or an affronted medical profession which considered itself handcuffed by the old restrictive abortion laws. It was quite the contrary. The abortion revolution was spearheaded by a small band of intrepid social revolutionaries—I was one—and was in the first 5 years of the struggle violently opposed by organized medicine.

I might also add that I was the only physician in those ranks in those years. I myself was branded a pariah and an outcast by the obstetrical and gynecological community. Sanctions were brought against me for my prominent role in the abortion revolution of the 1960's.

Much is made of the fanciful notion that if restrictions on abortion are reimposed, physicians caring for women undergoing miscarriage will be forced to act as investigators and policemen interrogating such women regarding how the miscarriage began. Physicians are healers who function not in a moral vacuum but within a codified set of socially acceptable rules called ethics. Medical ethics are only a specific application of the universal norms of moral behavior.

In 1958, the U.S. Congress approved and adopted a code of ethics, and again in 1968 both Chambers adopted more explicit formal codes. As a result of Representative Obey's work with Senator

Nelson's Special Committee on Official Conduct, the Congress adopted a new and more comprehensive code of ethics in 1977. Do the Members of this august body find themselves significantly impeded in their work by prohibitions on unethical conduct in this code?

The American Medical Association has had a codified set of principles of its members since its founding in Philadelphia in 1847. That code has been revised from time to time, most recently in 1957. Now a new draft of seven principles has been submitted to the membership. The second principle states the following:

> A physician shall uphold the honor of the profession by dealing honestly with patients and colleagues, and striving to expose those physicians deficient in character, competence, or who engaged in fraud or deception.

This stricture of course charges physicians to report on colleagues who are engaged in deceit or who are incapacitated by reason of drug abuse, alcohol abuse, or mental disorder. Yet no reasonable physician can object to this charge on the grounds that it converts us into spies, informers, or the like on each other.

Simple honor requires that to function within a decent code of ethics is to act to enforce it within reasonable limits, particularly where a serious public responsibility is at stake, for example in the U.S. Congress or in the medical discipline.

Finally, let me say a few words on the current arguments on this issue. If abortion were to be proscribed tomorrow morning throughout the United States, there would be a tragic return to the back-alley, kitchen-table criminal abortionist wielding the bloodied coathanger, and the body count of women maimed and slaughtered would rise to astronomical heights. This statement, central to the proabortion argument and a potent selling point to the uncommitted public, is an incontestable fact. Right? Wrong. Egregiously wrong.

The search for a safe, inexpensive, and effective abortifacient drug can be traced to antiquity. All manner of odd and noxious substances have been promoted. But technology never slumbers. In the 1970's, the long quest has ended for an abortifacient agent with the development and identification of a class of chemicals known as prostaglandins.

The prostaglandins are a relatively simple, naturally occurring group of chemicals which have been inexpensively synthesized and widely utilized in the past decade for the purpose of effecting second trimester late abortions. They are uniformly effective for this purpose and have virtually no serious side effects.

Recently, there are accumulating increasing numbers of reports from the international medical community that the newest generation of these chemicals, when used as vaginal suppositories, have been used on large numbers of women in early pregnancy and are enormously effective for the production of first trimester early abortions.

The intravaginal application of three or four of these suppositories over a period of 8 hours will result in the induction of a simple, swift, and safe abortion at home. Perhaps 1 out of 5 will be incomplete and would require a trip to the local hospital emergency room for completion.

If abortion were to be proscribed tomorrow morning throughout the United States, the unwillingly pregnant woman would purchase prostaglandin suppositories at the local drug store, probably under the counter, for a few dollars, take them home, and have her abortion in the privacy and comfort of her bathroom.

Since prostaglandins are chemicals ubiquitous in medical practice and are used for other purposes than abortion, it is most unlikely that their production would be prohibited. Further, even if they were banned, they are relatively simple substances and could readily be synthesized by any enterprising chemistry major in his garage.

Please do not misunderstand me. I am not advocating the use of prostaglandins for abortion. I am simply outlining the scenario were abortion to be proscribed tomorrow morning.

You may well ask, if prostaglandins are so effective and so safe in producing early abortion, why do physicians continue to do abortion by the older, exponentially more hazardous surgical procedure of suction D and C? Why has information regarding prostaglandins been suppressed or not disseminated in the media?

Simply arithmetics, elementary economics: 1.3 million abortions a year at an average of perhaps $250 per abortion multiplies out to $325 million into the pockets of clinic entrepreneurs, physicians, hospitals, and ancillary abortion services.

On the other hand, prostaglandin suppositories are $1 or so apiece and require no more medical expertise than the insertion of a tampon into the vagina.

By all means, let us continue the abortion debate. However, let us finally retire the rustly old coathanger, the knitting needle, the catheter, the bougie, and acknowledge that technologically obsolete emotional cant has no place in the 1980's.

The destruction of a living being, embryo, defective fetus, neonate, is an act of irretrievable finality. One life is not fungible with another, and the value of each human life transcends ordinary measurement.

To justify the destruction of the fetal life for any reason other than where the mother's own life is at stake is a morally impudent and utterly repugnant act. Citizens should declare a moratorium on the destruction of life until we have explored unceasingly every feasible alternative and until we more fully comprehend the inexpressible divinity of existence.

Senator EAST. Thank you, Dr. Nathanson.

[The prepared statement of Dr. Nathanson follows:]

PREPARED STATEMENT OF DR. BERNARD H. NATHANSON

I am a Board Certified obstetrician and gynecologist presently practicing in New York City. In 1968 I was one of the co-founders of the National Abortion Rights Action League, and was a political activist in the pro-abortion cause for seven years thereafter. For a period of two years (1971 and 1972) I was the Director of the largest abortion clinic in the world. I have had personal experience with 75,000 abortions. In 1974 I published an article in the New England Journal of Medicine in which I indicated that I had changed my views on abortion. This was followed by a book "Aborting America" published in 1979 in which I have enlarged upon my reasons for assuming now a strong anti-abortion posture. I submit to you that I have—without question—more personal experience with abortion than any other physician in the United States.

I should like to confine my remarks to this forum to three major facets of this Issue: the definition of human life; the impact of the passage of this bill on medical practice; and the impact of the proscription of abortion on women.

Practicing at the southern borders of life, the obstetrician has traditionally been pledged to the dictum: Primum Non Nocere. Whether in treating the dying fetus in utero or in resuscitating the profoundly depressed newborn in the delivery room, the deontology of obstetrical practice has cleaved unswervingly to the undiscriminating and unshakable resolve to first do no harm: to preserve and protect life in all of its manifestations: actual, probable, and even "potential".

Regrettably the modern obstetrician is now engaged in carrying out medical procedures for para-medical or social purposes: elective abortioneering. The obstetrician is in danger of becoming de facto and de iure another social engineer.

In early 1969 I and a group of equally concerned and indignant citizens who had been outspoken on the subject of legalized abortion, organized a political action unit known as NARAL—then standing for National Association for Repeal of Abortion Laws, now known as the National Abortion Rights Action League. We were outspokenly militant on this matter and enlisted the women's movement and the Protestant clergy into our ranks. We used every device available to political-action groups such as pamphleteering, public demonstrations, exploitation of the media and lobbying in the appropriate legislative chambers. In late 1969 we mounted a demonstration outside one of the major university hospitals in New York City that had refused to perform even therapeutic abortions. Largely as a result of the efforts of this and a few similar groups, the monumental New York State Abortion Statute of 1970 was passed and signed into law by Governor Nelson Rockefeller. Our next goal was to assure ourselves that low cost, safe and humane abortions were available to all, and to that end we established the Center for Reproductive and Sexual Health, which was the first—and largest—abortion clinic in the Western world.

After a tenure of a year and a half, I resigned as director for the Center of Reproductive and Sexual Health. The Center had performed 60,000 abortions with no maternal deaths—an outstanding record of which we were proud. However, I was deeply troubled by my own increasing certainty that I had in fact presided over 60,000 deaths.

There is no longer serious doubt in my mind that human life exists within the womb from the very onset of pregnancy, despite the fact that the nature of the intrauerine life has been the subject of considerable dispute in the past. Electrocardiographic evidence of heart function has been established in embryos as early as six weeks. Electroencephalographic recordings of human brain activity have been noted in embryos at eight weeks. Our capacity to measure signs of life is daily becoming more sophisticated, and as time goes by, we will doubtless be able to isolate life signs at earlier and earlier stages in fetal development.

The Harvard Criteria for the pronouncement of death assert that if the subject is unresponsive to external stimuli, (e.g. pain), if the deep reflexes are absent, if there are no spontaneous movements of respiratory effects, if the electroencephalogram reveals no activity of the brain, one may conclude that the patient is dead. If any or all of these criteria are absent—and the fetus does respond to pain, makes respiratory efforts, moves spontaneously, and have electroencephalographic activity—life must be present.

To those who cry that nothing can be human life that cannot exist independently, I ask if the patient totally dependent for his life on treatments by the artificial kidney twice weekly is alive? Is the person with chronic cardiac disease, solely dependent for his life on the tiny batteries on his pacemaker, alive? Would my life be safe in this city without my eyeglasses?

Life is an interdependent phenomenon for us all. It is a continuous spectrum that begins in utero and ends at death—the bands of the spectrum are designated by words such as fetus, infant, child, adolescent, and adult.

We must courageously face the fact—finally—that human life of a special order is being taken. And since the vast majority of pregnancies are carried successfully to term, abortion must be seen as the interruption of a process that would otherwise have produced a citizen of the world. Denial of this reality is the crassest kind of moral evasiveness.

An unconscionable amount of sententious fustian has been thundered on the impact of the re-imposition of restrictive abortion laws on medical practice—as if the medical community had never before practised under such regulations. Let me remind this respected body that we physicians practised under such laws in New York State from 1829 until 1970. We found no significant impediment to our work in that span of 140 years merely because an ethically unacceptable practise—permissive abortion—remained sequestered from the corpus of medically legal procedures. Please keep in mind this one rather striking lesson of history: the impetus

for the legalization of permissive abortion did not come from an aroused and affronted medical profession which considered itself handcuffed by the old restrictive abortion laws. Quite the contrary: the Abortion Revolution was spearheaded by a small band of intrepid social revolutionaries (including the author) and was, in the first five years of the struggle, violently opposed by organized medicine. I, myself, was branded a pariah and an outcast by the obstetrical and gynecological community, and sanctions were brought to bear against me for my prominent role in the abortion revolution of the sixties.

Much is made of the fanciful notion that if restrictions on abortion are reimposed, physicians caring for women undergoing miscarriage will be forced to act as investigators and policemen interrogating such women regarding how the miscarriage began. Physicians are healers who function not in a moral vacuum but within a codified set of socially acceptable rules called ethics. Medical ethics are only a specific applicaiton of the universal norms of moral behavior.

In 1958 the U.S. Congress approved and adopted a Code of Ethics, and again in 1968 both chambers adopted more explicit formal codes. As a result of Rep. Obey's work with Sen. Nelson's Special Committee of Official Conduct, the Congress adopted a new more comprehensive Code of Ethics in 1977. Do the members of this august body find themselves significantly impeded in their work by the prohibitions on unethical conduct in this Code?

The American Medical Association has had a codified set of principles for its members since its founding in Philadelphia in 1847. That code has been revised from time to time, most recently in 1957. Now a new draft of Seven Principles has been submitted to the membership for approval. The secon Principle states the following:

"A physician shall uphold the honor of the profession by dealing honestly with patients and colleagues, and striving to expose those physicians deficient in character, competence or who engage in fraud or deception."

This stricture of course charges physicians to report on colleagues who are engaged in deceit or who are incapacited by reason of drug abuse, alcohol abuse or mental disorder. Yet no reasonable physician can object to this charge on the grounds that it converts us into spies, informers or the like. Simple honor requires that to function within a decent code of ethics is to act to enforce it within reasonable limits, particularly where a serious public responsibility is at stake; e.g., in the U.S. Congress, or in the medical discipline.

If abortion were to be proscribed tomorrow morning throughout the United States, there would be a tragic return to the back-alley, kitchen table criminal abortionist wielding the bloodied coathanger, and the body count of women maimed and slaughtered would rise to astronomical heights. This statement central to the pro-abortion argument and a potent selling-point to the uncommitted public—is an incontestable fact. Right?

Wrong. Egregiously wrong.

The search for a safe, inexpensive and effective abortifacient drug can be traced to antiquity. All manner of odd and noxious substances have been promoted. In the nineteen seventies the long quest ended with the identification and development of a class of chemicals known as Prostaglandins.

The Prostaglandins are a relatively simple, naturally occurring (in the human body) group of chemicals which have been inexpensively synthesized and widely utilized in the past decade for the purpose of effecting second trimester (late) abortions. They are uniformly effective for this purpose, and have virtually no serious side effects. Recently there are accumulating increasing numbers of reports from the international medical community that the newest generation of these chemicals—when used as vaginal suppositories—have been used on large numbers of women in early pregnancy and are enormously effective for the production of first-trimester (early) abortions. The intravaginal application of three or four of these suppositories over a period of eight hours will result in the induction of a simple, swift and safe abortion at home; perhaps one out of five will be "incomplete" and would require a trip to the local hospital emergency room for completion.

If abortion were to be proscribed tomorrow morning throughout the United States, the unwillingly pregnant women would purchase Prostaglandin suppositories at the local drug store for a few dollars, takem them home and have her abortion in the privacy and comfort of her bathroom. Since Prostaglandins are chemicals ubiquitous in medical practice and used for other purposes than abortion, it is most unlikely that their production could be prohibited. But even it they were banned, they are relatively simple substances and could readily be synthesized by any enterprising high-school chemistry major in his garage. Please don't misunderstand. I am not advocating the use of Prostaglandin for an abortion.

Well, you may ask, if Prostaglandins are so effective and so safe in producing early abortion, why do physicians continue to do abortion by the older, exponentially more hazardous surgical method of suction D and C; why has information regarding Prostaglandins been burked in the media? Simple arithmetics, elementary economics; 1.3 million abortions a year at an average of perhaps $250 per abortion multiplies out to 325 million or so dollars into the pockets of clinic entrepreneurs, physicians, hospitals and ancillary abortion "services". Prostaglandin suppositories on the other hand cost no more than a dollar or so apiece, and require no more medical expertise than the insertion of a tampon into the vagina. Any other questions?

By all means, let us continue the abortion debate. But let us finally retire that rusty old coathanger (knitting needle, catheter or bougie) and acknowledge that technologically obsolete emotional cant has no place in the nineteen eighties.

The destruction of a living being-embryo, defective fetus, neonate—is an act of irretrievable finality. One life is not fungible with another, and the value of each human life transcends ordinary mensuration. To justify the destruction of the fetal life for any reason other than where the mother's own life is at stake is a morally impudent and unacceptable act. Citizens should declare a moratorium on the destruction of life until we have explored unceasingly every feasible alternative and until we more fully comprehend the inexpressible divinity of existence.

Senator EAST. Our next witness is Dr. Naomi Goldstein. She is representing the American Psychiatric Association. Dr. Goldstein is clinical associate professor of psychiatry at New York University Medical School. She practices psychiatry in New York City and is a member of the American Psychiatric Association Joint Commission on Government Relations.

Dr. Goldstein, we welcome you here this afternoon.

## STATEMENT OF NAOMI GOLDSTEIN, M.D., AMERICAN PSYCHIATRIC ASSOCIATION

Dr. GOLDSTEIN. Thank you very much, Mr. Chairman.

I should also like to add to my credentials that I am a mother with three children, including one 21-year-old daughter and one 19-year-old daughter. I think as a woman and as a physician, we all have very strong feelings about this.

The American Psychiatric Association, a medical specialty society representing over 26,000 psychiatrists nationwide, has been requested to testify in order to bring to your attention relevant scientific information regarding the psychiatric sequelae resulting from an unwanted pregnancy and the grave consequences that it may later have in the development of the mother-infant mother-child relationship.

The American Psychiatric Association would like to call your attention to some of the data. Brewer, in the British Medical Journal, states:

> Although most women experience some psychological reactions to terminating a pregnancy, these reactions are generally not as frequent or severe as the psychological effect of continuing an unplanned or unwanted pregnancy.

### CONSEQUENCES OF UNWANTED PREGNANCY

The emotional consequences of unwanted pregnancy on parents and their offspring may lead to long-standing life distress and disability, and the children of unwanted pregnancies are at high risk for abuse, neglect, mental illness, and deprivation of the quality of life for example.

A case-controlled study 9 years after the birth of 220 children born of unwanted pregnancies was conducted in Czechoslovakia,

which in 1957 introduced legislation to provide an abortion upon request of a pregnant woman on the basis of medical or social indications. The 220 children included in the study were born to women who had twice requested an induced abortion for the same pregnancy and were twice refused, indicating that the child was decidedly unwanted. The objective of the study was to assess the health and the psychosocial consequences for a child born of an unwanted pregnancy.

The findings of the study were: One, the mothers of unwanted children, compared with mothers who accepted their pregnancy, despite having the same level of education and socioeconomic background, show less stability in their marital lives, poorer interaction with their husbands, a higher abortion rate before and after the birth of the unwanted child, less involvement in the upbringing of the child, and somewhat poorer interaction with their social environments.

The second finding: The differences between wanted and unwanted children were—

consistent and multiple and tend to support the major hypothesis that the development of children born of unwanted pregnancies would be more problem prone. A child born from an unwanted pregnancy, especially a boy, is more likely to have deficiencies in psychological development and educational achievement than other children his own age, despite equivalent health status at birth.

A recent study at Temple University of Philadelphia has shown that pregnant women who undergo unusual amounts of stress may give birth to infants with physical and behavioral abnormalities that would be lifelong. Abnormalities include low birth weight and associated neurological deficits.

CHILDREN OF UNWANTED PREGNANCIES

Unwanted children have poorer levels of mental health, social adjustment, and educational achievement than a group matched for age, sex, social, and economic status of children who were products of planned pregnancies.

One of the most thorough and often-quoted studies on the outcome of children born after abortion had been refused was conducted by Forssman and Thuwe. They investigated the mental health, social adjustment, and educational level of 120 such children up to the age of 21 years. The unwanted children received more psychiatric care and exhibited more antisocial and criminal behavior than the control groups.

Dr. Thomas Silber, in an article published in Adolescence, states that being a pediatrician he feels great loyalty to the fetus emotionally.

On the other hand, on reviewing 15 years of medical practice, I recall hundreds of unwanted pregnancies by teenage mothers. In one case conference after another, I recognize their children in child-abuse rounds, in dead on arrival cases, in the victims of lead poisoning, in learning disability clinics, in psychiatric clinics, and in juvenile deliquent programs. Too often I have seen what life has done to the teenage mother who enters the "failure syndrome." I also sense deeply an obligation to my adolescent patients and their development as well as that of their future possible children.

A pregnant woman carrying an unwanted pregnancy will experience a high degree of stress which is known to manifest itself in some of the following ways: anxiety, depression, self-destructive

behaviors, lowered self-esteem, feelings of helplessness, and despair about her future. In the absence of legal abortion, there is increased morbidity and mortality in this group due to suicide and medical complications of self-induced and medically incompetently performed abortions. This may impair her capacity to function as a mother, wife, or citizen, and may seriously undermine the stability of the family, as may the unwanted child itself.

### PSYCHOLOGICAL EFFECTS OF THERAPEUTIC ABORTION

Since 1935, numerous studies evaluating the psychological effects of therapeutic abortion have shown that deleterious psychological effects are rare and occur mainly in women with preexisting psychiatric illness.

Systematic followup studies described in the British Journal of Obstetrics and Gynecology have found remarkable few psychiatric sequelae following abortion. When they do occur, they are usually related to longstanding emotional difficulties. When psychological reactions do occur, they frequently relate to feelings of guilt or regret and are short lived.

According to McCance, and others, and Fredman, and others, the factors determining a satisfactory outcome seem to be those conducive to a woman making a decision which she believes to be her own in a context where she is accorded respect and support. The presence of ambivalence, coercion, a medical indication, or concomitant severe psychiatric illiness carry a poorer prognosis.

Another study published in the Journal of Family Practice dealt with 63 women questioned 1 year after a first trimester abortion at an outpatient clinic. Almost without exception 6 months after the abortion, even these women felt their decision had been right for them.

The authors concluded that the opportunity to choose or reject abortion and to play an active role in resolving a personal crisis promoted successful adjustment and maturation, and that termination of pregnancy by abortion did not constitute serious psychological trauma or precipitate emotional conflict for most women.

It may be, according to the Canadian Psychiatric Journal, that earlier reports in the literature claiming that therapeutic abortion is accompanied by psychological disturbances are not in fact based upon the reactions to the unwanted pregnancy itself but to the psychological stresses produced by a disapproving and judgmental social atmosphere.

### CONSEQUENCES OF RAPE

Pregnancy that results from undue coercion, rape, or incest creates greater potential distress or disability in the child and the parents. Rape is now a sufficiently common event that statistically one woman in three is likely to be raped in her lifetime. One study shows that 5 percent of rapes result in pregnancy. In addition to the other factors affecting the unwanted pregnancy, the rape victim has to deal with the profound psychological consequences of having violence inflicted upon the most intimate parts of her body. The consequences are severe and often last for years. The pregnancy itself is felt and known to be by the mother as the seed of that

violence. To force the victim of assault to bear the pregnancy is to further violate her person and to force her to feel the effects of violence.

### EFFECTS OF INCEST

Incest, a sexual activity usually forced upon children by family members and once believed rare and limited to a small segment of society is now known to be prevalent within all economic and social classes. It causes severe psychiatric damage, frequent dissolution of the family, and is all too often perpetuated in multigenerational victim-victim relationship. Pregnancy results when the victim has reached menarche, which can be as young as 10, with pregnancy rates as high as 20 percent. The child victim and the family structure are powerfully disrupted by incest. To force the child to carry the seed of her father, uncle, grandfather, or brother which has been forced upon her violates her psychological and social development. Not only is the child a victim of her family, but the parents are victims of their past, which is sometimes remarkably similar to their child's present. Their life histories, including incestuous relationships, seem to create a defect in their parenting abilities and make them prone to expose their children to similar experience.

### ADOLESCENT PREGNANCY

Despite the decline in the total birth rate in the United States, there has been a dramatic increase in adolescent pregnancy during the past decade. According to recent estimates, 1 out of 10 American women become pregnant during her high school years. Forty percent of 15- to 19-year-olds risk unintended pregnancy; so many teenage pregnancies are unwanted and so many teenagers are unprepared for parenting. This is a very great tragedy.

Teenage pregnancy is a major concern because of the psychologic, social, and economic sequelae of early child bearing. Premature birth, developmental disabilities, perinatal loss, and complications of labor and delivery are more frequent in the young adolescent and appear to be related to poor prenatal care.

Data from New York State for 1974 through 1978 indicate that babies born to teenage mothers are far more likely to die in the first year of life than those born to mothers over age 20. Low birth weight is a major cause of this infant mortality, as well as a host of serious childhood illnesses, birth injuries, and neurological defects including mental retardation.

Maternal mortality also appears to be higher among teenage mothers, especially young adolescent mothers. In 1977 and 1978, the maternal death rate among mothers under age 15 was 18 per 100,000 live births.

In addition, the younger pregnant adolescent is less likely to develop and realize life plans and goals. One-half to two-thirds of females cite pregnancy as the principal reason for leaving school. The most far-reaching consequence of teenage childbearing is the truncation of education among the young parents, and the resulting limitation of opportunities to gain skills needed to compete in society.

Largely because of educational deficits, teenage parents are frequently unable to get decent jobs, and their family incomes tend to be much lower than those earned by other families. These children all too often live and survive at great psychological cost as well as real cost to society.

Living in poverty, lacking education and opportunity, and being brought up in a one-parent home hurts the children of teenage parents, too. Such children are likely to have lower IQ achievement scores than others and are more likely to repeat school grades than other children. When they grow up, they are more likely than others to become teenage parents themselves.

These children born to adolescents face other problems as well. Maternal ambivalence or rejection has long been acknowledged as a major contributing element in the development of psychological and physical illness. Furthermore, recent studies suggest that there is a higher incidence of child abuse by teenagers than by older mothers.

Thus, the health, social, and economic consequences of teenage pregnancy are almost all adverse. Pregnancies that end in abortion or miscarriage are at the least upsetting and sometimes traumatic to the pregnant women. Those pregnancies that result in births, however, most of which are unintended, have the most obvious negative consequences and are of the most concern.

### ABORTION AS A POSITIVE MEASURE

Abortion itself often brings immediate relief to a distressed woman, and, second, it prevents the birth of an unplanned and often unwanted child.

Lebershohn, in an article in "Psychiatry" in 1973, maintained that legal abortion is a positive measure, not only for the relief of anxiety and despair of the unwilling mother, but also as an effective mental health measure to avert the consequences of a feeling of unwantedness in the children and the rest of the family.

The psychiatric profession is concerned with the quality of life, and, as such, with the effect of unwantedness on an infant. The well-controlled studies of Forssman and Thuwe bear evidence of the sequelae of unwantedness. I quote: "The population explosion already threatens the quality of life. On the individual level, the forced arrival of an unwanted, unloved child creates grave consequences for the unwanted child, the unloving mother, the fragmented family, and ultimately society itself."

Some opponents of abortion seem to suggest that women who chose abortion have been morally irresponsible, sexually promiscuous, and selfishly uncaring. However, our clinical experience does not support these covert assumptions.

Based on the past clinical experience, and we have a great deal of clinical experience that is really quite vast, and based on scientific evidence of which we have presented only a sample, the American Psychiatric Association strongly opposes the human life amendment and reaffirms its position to oppose all constitutional amendments, legislation, and regulations curtailing family planning and abortion services to any segment of the population.

OFFICIAL APA POSITION

It reaffirms its position that abortion is a medical procedure in which physicians should respect the patient's right to freedom of choice, calling on psychiatrists as consultants to the patient or physician in those cases in which the patient or physician requests such consultation to expand mutual appreciation of motivation and consequences.

Lastly, it affirms that the freedom to act to interrupt pregnancy must be considered a mental health imperative with major social and mental health implications.

We appreciate the opportunity to participate in these hearings and are sure that you will share our findings with other members of the committee. Later on, we would be pleased to answer any questions that you may have.

Senator EAST. Thank you, Dr. Goldstein. We appreciate your contribution.

[The prepared statement of Dr. Goldstein and American Psychiatric Association position statement follow:]

PREPARED STATEMENT OF DR. NAOMI GOLDSTEIN

GOOD MORNING, MR CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE. I AM NAOMI GOLDSTEIN, M.D., CLINICAL ASSOCIATE PROFESSOR OF PSYCHIATRY AT NEW YORK UNIVERSITY MEDICAL SCHOOL, I AM IN PRIVATE PRACTICE OF PSYCHIATRY IN NEW YORK CITY AND A MEMBER OF THE AMERICAN PSYCHIATRIC ASSOCIATION JOINT COMMISSION ON GOVERNMENT RELATIONS.

THE AMERICAN PSYCHIATRIC ASSOCIATION, A MEDICAL SPECIALTY SOCIETY REPRESENTING OVER 26,000 PSYCHIATRISTS NATIONWIDE, HAS REQUESTED TO TESTIFY IN ORDER TO BRING TO YOUR ATTENTION THE RELEVANT SCIENTIFIC INFORMATION REGARDING PSYCHIATRIC SEQUELAE RESULTING FROM AN UNWANTED PREGNANCY AND THE GRAVE CONSEQUENCES THAT IT MAY LATER HAVE IN THE DEVELOPMENT OF THE MOTHER-INFANT RELATIONSHIP. BREWER IN THE BRITISH MEDICAL JOURNAL STATES, "ALTHOUGH MOST WOMEN EXPERIENCE SOME PSYCHOLOGICAL REACTIONS TO TERMINATING A PREGNANCY, THESE REACTIONS ARE GENERALLY NOT AS FREQUENT OR SEVERE AS THE PSYCHOLOGIC EFFECTS OF CONTINUING AN UNPLANNED OR UNWANTED PREGNANCY."[1]

THE EMOTIONAL CONSEQUENCES OF UNWANTED PREGNANCY ON PARENTS AND THEIR OFFSPRING MAY LEAD TO LONG-STANDING LIFE DISTRESS AND DISABILITY, AND THE CHILDREN OF UNWANTED PREGNANCIES ARE AT HIGH RISK FOR ABUSE, NEGLECT, MENTAL ILLNESS AND DEPRIVATION OF THE QUALITY OF LIFE:

-- A CASE-CONTROLLED STUDY NINE YEARS AFTER THE BIRTH OF 220 CHILDREN BORN OF UNWANTED PREGNANCIES WAS CONDUCTED IN CZECHOSLAVAKIA, WHICH IN 1957 INTRODUCED LEGISLATION TO PROVIDE AN ABORTION UPON REQUEST OF A PREGNANT WOMAN ON THE BASIS OF MEDICAL OR SOCIAL INDICATIONS. THE 220 CHILDREN INCLUDED IN THE STUDY WERE BORN TO WOMEN WHO HAD TWICE REQUESTED AN INDUCED ABORTION FOR THE SAME PREGNANCY AND WERE TWICE REFUSED, INDICATING THAT THE CHILD WAS DECIDEDLY "UNWANTED". THE OBJECTIVE OF THE STUDY WAS TO ASSESS THE HEALTH AND PSYCHOSOCIAL CONSEQUENCES FOR A CHILD BORN OF AN UNWANTED PREGNANCY. THE FINDINGS OF THE STUDY WERE (1) THE MOTHERS OF UNWANTED CHILDREN, COMPARED WITH MOTHERS WHO ACCEPTED THEIR PREGNANCY, DESPITE HAVING THE SAME LEVEL OF EDUCATION AND SOCIO-ECONOMIC BACKGROUND, SHOW LESS STABILITY IN THEIR MARITAL LIVES, POORER INTERACTION WITH THEIR HUSBANDS, A HIGHER ABORTION RATE BEFORE AND AFTER THE BIRTH OF THE UNWANTED CHILD, LESS INVOLVEMENT IN THE UPBRINGING OF THE CHILD, AND SOMEWHAT POORER INTERACTION WITH THEIR SOCIAL ENVIRONMENTS." AND (2) THE DIFFERENCES BETWEEN WANTED AND UNWANTED CHILDREN WERE "CONSISTENT AND MULTIPLE AND TEND TO SUPPORT THE MAJOR HYPOTHESIS THAT THE DEVELOPMENT OF CHILDREN BORN OF UNWANTED PREGNANCIES WOULD BE MORE PROBLEM PRONE. A CHILD BORN FROM AN UNWANTED PREGNANCY, ESPECIALLY A BOY, IS MORE LIKELY TO HAVE DEFICIENCIES IN PSYCHOLOGICAL DEVELOPMENT AND EDUCATIONAL ACHIEVEMENT THAN OTHER CHILDREN HIS OWN AGE, DESPITE EQUIVALENT HEALTH STATUS AT BIRTH."[2]

-- A RECENT STUDY AT TEMPLE UNIVERSITY OF PHILADELPHIA HAS SHOWN THAT PREGNANT WOMEN WHO UNDERGO UNUSUAL AMOUNTS OF STRESS MAY

NOTE.--Footnotes appear at end of prepared statement.

GIVE BIRTH TO INFANTS WITH PHYSICAL AND BEHAVIORAL ABNORMALITIES THAT WILL BE LIFE LONG. ABNORMALITIES INCLUDE LOW BIRTH WEIGHT AND ASSOCIATED NEUROLOGICAL DEFICITS. UNWANTED CHILDREN HAVE POORER LEVELS OF MENTAL HEALTH, SOCIAL ADJUSTMENT AND EDUCATIONAL ACHIEVEMENT THAN A GROUP MATCHED FOR AGE, SEX, SOCIAL AND ECONOMIC STATUS OF CHILDREN WHO WERE PRODUCTS OF PLANNED PREGNANCIES.[3]

-- ONE OF THE MOST THOROUGH AND OFTEN-QUOTED STUDIES ON THE OUTCOME OF CHILDREN BORN -- AFTER ABORTION HAD BEEN REFUSED -- WAS CONDUCTED BY FORSSMAN AND THUWE. THEY INVESTIGATED THE MENTAL HEALTH, SOCIAL ADJUSTMENT AND EDUCATIONAL LEVEL OF 120 SUCH CHILDREN UP TO THE AGE OF 21 YEARS. THE UNWANTED CHILDREN RECEIVED MORE PSYCHIATRIC CARE, AND EXHIBITED MORE ANTISOCIAL AND CRIMINAL BEHAVIOR THAN THE CONTROL GROUPS.[4]

-- THE BATTERED BABY SYNDROME IS SOMETIMES QUOTED AS AN OUTCOME OF REFUSED ABORTION. THE LANE COMMISSION[5] STATED THAT, "WE KNOW OF SEVERAL CASES WHERE THE MOTHER OF A 'BATTERED BABY' HAD TRIED AND FAILED TO OBTAIN AN ABORTION, BUT WE DO NOT KNOW THE PROPORTION WHICH SUCH MOTHERS BEAR TO THE WHOLE NUMBER OF MOTHERS OF THESE UNFORTUNATE CHILDREN."[6]

-- DR. THOMAS SILBER IN AN ARTICLE PUBLISHED IN ADOLESCENCE[7] STATES: "THAT BEING A PEDIATRICIAN HE FEELS GREAT LOYALTY TO THE FETUS EMOTIONALLY, ON THE OTHER HAND ON REVIEWING FIFTEEN YEARS OF MEDICAL PRACTICE, I RECALL HUNDREDS OF UNWANTED PREGNANCIES BY TEENAGE MOTHERS. IN ONE CASE CONFERENCE AFTER ANOTHER I RECOGNIZE THEIR CHILDREN IN CHILD ABUSE ROUNDS, IN D.O.A. CASES, IN THE VICTIMS OF LEAD POISONING, IN LEARNING DISABILITY CLINICS, IN PSYCHIATRIC CLINICS, AND IN JUVENILE DELIQUENT PROGRAMS. TOO OFTEN I HAVE SEEN WHAT LIFE HAS DONE TO THE TEENAGE MOTHER WHO ENTERS THE 'FAILURE SYNDROME'. I ALSO SENSE DEEPLY AN OBLIGATION TOWARD MY ADOLESCENT PATIENTS AND THEIR DEVELOPMENT AS WELL AS THAT OF THEIR FUTURE 'POSSIBLE CHILDREN'."

-- AMONG 8000 WOMEN STUDIED AT KAISER IN SAN FRANCISCO IN 1980, THE WOMEN WHOSE PREGNANCIES WERE UNPLANNED DEMONSTRATED A HIGHER INCIDENCE OF TOXEMIA, HEMMORRHAGE AND INFECTION AS WELL AS DEATH AND CONGENITAL ABNORMALITIES IN THE NEWBORN INFANT.[8]

A PREGNANT WOMEN CARRYING AN UNWANTED PREGNANCY WILL EXPERIENCE A HIGH DEGREE OF STRESS WHICH IS KNOWN TO MANIFEST ITSELF IN SOME OF THE FOLLOWING WAYS: ANXIETY, DEPRESSION, SELF-DESTRUCTIVE BEHAVIORS, LOWERED SELF ESTEEM, FEELINGS OF HELPLESSNESS AND DESPAIR ABOUT HER FUTURE. IN THE ABSENCE OF LEGAL ABORTION THERE IS INCREASED MORBIDITY AND MORTALITY IN THIS GROUP DUE TO SUICIDE AND MEDICAL COMPLICATIONS OF SELF-INDUCED AND MEDICALLY INCOMPETENTLY-PERFORMED ABORTIONS. THIS MAY IMPAIR HER CAPACITY TO FUNCTION AS A MOTHER, WIFE OR CITIZEN, AND MAY SERIOUSLY UNDERMINE THE STABILITY OF THE FAMILY.

SINCE 1935 NUMEROUS STUDIES EVALUATING THE PSYCHOLOGICAL EFFECTS OF THERAPEUTIC ABORTION HAVE SHOWN THAT DELETERIOUS PSYCHOLOGICAL EFFECTS ARE RARE AND OCCUR MAINLY IN WOMEN WITH PRE-EXISTING PSYCHIATRIC ILLNESS.

-- Systematic follow up studies described in the British Journal of Obstetrics and Gynecology have found remarkably few serious psychiatric sequelae following abortion and when they do occur they are usually related to long standing emotional difficulties. When psychological reactions do occur they usually relate to feelings of guilt or regret and are shortlived. According to McCance et al and Fredman et al the factors determining a satisfactory outcome seem to be those conducive to a woman making a decision which she believes to be her own in a context where she is accorded respect and support. Teh presence of ambivalence, coercion, a medical indication or concomitant severe psychiatric illness carry a poorer prognosis.[9]

-- A study published in the Journal of Family Practice dealt with 63 women questioned one year after a first trimester aboriton at an outpatient clinic, almost withour exception, six months after the abortion even these women felt their decision had been right for them. The authors concluded that the opportunity to choose or reject abortion and to play an active role in resolving a personal crisis promoted successful adjustment and maturation and that termination of pregnancy by abortion did not constitute serious psychologcial trauma or precipitate emotional conflict for most women.[10]

-- It may be, the Canadian Psychiatric Journal concludes, that earlier reports in the literature claiming that therapeutic abortion is accompanied by psychological disturbances are not in fact based upon the reactions to the unwanted pregnancy itself but to the psychological stresses produced by a disapproving and judgemental social atmosphere.[11]

-- A study comparing the emotional status of 100 women applying for therapeutic abortions during 1967/68 to 100 women applicants in 1975 showed in the Minnesota Multiphasic Personality Inventory a "significant reduction in psychopathology amongst the more recent applicants."[12] The differences remained constant when differences in age, marital status were controlled. "These results are interpreted as suggesting that the generally more liberal social apmosphere surrounding present day abortions is reducing psychological stress among women undergoing this procedure.[13]

Pregnancy that results from undue coercion, rape, or incest creates greater potential distress or disability in the child and the parents. Rape is now a sufficiently common event that statistically one women in three is likely to be raped in her lifetime. One study shows five percent of rapes resulting in pregnancy. In addition to the other factors affecting an unwanted pregnancy, the rape victim has to deal with the profound psychological consequences of having violence inflicted upon the intimate parts of her body. The consequences are severe and often last for years. The pregnancy is felt and known to be by the mother as the seed of that violence. To force the victim of assault to bear the pregnancy is to further violate her person and force her to feel the effects of violence.

In a study done by Nadelson, Zackson and Gornick,[14] on 'The Long

TERM IMPACT OF RAPE', FORTY-ONE RAPE VICTIMS WERE INTERVIEWED FIFTEEN TO THIRTY MONTHS POST RAPE. TERROR OF THE INCIDENT, FEARS ACQUIRED SINCE THE ATTACK AND SUSPICIOUSNESS REMAINED THE OURSTANDING FEELINGS. MORE THAN HALF OF THE VICTIMS WITH NO HISTORY OF PREVIOUS MENTAL ILLNESS OR EMOTIONAL DISTURBANCE STATED THAT THEY CONTINUED TO BE DEPRESSSED.

INCEST, A SEXUAL ACTIVITY USUALLY FORCED UPON CHILDREN BY FAMILY MEMBERS, AND ONCE BELIEVED RARE AND LIMITED TO A SMALL SEGMENT OF SOCIETY, IS NOW KNOWN TO BE PREVALENT WITHIN ALL ECONOMIC AND SOCIAL CLASSES CAUSING SEVERE PSYCHIATRIC DAMAGE, OFTEN FAMILY DISSOLUTION AND TO BE PERPETUATED IN A MULTI-GENERATIONAL VICTIM-VICTIM RELATIONSHIP. PREGNANCY RESULTS WHEN THE VICTIM HAS REACHED MENARCHE WHICH CAN BE AS YOUNG AS TEN, WITH PREGNANCY RATES AS HIGH AS TWENTY PERCENT. THE CHILD VICTIM AND THE FAMILY STRUCTURE ARE POWERFULLY DISRUPTED BY INCEST. TO FORCE THE CHILD TO CARRY THE SEED OF HER FATHER, UNCLE, GRANDFATHER OR BROTHER, WHICH HAS BEEN FORCED UPON HER VIOLATES HER PSYCHOLOGICAL AND SOCIAL DEVELOPMENT. NOT ONLY THE CHILD A VICTIM OF HER FAMILY, BUT THE PARENTS ARE VICTIMS OF THEIR PAST, WHICH IS SOMETIMES REMARKABLY SIMILAR TO THEIR CHILD'S PRESENT. THEIR LIFE HISTORIES, INCLUDING INCESTUOUS RELATIONSHIPS SEEM TO CREATE A DEFECT IN THEIR PARENTING ABILITIES AND MAKE THEM PRONE TO EXPOSE THEIR CHILDREN TO SIMILAR EXPERIENCE. THUS, ENDOGAMIC INCEST SEEMS TO BE A MULTI-GENERATIONAL VICTIM-VICTIM RELATIONSHIP.[15]

DESPITE THE DECLINE IN THE TOTAL BIRTH RATE IN THE UNITED STATES, THERE HAS BEEN A DRAMATIC INCREASE IN ADOLESCENT PREGNANCY DURING THE PAST DECADE. ACCORDING TO RECENT ESTIMATES, 1 OUT OF 10 AMERICAN WOMEN BECOMES PREGNANT DURING HER HIGH SCHOOL YEARS, AND 40% OF 15 TO 19 YEAR OLDS RISK UNINTENDED PREGNANCY.[16] TEENAGE PREGNANCY IS A MAJOR CONCERN BECAUSE OF THE PSYCHOLOGIC, SOCIAL AND ECONOMIC SEQUELAE OF EARLY CHILDBEARING. FREMATURE BIRTH, PERINATAL LOSS, AND COMPLICATIONS OF LABOR AND DELIVERY ARE MORE FREQUENT IN THE YOUNG ADOLESCENT AND APPEAR TO BE RELATED TO POOR PRENATAL CARE. DATA FROM NEW YORK STATE FOR 1974-1978 INDICATE THAT BABIES BORN TO TEENAGE MOTHERS ARE FAR MORE LIKELY TO DIE IN THE FIRST YEAR OF LIFE THAN THOSE BORN TO MOTHERS OVER AGE 20.[17] LOW BIRTH WEIGHT IS A MAJOR CAUSE OF INFANT MORTALITY, AS WELL AS A HOST OF SERIOUS CHILDHOOD ILLNESSES, BIRTH INJURIES AND NEUROLOGICAL DEFECTS, INCLUDING MENTAL RETARDATION.[18] MATERNAL MORTALITY ALSO APPEARS TO BE HIGHER AMONG TEENAGE MOTHERS, ESPECIALLY YOUNG ADOLESCENT MOTHERS; IN 1977-78, THE MATERNAL DEATH RATE AMONG MOTHERS UNDER AGE 15 WAS 18 PER 100,000 LIVE BIRTHS.[19] IN ADDITION, THE YOUNGER PREGNANT ADOLESCENT IS LESS LIKELY TO DEVELOP AND REALIZE LIFE PLANS AND GOALS; ONE HALF TO TWO THIRDS OF FEMALES CITE PREGNANCY AS THE PRINCIPAL REASON FOR LEAVING SCHOOL. THE MOST FAR-REACHING CONSEQUENCE OF TEENAGE CHILDBEARING IS THE TRUNCATION OF EDUCATION AMONG THE YOUNG PARENTS, AND THE RESULTING LIMITATION OF OPPORTUNITIES TO GAIN SKILLS NEEDED TO COMPETE IN SOCIETY. LARGELY BECAUSE OF EDUCATIONAL DEFICITS, TEENAGE PARENTS ARE FREQUENTLY UNABLE TO GET DECENT JOBS, AND THEIR FAMILY INCOMES TEND TO BE MUCH LOWER THAN THOSE EARNED BY OTHER FAMILIES. LIVING IN POVERTY, LACKING EDUCATION AND OPPORTUNITY AND BEING BROUGHT UP IN A ONE-PARENT HOME

HURTS THE CHILDREN OF TEENAGE PARENTS, TOO. SUCH CHILDREN ARE LIKELY TO HAVE LOWER IQ ACHIEVEMENT SCORES THAN OTHERS, AND ARE MORE LIKELY TO REPEAT SCHOOL GRADES THAN OTHER CHILDREN. WHEN THEY GROW UP, THEY ARE MORE LIKELY THAN OTHERS TO BECOME TEENAGE PARENTS THEMSELVES.[20] THESE CHILDREN BORN TO ADOLESCENTS FACE OTHER PROBLEMS AS WELL. MATERNAL AMBIVALENCE OR REJECTION HAS LONG BEEN ACKNOWLEDGED AS A MAJOR CONTRIBUTING ELEMENT IN THE DEVELOPMENT OF PSYCHOLOGIC AND PHYSICAL ILLNESS; AND FURTHERMORE, RECENT STUDIES SUGGEST THAT THERE IS A HIGHER INCIDENCE OF CHILD ABUSE BY TEENAGERS THAN BY OLDER MOTHERS.

THUS, THE HEALTH SOCIAL AND ECONOMIC CONSEQUENCES OF TEENAGE PREGNANCY ARE ALMOST ALL ADVERSE. PREGNANCIES THAT END IN ABORTION OR MISCARRIAGE ARE AT THE LEAST, UPSETTING AND SOMETIMES TRAUMATIC TO THE PREGNANT WOMEN. THOSE PREGNANCIES THAT RESULT IN BIRTHS, HOWEVER, MOST OF WHICH ARE UNINTENDED -- HAVE THE MOST OBVIOUS NEGATIVE CONSEQUENCES AND ARE OF THE MOST CONCERN.

-- AN ARTICLE APPEARING IN A SOUTH AFRICAN PERIODICAL[21] REVIEWED LITERATURE COVERING THERAPEUTIC ABORTION ON PSYHCIATRIC GROUNDS, INCLUDING STUDIES OF WOMEN GRANTED TERMINATION AS WELL AS THOSE REFUSED. IN ADDITION, THE ARTICLE ALSO CONSIDERED RELATED AREAS SUCH AS THE LONG TERM EFFECT ON CHILDREN BORN AFTER THE REFUSAL OF TERMINATION. IN IT WAS DISCUSSED FINDINGS OF THE LANE COMMISSION IN 1974[22] WHICH MADE THE FOLLOWING GENERALIZATIONS ABOUT PSYCHIATIRC SEQUELAE (1) THERAPEUTIC ABORTION HAS LITTLE INFLUENCE, FOR GOOD OR ILL UPON THE COURSE OF AN EXISTING SERIOUS MENTAL ILLNESS (2) IN THOSE WHO ARE TEMPORARILY UNSTABLE, CONTINUATION OF AN UNWANTED PREGNANCY IS MORE LIKELY TO HAVE ADVERSE EFFECTS THAN A THERAPEUTIC ABORTION AND (3) TO THOSE DISTRESSED BY AN UNWANTED PREGNANCY (SUFFERING FROM 'REACTIVE DEPRESSION') ABORTION USUALLY BRINGS QUICK, SUBSTANTIAL AND LASTING RELIEF.

ABORTION ITSELF OFTEN BRINGS IMMEDIATE RELIEF TO A DISTRESSED WOMAN, AND SECONDLY, IT PREVENTS THE BIRTH OF AN UNPLANNED AND OFTEN UNWANTED CHILD. LEBERSHOHN IN PSYCHIATRY, 1973[23] MAINTAINED THAT LEGAL ABORTION IS A POSITIVE MEASURE, NOT ONLY FOR THE RELIEF OF ANXIETY AND DESPAIR OF THE UNWILLING MOTHER, BUT ALSO AS AN EFFECTIVE MENTAL HEALTH MEASURE TO AVERT THE CONSEQUENCES OF A FEELING OF UNWANTEDNESS IN THE CHILDREN AND THE REST OF THE FAMILY.

THE PSYCHIATRIC PROFESSION IS CONCERNED WITH THE QULAITY OF LIFE AND AS SUCH WITH THE EFFECT OF UNWANTEDNESS ON AN INFANT. THE WELL CONTROLLED STUDIES OF FORSSMAN AND THUWE BEAR EVIDENCE OF THE SEQUELAE OF UNWANTEDNESS. "THE POPULATION EXPLOSION ALREADY THREATENS THE QUALITY OF LIFE. ON THE INDIVIDUAL LEVEL THE FORCED ARRIVAL OF AN UNWANTED, UNLOVED CHILD, CREATES GRAVE CONSEQUENCES FOR THE UNWANTED CHILD, THE UNLOVING MOTHER, THE FRAGMENTED FAMILY AND ULTIMATELY SOCIETY ITSELF."[24] SOME OPPONENTS OF ABORTION SEEM TO SUGGEST THAT WOMEN WHO CHOSE ABORTION HAVE BEEN MORALLY IRRESPONSILBE, SEXUALLY PROMISCUOUS AND SELFISHLY UNCARING. OUR CLINICAL EXPERIENCE DOES NOT SUPPORT THESE COVERT ASSUMPTIONS.

BECAUSE OF THE ENUMERATED SCIENTIFIC EVIDENCE, THE AMERICAN PSYCHIATRIC ASSOCIATION STRONGLY OPPOSES THE "HUMAN LIFE AMENDMENT" AND REAFFIRMS IT POSITION TO: (1) OPPOSE ALL CONSTITUTIONAL AMENDMENTS,

LEGISLATION, AND REGULATIONS CURTAILING FAMILY PLANNING AND ABORTION SERVICES TO ANY SEGMENT OF THE POPULATION; (2)REAFFIRMS ITS POSITION THAT ABORTION IS A MEDICAL PROCEDURE IN WHICH PHYSICIANS SHOULD RESPECT THE PATIENT'S RIGHT TO FREEDOM OF CHOICE -- PSYCHIATRISTS MAY BE CALLED ON AS CONSULTANTS TO THE PATIENT OR PHYSICIAN IN THOSE CASES IN WHICH THE PATIENT OR PSYSICIAN REQUESTS SUCH CONSULTATION TO EXPAND MUTUAL APPRECIATION OF MOTIVATION AND CONSEQUENCES; AND (3)AFFIRMS THAT THE FREEDOM TO ACT TO INTERRUPT PREGNANCY MUST BE CONSIDERED A MENTAL HEALTH IMPERATIVE WITH MAJOR SOCIAL AND MENTAL HEALTH IMPLICATIONS.

WE APPRECIATE HAVING THE OPPORTUNITY TO TESTIFY HERE TODAY AND WOULD BE HAPPY TO ANSWER ANY QUESTIONS YOU MAY HAVE.

## FOOTNOTES


1. CATES, WILLARD, JR, M.P.H., GOLD, JULIAN, M.D., AND SELIK, RICHARD, M.D. "REGULATION OF ABORTION SERVICES - FOR BETTER OR WORSE?" THE NEW ENGLAND JOURNAL OF MEDICINE, SEPTEMBER 27, 1979, VOL.301, NO.13, PP. 720-723
2. MATIJCIK, Z., DYTRYCH, Z. AND SCHULLER, V. "CHILDREN FROM UNWNATED FREGNANCIES." ACTA FSYCHIATRICA SCANDINAVIA, 1978, VOL. 57, PP.67-90
3. HERRENKOHL, LORRAINE, PH.D., TEMPLE UNIVERSITY, PHILADELPHIA PA, SYMPOSIUM ON BIOLOGY OF ANXIETY, AT TEXAS RESEARCH INSTITUTE OF MENTAL SCIENCES, MARCH, 1981.
4. DROWER, SANDRA J. AND NASH, ELEANOR S. "THERAPEUTIC ABORTION ON PSYCHIATRIC GROUNDS, FART 1. A LOCAL STUDY" SOUTH AFRICA MEDICAL JOURNAL, OCTOBER 7, 1978, VOL. 54, NO.604, PP. 604-608
5. COMMITTEE ON THE WORKING OF THE ABORTION ACT (1974): REPORT, VOL.I PP. 53, LONDON: HMSO
6. DROWER AND NASH, OP.CIT., PP. 604-608
7. SILBER, THOMAS, M.D., M.A.S.S. "ABORTION IN ADOLESCENCE: THE ETHICAL DIMENSION.", ADOLESCENCE, SUMMER 1980, VOL. 15, NO. 58, PP. 461-474
8. KAISER FOUNDATION HEALTH PLAN STUDY, SAN FRANCISCO, CALIFORNIA.
9. ASHTON, J.R., SENIOR LECTURER. "THE PSYCHOSCOIAL OUTCOME OF INDUCED ABORTION." BRITISH JOURNAL OF OBSTETRICS AND GYNAECOLOGY, DECEMBER 1980, VOL. 87, PP. 1115-1122.
10. ABRAMS, MARILYN, M.A., DIBIASE, VILMA, M.S.W., AND STURGIA, SOMERS,M.D. "POST-ABORTION ATTITUDES AND FATTERNS OF BIRTH CONTROL" THE JOURNAL OF FAMILY PRACTICE, 1979, VOL. 9, NO.4, PP. 593-599.
11. MEIKLE, STEWART, PH.D., ROBINSON, CAROL, R.N. AND BRODY, HARRY, M.D. "RECENT CHANGES IN THE EMOTIONAL REACTIONS OF THERAPEUTIC ABORTION APPLICANTS." CANADIAN PSYCHIATRIC ASSOCIATION, MARCH 1977, VOL. 22, PP. 67-70.
12. IBID, PP.67-70
13. IBID PP. 69


(Continued)

FOOTNOTES CONTINUED

14. NADELSON, CAROL C., M.D., NOTMAN, MALKAH T., M.D., ZACKSON, HANNAH, M.D., GORNICK, JANET, B.A. "THE LONG-TERM IMPACT OF RAPE; A FOLLOW-UP STUDY." PRESENTED AT THE SIXTH ANNUAL MEETING OF THE SOCIETY FOR SEX THERAPY AND RESEARCH, HARVARD SCIENCE CENTER, CAMBRIDGE, MA.

15. NADELSON, CAROL C. M.D., ROSENFELD, ALVIN A. M.D. "SEXUAL MISUSE OF OF CHILDREN" CHILD PSYCHIATRY AND THE LAW, 1980, PP.98

16. NADELSON, CAROL C., NOTMAN, MALKAH T., M.D., GILLON, JEAN W., B.A. "SEXUAL KNOWLEDGE AND ATTITUDES OF ADOLESCENTS: RELATIONSHIP TO CONTRACEPTIVE USE." OBSTETRICS AND GYNECOLOGY, VOL.55, NO. 3, MARCH 1980, PP. 340

17. IBID, PP.340

18. THE ALAN GUTTMACHER INSTITUTE. TEENAGE PREGNANCY: THE PROBLEM THAT HASN'T GONE AWAY.. 1981.PP28-29

19. IBID, PP.28-29

20. IBID, PP28-29

21. DROWER AND NASH, OP.CIT., PP.643-647

22. IBID, PP.643-647

23. IBID, PP.643-647

24. IBID, PP.643-647

Am J Psychiatry 136:2, February 1979

OFFICIAL ACTIONS

# Position Statement on Abortion

*This statement was approved by the Assembly of District Branches at its October 15, 1978, meeting and by the Board of Trustees at its December 10, 1977, meeting. This final draft was drawn up by a subcommittee[1] appointed by the Reference Committee to collate an Area I Action Paper and information provided by the Committee on Women, the Council on National Affairs, the Council on Children, Adolescents, and Their Families, and the American Academy of Child Psychiatry.*

THE EMOTIONAL CONSEQUENCES of unwanted pregnancy on parents and their offspring may lead to long-standing life distress and disability, and the children of unwanted pregnancies are at high risk for abuse, neglect, mental illness, and deprivation of the quality of life. Pregnancy that results from undue coercion, rape, or incest creates even greater mental distress or disability in the child and the parents. The adolescent most vulnerable to early pregnancy is the product of adverse sociocultural conditions involving poverty, discrimination, and family disorganization, and statistics indicate that the resulting pregnancy is laden with medical complications which threaten the well-being of mother and fetus. The delivery that ensues from teenage pregnancy is prone to prematurity and major threats to the health of mother and child, and the resulting newborns have a higher percentage of birth defects, developmental difficulties, and a poorer life and health expectancy than the average for our society. Such children are often not released for adoption and thus get caught in the web of foster care and welfare systems, possibly entering lifetimes of dependency and costly social interventions. The tendency of this pattern to pass from generation to generation is very marked and thus serves to perpetuate a cycle of social and educational failure, mental and physical illness, and serious delinquency.

Because of these considerations, and in the interest of public welfare, the American Psychiatric Association 1) opposes all constitutional amendments, legislation, and regulations curtailing family planning and abortion services to any segment of the population; 2) reaffirms its position that abortion is a medical procedure in which physicians should respect the patient's right to freedom of choice—psychiatrists may be called on as consultants to the patient or physician in those cases in which the patient or physician requests such consultation to expand mutual appreciation of motivation and consequences; and 3) affirms that the freedom to act to interrupt pregnancy must be considered a mental health imperative with major social and mental health implications.

May 1981, Assembly reaffirmed along with the following resolution:
"The Assembly of the APA is deeply concerned about current legislative attempts to erode access to abortion and family planning. Since the health and mental health consequences of such erosion would be devastating, we reaffirm our 1978 position statement, which opposes any regulation curtailing family planning and abortion services to any segment of the population. We direct our legislative network to give high priority to work in this area in appropriate ways."

For consideration by the Board in June 1981

[1]The subcommittee included Edward H. Futterman, M.D., chairperson of the Council on Children, Adolescents, and Their Families; James M. Stubblebine, M.D., chairperson of the Council on Mental Health Services; Harold M. Visotsky, M.D., chairperson of the Council on National Affairs (1975–1978); Jeanne Spurlock, M.D., staff liaison; and Jay Cutler, staff legal counsel.

Senator EAST. We now have Dr. John Willke, who is representing the National Right to Life Committee of which he is president. He is certified in the specialty of family practice and is also a certified sex educator and counselor. He has published several books on the subject of human sexuality.

Dr. Willke, we welcome you this afternoon.

## STATEMENT OF JOHN C. WILLKE, M.D., NATIONAL RIGHT TO LIFE COMMITTEE, WASHINGTON, D.C.

Dr. WILLKE. Thank you, Senator East.

My paper will be something of a summary of many of the high-points that have been touched on. I would be pleased to respond to details in questioning.

The central issue of the entire abortion question is the answer to the question: Is this human life? If that answer is yes, then the only other question is: Should all human life be protected equally, or should our Nation continue, in its law, fatal discrimination against an entire class of living Americans?

We believe the answer to the first question is yes. The second question clearly speaks to basic civil rights. If this is answered in the continuous tradition of our Nation, then all other considerations used to justify abortion become moot, except where the very life of the mother hangs in balance.

Human life: when? As you yourself have so clearly said, Senator East, in an earlier hearing, that question must be answered. If a Nation-State exists for only one reason, it exists to protect the lives of its citizens. However, when does that human life exist? That question must be answered.

The confusion that has arisen before this committee is that various testimony has used different yardsticks with which to measure human life. Let us look.

First, there is a religious faith yardstick, a religious faith belief. That is a valid yardstick. It speaks of God, of creation of a soul, and it dates human life or a theological measurement of personhood from that time.

However, such is a belief. Such cannot be scientifically proven. Each of us has the right to hold different beliefs, and many do. Most importantly, no State should impose a religious faith belief on its citizens. Therefore, a theologic yardstick cannot be used.

Second is measurement by philosophic theories. Human life can be defined using a wide variety of philosophic theories and beliefs. These commonly use social or psychologic rationale and often involve medical or biologic mileposts.

Examples of philosophic definitions of when human life begins include when there is consciousness, when there is movement, when there is brain function or a heartbeat, when viable, at birth, when wanted, when there has been an exchange of love, when humanized, when personhood exists—however that is defined—if mentally or physically normal, and the list goes on.

While such ways of measuring human life are arrived at through a certain reasoning process, such ways of measuring human life remain theories and beliefs, none of which can be scientifically proven. Quite obviously, people of good will differ completely on the validity of such theories.

84-581 O—81——68

It should be obvious to an unbiased observer that no nation should impose philosophic beliefs and theories upon its citizens by law.

Third is biologic measurement. This was well-spoken to in the first day of these hearings. Simply stated, and not to recap, there is only one embryology book studied in medical school. There are no differences as to what is human life when we use a scientific or biologic yardstick.

By this dimension, human life, in its totality, exists from fertilization and is continuous until death. This is alive? Yes, this being is not dead. This is human? Yes, this being has 46 human chromosomes. It is not a rabbit. This being is growing, self-controlled, sexed, male or female from the start, totally contained in that single cell and completely unique. In truth, each of us did not come from a single cell. Rather, each of us once were a single cell. All we have done since then has been to grow up.

Granting that our Nation demands a definition of human life, which discipline should we use to measure that reality? A religious one? No. A philosophic one? No. A scientific one? The answer should be obvious.

The only measuring stick that everyone can agree upon in a pluralistic society that can be scientifically proven, is the scientific biologic one. It simply says, without challenge, that human life in its totality exists at fertilization.

I turn then to the second question, which clearly speaks of civil rights. At its base, that is what abortion is all about, discrimination against an entire class of living humans, very tiny ones.

We have seen discrimination to our sorrow when race was a cause. The Holocaust haunts us and will forever. In our own Nation, we fought a war to eliminate discrimination on the basis of skin color. The parallels here are striking.

In 1857, by a 7 to 2 vote, the U.S. Supreme Court, in *Dred Scott* v. *Sanford,* ruled that black humans were not legal persons, that they were the property of the owner who could buy, sell, or kill. Abolitionists protested. They were told, if they had moral problems with owning slaves, they did not have to, but that they should not impose their morality on the slave owner. After all, slavery was legal. The Supreme Court had ruled.

In 1973, by a similar 7 to 2 vote, the U.S. Supreme Court in *Roe* v. *Wade* ruled that unborn humans were not legal persons, that they were the property of the owner, the mother, who could keep or kill. Pro-lifers protested and were told, if they had moral problems with abortion, they did not have to get one, but that they should not impose their morality on the owner, the mother. After all, abortion was legal. The Supreme Court had ruled.

Discrimination on the basis of age is also common in our world today. In France, an unborn child's life is protected after 10 weeks. In Denmark, it is 12. In England, it is 28. Dr. Arthur Watson, famed Nobel Prize winner, has proposed that we should not protect human life until 3 days after birth.

Discrimination on the basis of physical or mental perfection is an elitist philosophy that should have no place in our world. Yet that is exactly what is done when a baby is killed through abortion because that child is handicapped. Such a practice is killing the

patient to cure the disease. After all, before birth or after birth, it is the same child and the same handicap.

Finally, in our Nation today we have discrimination on the basis of place of residence. Abortion here is legal until birth in all 50 States. If a baby can escape from his first place of residence, the womb, the night before his scheduled execution, then all of the civil rights of our land descend to protect his life after birth, but not 1 minute before.

Those who who would permit abortion call themselves pro-choice, but choice to do what? A pregnant woman has always had a choice, God willing, to have a live baby. Now she is offered another choice, the choice to kill, the choice to kill her own flesh and blood.

"Every child a wanted child" is a famous planned parenthood slogan, and who could argue? Perhaps we should also finish that sentence. What is the alternative offered in the event of not being wanted? The answer is obvious. Then the sentence reads: "Every child a wanted child, and if not wanted, kill"—by abortion of course.

The ethic is ghastly. If someone does not love you, want you, then you can be killed? Since when does one's right to live depend upon being wanted by someone else? If we took that to its logical conclusion, I doubt if any of our children would survive their teens.

Let us go past the ugly ethic for a moment and ask the basic question that the statement assumes: Does unwanted pregnancy produce an unwanted child?

We have just heard some claims that it does. Two papers, one from Czechoslovakia and one from Sweden, are standard stock among our proabortion friends who quote them endlessly. They are the two most prominent among a small series of other papers, not a one of which has any validity, for the two I mentioned have been torn apart by dispassionate scientific evaluation on different occasions. Their results were skewed from the beginning by a weighted, preselection of subjects.

In fact, there is not a single valid major study in the world's sociological literature that would uphold the thesis that unwanted pregnancies produce unwanted children. Without exception in every study, the final result has been to show that just as many unwanted children result from wanted as from unwanted pregnancies.

To pursue this to its logical conclusion, one must conclude that if one really did want to rid the world of unwanted children, it would be very stupid to abort unwanted pregnancies, for by doing so you would be killing children, the overwhelming majority of whom were to become very wanted and loved children indeed. Would it not be far more logical to wait until after birth and then kill the unwanted ones?

Let us proceed to the presumed next step which we have heard about again today, the battered child. Is that not a reason to abort?

There is one definitive study in the world's literature. It was done by Edward Lenoski, professor of pediatrics, University of Southern California. He studied almost 600 battered children who came into the in- and out-patient facilities of that medical center. He found that over 90 percent of battered children were planned and wanted pregnancies.

Those mothers wore pregnancy clothes 2 to 3 months earlier than the norm. Those fathers named the boys after themselves two to three times more often than the norm. They were so pleased to have a child.

Whatever the sick psychology of battering children is, and we certainly do not have all the answers, one thing stands out: These are not unwanted pregnancies. These were super wanted pregnancies.

What of rape and what of incest? Would we not allow abortion even for these?

Incest involves a sick husband, a sick wife, and an innocent exploited daughter. In a twisted sort of way, that girl is in a love relationship. What is needed is to remove her, to help and support her, and to treat those parents. Too often in this situation to kill her baby could be psychologically catastrophic for her. She needs help, not violence.

Rape is an evil that lives beyond the doing. It is by far the most pressing social problem that seems to call for abortion, but social it is. The physical trauma is over and she is now proceeding with a normal physiologic process, being pregnant.

True, it is the assailant's child, but it is hers also. To deny that is to recall the child of the slave owner born him by a slave woman and to have him deny that this was his son.

Pregnancy from assault rape is extremely rare. If the woman goes to an emergency hospital for treatment, she will not get pregnant. The problem is basically one of education, not meeting violence with violence.

One might ask who would favor capital punishment for the rapist? Why then for the innocent child? The bottom line for rape is this: Should we kill an innocent baby for the crime of his father?

Rape is not simple. There are no good answers. Compassion must be the 1st, 2d, and 10th line, but do we solve that problem, however serious, by killing an innocent baby?

Dr. Nathanson has spoken well to back-alley abortions. I would speak to only one aspect of that. It would seem that since we will never stop abortions, we must legalize them, although we could cut them down drastically. That is a rather interesting rationale: since we cannot stop a crime, legalize it.

Comparisons here range from cheating on income tax, to automotive stealing, to bank robbing. We have never been able to completely stop any of these crimes. By such logic, we should then legalize cheating, car stealing, and bank robbing. Oh, but these are crimes. So is the deliberate killing of an innocent unborn child. Of course we will never stop all abortions, but we can stop 90 to 95 percent of them.

Noting that testimony from certain physicians before this committee has indicated that some at least approve of this social killing, I would like to call your attention to a major poll by the Connecticut Mutual Life Insurance Co. entitled "American Values in the 1980's" that has just been published. It reports that the scientific community is dramatically out of step with the American public. A central question asks: "Do you believe abortion is morally wrong, or is it not a moral issue?" Sixty-five percent of the general public said that it was morally wrong, while among leaders in

science, including medicine, only 25 percent said it was morally wrong.

As per relevancy to the Black Caucus' statement, I might point out that in the general public, 63 percent of white people found it morally wrong while 73 percent of black people found it morally wrong.

What if a statute of this kind, or a full human life amendment, were passed? Would it directly outlaw birth control drugs and devices? The answer for all types is a definite no. Such legislation of course does not even address true contraceptives.

What of drugs and devices that are partly abortifacient? The answer is also no. Would not a human life statute or amendment authorize a State or Federal legislative body to outlaw them? To answer to this in depth, I have appended a white paper prepared by the National Right to Life Committee on this subject. Simply stated, if a drug or device has a dual action, contraceptive and abortifacient, it cannot be outlawed. If it has only a single action and that is abortive, it very possibly could be.

In summary, human life must be protected by law. For that to happen, human life must be defined. Only a scientific, biological definition may be used in a pluralistic society. We cannot use religious belief or philosophic theories to define human life for the purpose of making law.

Abortion is fatal discrimination against an entire class of living Americans on the basis of place of residence. Abortion is a civil rights issue. Abortion is a civil rights outrage. We must extend equal protection by law, civil rights and the right to life again in this Nation to the smallest, most innocent, most defenseless humans among us. Only then will we be true to our Founding Fathers who said that all men are "created," not born equal and endowed with inalienable rights, the first of which was life.

Thank you.

Senator EAST. Thank you, Dr. Willke.

[The prepared statement of Dr. Willke follows:]

## PREPARED STATEMENT OF DR. J. C. WILLKE

Considerable controversy has arisen recently, fueled by opponents of the Human Life Amendment, on the effect of the passage of a Human Life Amendment on birth control drugs and devices. This paper analyzes the effect of the passage of the Human Life Amendment endorsed by National Right to Life Committee on birth control drugs and devices based upon the medical conclusions reached in our examination of the physiological function of certain birth control drugs and devices.

### SUMMARY OF FINDINGS

The Human Life Amendment, in and of itself, will have a very limited effect upon birth control drugs and devices. First, all birth control drugs and devices that are contraceptive rather than abortive in their actions will not be effected in any way. These include the condom, diaphragm, spermicidal foam, and some forms of the pill. Secondly, as a practical matter, the Human Life Amendment, without supportive legislation, will only protect human beings known to be in existence. Those birth control drugs or devices whose action is, in whole or in part, abortifacient will not be directly effected by the passage of a Human Life Amendment if their action occurs prior to positive evidence of pregnancy. These could include forms of the contraceptive pill such as the low dose estrogen combination type, mini and DES, as well as the IUD. The effect of a Human Life Amendment, in and of itself, therefore, would have no effect on almost all birth control drugs and devices and would only impact those which are used after there exists positive evidence of pregnancy.

After the passage of a Human Life Amendment, however, a federal or state law or FDA regulation could be passed to prohibit the sale, manufacture and possession of birth control drugs and devices whose sole action is abortifacient, that have no legitimate non-abortive use and are not used to perform life saving abortions. These could include the mini pill and IUD if medical opinion was conclusive that their action is solely abortive. Such a law certainly would outlaw first trimester prostaglandin suppository, the only function of which is to abort. In addition, a federal

or state law or regulation could be passed to limit the use of certain birth control drugs and devices to their non-abortive uses. In addition to the three indicated above, any use of the regular contraceptive pill or DES which was solely abortive in action, if such could be determined, could be regulated. The passage of a Human Life Amendment, however, does not mandate the passage of any particular type of statute regulating birth control drugs and devices. This is a matter for subsequent legislation or regulation.

A Human Life Amendment will, however, clearly limit all birth control methods, when there is positive proof of pregnancy, to non-abortive or life saving uses. Surgical non-life saving abortion, therefore, will be clearly outlawed by a Human Life Amendment. This is the direct effect of a Human Life Amendment. Its direct effect does not include the regulation of birth control drugs and devices.

THE I.U.D.

What is the mechanism of action of the IUD? It would seem at this time that medical opinion has crystallized to a near unaniminity. The presence of this foreign body within the cavity of the uterus produces a foreign body reaction. This is a local, sterile (usually), inflammatory reaction, which alters the normal body fluids within the uterus. It changes what had been a friendly environment, for the migration of sperm and the subsequent implantation of the new human being, to an unfriendly environment. Some have described the intra-uterine fluid produced as containing "sterile pus." This unfriendly fluid environment can have an influence on the sperm migrating into the uterus and tubes, and quite clearly does have an influence on later implantation.

Not too much has been said or written to indicate that the sperm are incapacitated in their passage through the uterus, for if they were, fertilization could not occur. Most of the research done tells us the same thing. A substantial number of sperm do pass through the uterine cavity, proceed out to the ovary, and fertilization can and does occur.

What is quite plain is that, following fertilization, the process does not proceed to a normally implanted pregnancy. What are the mechanisms

postulated as to why she does not "get pregnant"? Overwhelmingly, almost all medical studies have demonstrated various mechanisms that prevent implantation into the nutrient lining of the womb, due to the foreign body and inflammatory reaction caused by the IUD. However, the end result, in almost every case, when fertilization does occur (an occasional pregnancy is carried to full term and delivery with the IUD still in the uterus), it is followed by a process that ends in the destruction of the developing new human in the uterus through his or her inability to implant. This can be accurately described as an abortion. Clearly, almost all current evidence indicates that the IUD's major effect is to act to prevent implantation.

The fact that it is described as a "contraceptive" agent is because of a change in the meaning of words by the Food and Drug Administration and the American College of Obstetrics and Gynecology a decade ago, when they redefined the word "conception" to mean implantation. Under these semantic gymnastics it is a "contraceptive," but everyone familiar with the function understands thoroughly that its action is that of an abortifacient.

One other relevant medical comment should be made. In all likelihood, the IUD may be withdrawn from the market in the not-too-distant future because of its serious side effects. The "sterile pus" mentioned above does not always remain sterile. At times it becomes infected, resulting in varying degrees of inflammation of the female organs and at times sterility. All practicing physicians in the United States were notified several years ago that if they were to insert one specific type of IUD, the Dalcon Shield, into a woman, it was their legal obligation to inform her that this might make her permanently sterile. To protect from a possible later malpractice suit, such consent should be in writing. In the face of such concern, this specific type of IUD was removed from the market. Whether or not other types of IUDs will remain on the market indefinitely is an open question. It is at least possible that they may be removed for medical reasons before any law can do so.

## THE PILL

The "pill" consists now of over 30 different varieties of chemical

combinations of the synthetic equivalent of the female hormones estrogen and progesterone, as well as the so-called "mini-pill" which contains progesterone alone. Understanding that there are different degrees of actions with different pills, that one has more of this effect and the other has more of that effect, they can, to some extent at least, be described generically.

The combination pills basically exert three actions in "preventing" pregnancy. The first effect of the contraceptive pill is to prevent ovulation or release of the ovum from the ovary. This has been described as "freezing" of the ovary. Even if the sperm do reach the ovary, fertilization cannot occur because the ovum has not been released. This action is accurately described as temporary sterilization, but in common usage it is usually spoken of as "contraceptive" action.

The first contraceptive pill, Enovid, contained ten milligrams of estrogen-like hormone. It was believed that its physiologic function was almost totally that of temporary sterilization. Enovid-5 was then marketed, to be followed by Enovid E (2.5 mg.). Since that time lower and lower doses of estrogen have been presented to the consumer so that now doses of 0.5 mgm. and 0.35 mgm. are commonly used. The well known reason for the reduction of the estrogen dosage was to try to minimize the threat of blood clot complications. Paralleling the reduction of the estrogen dosage, however, there has been the development of break-through ovulation, as the lower doses have apparently not been successful in completely suppressing ovulation.

With break-through ovulation it is now generally accepted that actual fertilization occurs at times in those taking these pills, but as described below, these women do not ordinarily "get pregnant."

The second action is one of thickening of the mucous plug at the cervical opening. This normally occurs at the beginning and at the end of a menstrual cycle, with the plug melting away at mid-cycle, and being replaced by an egg white like substance containing nutrient fluids, which are "friendly" to the passage of sperm. The combination pill prevents this from occuring at mid-cycle, maintaining the plug, and as such probably exerts true "anti-fertilization" action by preventing entrance of the sperm.

The third function of the combination pill is an anti-implantation or anti-nidatory action. When this is the function that is dominant in that particular month, there is sperm passage, there is fertilization and migration of the new human through the tube and into the uterus, but implantation does not occur. This is because the action of the pill has "hardened" the lining of the uterus, created a hostile environment, and the multicelled tiny human being cannot implant. This function is one of an abortion at one week of life. There is no definitive medical agreement as to what percentage of times this function occurs, in which woman and with which pill.

THE MINI-PILL

This is a form of birth control pill, different from the combination of estrogen and progesterone above, which is commonly known as the "mini-pill." This contains only a small dose of progesterone. It is taken daily, 30 days a month, rather than the 21-7 schedule for the combination pill. It allows a menstrual flow to occur monthly while the pill is being taken. There is considerable controversy as to whether or not its action is primarily in preventing implantation, as other mechanisms of action have been suggested, but general scientific opinion at this time is in substantial agreement. It would seem that it does allow a substantial amount of breakthrough ovulation, and presumably at times fertilization. When fertilization occurs it "prevents" pregnancy by an anti-implantation action. This action is best described as an abortifacient effect.

THE MORNING-AFTER PILL

DES or Diethlstilbesteral is a synthetic estrogen. Given in high dosage, in the days immediately following intercourse, it is known as the morning-after pill. What is its function? This is best illustrated by giving two examples.

In the first, a woman is raped at midnight Saturday and is given DES at 2 a.m. in a hospital emergency room. Within a few hours there is a high level of estrogen in her blood. Her body was programmed to ovulate 24 hours later at midnight Sunday. The high level of estrogen blocks that ovulation, fertilization does not occur, and she does not get pregnant. This

effect is one of temporary sterilization.

In the second case, rape also occurs at midnight Saturday and the medication is given at 2 a.m. This woman, however, has ovulated several hours before the rape. The ovum waited. It was fertilized. She also does not "get pregnant" but the mechanism of action is quite different. The drug had "hardened" the lining of the womb. About one week after fertilization, the multicelled tiny boy or girl could not implant and died. This mechanism was an abortion.

Which mechanism occurs in any specific case may well not be known, but the sterilizing action will probably occur two or three times for every abortive action.

Other medications, such as a shot of progesterone are often used in place of DES, as well as other forms of estrogen. Without going into detail, one can say that their mechanism of action is substantially the same.

PROSTAGLANDINS

As is well known, these substances cause the onset of strong uterine contractions and delivery of whatever size baby the uterus contains. If used before viability, this is the equivalent of abortion.

The first form licensed, Prostin F2 alpha, carried a directive from the FDA that limited its use to the induction of mid-trimester abortion only. Subsequently, Prostin A2 and 15M have been licensed. These have now been authorized for use for several therapeutic medical conditions (uterine inertia, non-malignant Hydatidaform mole and missed abortion).

HUMAN LIFE AMENDMENT

On April 11, 1981, the National Right to Life Committee Board of Directors reaffirmed its support for the version adopted by NRLC's Board of Directors in 1974. This version reads as follows:

> SECTION 1. With respect to the right to life, the word "person", as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.
>
> SECTION 2. No unborn person shall be deprived of life by any person: Provided, however, that nothing in

this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

SECTION 3. Congress and the several States shall have the power to enforce this article by appropriate legislation within their respective jurisdictions.

This amendment has been introduced in Congress by Congressman Oberstar and Senator Garn and has gained more than thirty co-sponsors in the Senate and sixty in the House.

NRLC's Human Life Amendment has three primary effects. First, by the adoption of Section 1, an unborn child will be treated as a person under those portions of the 5th and 14th Amendments which prohibit the federal government and states from depriving a person of life without due process of law and guarantees the equal protection of laws to all persons. Thus, states, under the equal protection clause of the 14th Amendment, would be required to extend protection against intentional homicides of unborn children. A state could not exclude the unborn as a class of person from the law's protection of life. Thus, if the state provided for penalties for the taking of the lives of born persons, some effective form of protection would have to be extended through the criminal law to the lives of the unborn.

In providing this degree of protection, the state would be free to determine what degree of punishment would be provided for illegal abortions. Thus, all illegal abortions would not be murder in the first degree but could be punished as a felony or even a misdemeanor. Before 1965, when the trend toward permissive abortion laws began, fifty of the fifty-one jurisdictions in the United States made the procurement of non-life saving abortion a felony. New Jersey, the lone exception, made it a high misdemeanor. Abortion, in some states, was murder when the woman died as a result of the abortion. In that instance, twenty-two states increased the punishment by characterizing the death as either murder, manslaughter, or assault with intent to murder. As a result of the adoption of Section 1 restoring personhood to the unborn, therefore, states would be forced to extend some degree of criminal protection to the unborn against illegal abortion. While the states would have some discretion, the penalty would

have to be of sufficient severity to effectively protect the lives of the unborn.

The adoption of Section 2 would have the effect of prohibiting the private taking of the lives of the unborn and the creation of a basis for a private cause of action to protect unborn children when state and federal governments refuse to do so. Thus, under the rationale of existing Supreme Court cases, a person with appropriate standing, such as the parent of an unmarried minor daughter or a spouse, could seek injunctive relief against the performance of an abortion upon their daughter or spouse. In addition, under certain circumstances, a guardian ad litem for an unborn child could be appointed who could then seek to civilly enjoin an abortion from taking place. In addition, appropriate action could be taken to prevent a state from depriving an unborn of life unless it is necessary to prevent the death of the mother.

Section 3 provides authority for state and federal governments to enforce the provisions of Sections 1 and 2.

Thus, Section 1 and 2 speaks affirmatively to the protection of persons, unborn persons and human beings. Thus, a person, unborn person or human being must be shown to be in existence for the provision of the amendment to protect it. This is also true with respect to the protection afforded born persons by the criminal law. State homocide statutes require that the death of a human being must be proved before a prosecution could be proved. The death of a person is the corpus delecti of the crime. Similarly, the corpus delecti under the amendment is the death of an unborn child.

Section 1 and Section 2, therefore, would have an affect only when there is proof that an unborn person is actually in existence. Thus, the unborn child would be protected by NRLC's Human Life Amendment only when there is positive proof of pregnancy. Without positive proof of pregnancy, a state is not required by Section 1 to extend protection to the unborn nor may a civil action be brought on behalf of an unborn to prevent an abortion.

The passage of NRLC's Human Life Amendment, however, would permit states and the federal government to protect unborn life before there is positive proof of pregnancy. Thus, a subsequent state or federal law or

regulation could be passed which limited the use of drugs or devices to non-abortive or life saving uses. Such a statute, upon the passage of a Human Life Amendment, could not be attacked upon the basis decided in Roe v. Wade, that a woman had a right to privacy to decide whether or not to have an abortion. With this decision fully reversed by NRLC's version of the Human Life Amendment, a state may exercise its compelling interest in unborn lives by regulating abortifacients.

CONTRACEPTIVES

Contraceptives, understood as contra-fertilization drugs or devices preventing fertilization, prevent a new human life from beginning. Abortion kills a new human life after it has begun. Contraception, therefore, is any device or drug which prevents fertilization of the female ovum by the male sperm. An abortifacient is any device or drug which artificially interrupts the natural biological development of the unborn child after the process of fertilization has begun. The Human Life Amendment is intended to protect the right to life of the unborn at every stage of biological development beginning with fertilization. The Human Life Amendment, however, does not extend before this point. Thus, any and all truly contraceptive agents such as the condom, diaphragm, spermicidal foam, and almost all forms of the regular contraceptive pills would be absolutely unaffected in any way by the passage of a Human Life Amendment.

ABORTIFACIENTS

There are many drugs and devices which in part or in whole have abortifacient actions. Depending upon the time in the gestation of the unborn child in which they are used and whether or not they have other legitimate non-abortive uses, the HLA may affect them. In addition, the Human Life Amendment may affect an abortifacient in different ways through criminal and civil law. Finally, subsequent state or federal statutes may be passed which impact upon their use.

PROSECUTION FOR USE OF ABORTIFACIENTS
UNDER EXISTING LAW

As discussed above, the Human Life Amendment would, pursuant to the equal protection clause of the 14th Amendment, require some degree of

protection under the criminal law be extended to the unborn if the state ; nalizes the intentional killing of born persons. Thus, if the state wishes to protect the lives of the born, it must protect the lives of the unborn.

In order for a prosecution to be brought, however, three facts would be required to be proved beyond a reasonable doubt. First, that a crime has been committed, i.e. the corpus delicti. Here, the prosecution must prove beyond a reasonable doubt that a homicide actually took place, that there was an unborn child alive and in being prior to the abortive act. Thus, positive evidence of pregnancy would have to be shown and the jury would have to be convinced beyond a reasonable doubt that an unborn person existed and was alive prior to the abortive act. Second, the prosecution would have to prove that the abortive act was committed and that an unborn child's life was actually taken. Thus, it must be proven beyond a reasonable doubt that the abortive act successfully terminated the pregnancy with a result of the death of the unborn child. Third, the abortive act must have been committed with the specific intent to cause the death of the unborn child. If the abortive act was unintended, negligent, or with the intent other than to deprive the unborn of life, a prosecution would not be legally proper.

## PROSECUTION FOR USE OF ABORTIFACIENTS UNDER NEW STATE STATUTES

Historically the states have treated abortion separately from their homicide statutes. Every jurisdiction in the United States prior to 1973 had a separate abortion statute. These statutes had two separate primary focuses.

Most statutes punished abortive acts, to-wit, acts done with the intent to produce an abortion regardless of whether an abortion actually resulted. In these instances, however, the states required that the person charged with the crime had knowledge or belief that the woman was actually pregnant whether, in fact, she was pregnant or not. With this knowledge or belief of the pregnancy on the part of the defendant, the statutes punished an act committed by the defendant with the intent to

produce a miscarriage.

Other states punished only actual abortions. Under these statutes, it must be proved beyond a reasonable doubt that the woman was actually pregnant and that the acts [illegible]icted resulted in the death of the child.

In either case, therefore, knowledge or belief of the pregnancy or actual existence of the pregnancy must be proved. In either case the prevailing statutory schemes permitted the abortion or abortional act at least when the abortion or abortional act was necessary to preserve the life of the mother.

PRIOR STATE LAWS
DIRECTLY EFFECTING ABORTIFACIENTS

Before 1973, state legislation frequently sought to regulate the traffic in abortifacients by prohibiting their manufacture, transportation, distribution, furnishing, sale or keeping or exposing for sale, giving away or lending. Before 1965, eighteen states so regulated abortifacients in one or more of these ways. There are very few cases under these statutes reported before 1973 since, as long as the substance sold or transported had a legitimate medical or commercial use (and most did), it was not in fact covered by this legislation.

NEW STATE OR FEDERAL LAWS
DIRECTLY EFFECTING ABORTIFACIENTS

While the Human Life Amendment does not directly effect abortifacients absent a positive proof of pregnancy, a federal or state law could be passed directly effecting abortifacients. It is likely that this type of statute would provide as follows:

1. Some mechanism would be created whereby a factual determination would be made whether or not any device or drug is an abortifacient.

2. If a device or drug is solely an abortifacient and had no legitimate non-abortive or life saving use, the statute could prohibit the use, manufacture, possession, transportation and sale of such a device.

3. If the device or drug had a legitimate non-abortive use or was used in life saving abortions, the statute would license its use in

those circumstances and penalize its illegal use, if such function could be separated.

Under such a statutory scheme, it is likely that the mini pill and IUD could be prohibited. The first trimester prostaglandin suppository drug would be prohibited. In addition, limits could be placed on the use of DES and some forms of contraceptive pills. It is clear, however, that the vast majority of regular contraceptive pills would not be affected in any way since their effect is solely or largely contraceptive rather than abortifacient.

## CONCLUSION

In conclusion, without subsequent state or federal laws, the Human Life Amendment does not effect any form of birth control drug or device except the first trimester prostaglandin suppository when there is positive evidence of pregnancy. All other birth control drugs and devices are uneffected. Subsequent state and federal laws, however, may limit the use of certain birth control drugs and devices to their non-abortive or life saving use. A few birth control drugs and devices could be prohibited if it can be proven that they are solely abortifacient and have no legitimate or life saving use. Such action, however, would have to be taken by state or federal statute since the Human Life Amendment, in and of itself, has no direct impact upon these drugs and devices without positive evidence of pregnancy.

84-581 O—81——69

| EFFECT OF HLA ON BIRTH CONTROL DRUGS AND DEVICES AND ABORTION METHODS | BIRTH CONTROL DRUGS AND DEVICES | | | | | | | ABORTION METHODS | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Condom | Diaphragm | Spermicidal Foam | Contraceptive Pills | | | IUD | Prostaglandin Drugs | | D&C | Saline Amniocentesis | Hysterotomy |
| | | | | Regular | DES | Mini | | Supp. | Inst. | | | |
| 1. Is it primarily contraception or abortifacient? | Contra | Contra | Contra | Contra | Contra | AB | AB | AB | AB | AB | AB | AB |
| 2. Does it have any possible abortifacient action? | No | No | No | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| 3. Does it have a legitimate non abortive use? | Yes | Yes | Yes | Yes | Yes | ? | No | No | Yes | Yes | No | Yes |
| 4. Could it be used to perform a life saving abortion? | No | No | No | No | No | No | No | No | Yes | Yes | Yes | Yes |
| 5. Is its primary use before or after positive proof of pregnancy? | Before | Before | Before | Before | Before | Before | Before | After | After | Both | After | After |
| 6. Will non-life saving use become criminal by passage of HLA? | No | No | No | No | No | No | No | Yes | No, unless pos. proof of pregnancy | | Yes | Yes |
| 7. Will HLA alone prohibit or limit its use to non-abortive or life saving use? | No | No | No | No | No | No | No | Yes | Yes, with pos. proof of pregnancy | | Yes | Yes |
| 8. Can a subsequent state or federal law limit its use to non-abortive or life saving use? | No | No | No | No, Because Unable To Biologically limit To Non-Abortive Action | | | | Yes | Yes | Yes | Yes | Yes |
| 9. Can a subsequent state or federal law prohibit its use completely? | No | No | No | No | No | ? | Yes | Yes | No | No | No | No |

Senator EAST. I would like to make a brief statement here. We have received letters from physicians and physician organizations stating their opposition to the views which have been expressed today by the representative from the American Medical Association and suggesting that the AMA board of trustees does not speak for all doctors on the matter.

Also, I would like to include letters from 12 professors of constitutional law expressing their opinion that S. 158 is constitutional. I would like to place these materials in the record.

I would also like to place in the record a copy of the report of the AMA Committee on Criminal Abortion presented at the 12th annual meeting of the AMA held in Louisville, Ky., in 1859.

All those materials will be placed in the record.

[The letters and report referred to above by Senator East follow:]

**ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC.**

8991 Cotswold Drive, Burke, VA 22015 703/425-6300

OFFICERS

Curtis W. Caine, M.D.
President
Jackson, Mississippi

Garland L. Campbell, M.D.
President-Elect
Arkansas City, Kansas

Bill G. Church, M.D.
Secretary
Sioux Falls, South Dakota

Mal Rumph, M.D.
Treasurer
Fort Worth, Texas

Henry K. May, M.D.
Speaker of the House of Delegates
Lake Jackson, Texas

Walter R. Buerger, M.D.
Immediate Past President
San Dimas, California

DIRECTORS

Thomas G. Dorrity, M.D.
Memphis, Tennessee

Robert G. England, M.D.
Carlinville, Illinois

Thomas Y. Gladney, M.D.
Baton Rouge, Louisiana

Emmit M. Jennings, M.D.
Roswell, New Mexico

W. Daniel Jordan, M.D.
Atlanta, Georgia

Paul W. Leithart, M.D.
Columbus, Ohio

Robert Moorhead, M.D.
Yazoo City, Mississippi

A. J. Penfield, M.D.
Syracuse, N.Y.

Donald Quinlan, M.D.
Northfield, Illinois

Frank A. Rogers, M.D.
Whittier, California

Robert M. Sade, M.D.
Charleston, South Carolina

EXECUTIVE DIRECTOR

Frank K. Woolley
Burke, Virginia

June 15, 1981

The Honorable John P. East
Dirksen Senate Office Building
Washington, D. C. 20510

Attention: Mr. James M. Sullivan,
Counsel

Dear Senator East:

I understand you are now chairing hearings on the Human Life Bill (H.L.B.), S-158.

I represent the Association of American Physicians and Surgeons whose statement of principles contain the following:

> "The physician should not condone the taking of human life in the practice of his profession, but at all times respect the sanctity of human life and seek to preserve or improve the quality of life."

On the contrary, the American Medical Association's present Code of Medical Ethics (CME) does not uphold the sanctity of human life.

We hold life from God. Thus, it is sacred. Taking it is, therefore, sin, immoral and must, ipso facto, be illegal since God has ordained civil government to carry out His law.

We are, therefore, anxious.

Respectfully,

Curtis W. Caine

Curtis W. Caine, M.D.
President

---

*Missouri Doctors For Life*

~~St. Paul, Texas~~
~~Rockwall, Texas 75087~~
11511 Tivoli Lane
St. Louis, Mo. 63141

June 15, 1981.

Mr. Chairman and members of the Senate Sub-committee:

I'd like to thank the Sub-committee for allowing me to submit this written testimony for the permanent record on S. 158.

Last week the AMA Board of Trustees announced that they would send representatives to Washington to speak in opposition to S. 158 - the Human Life Bill. The representatives of the AMA are to make at least two claims:

1. That there is no scientific consensus as to when human life begins and,
2. That those representatives of the Board of Trustees of the AMA also represent a consensus of the medical and scientific thoughts, on this issue, of all AMA members.

Both of the above claims are blatantly false. A careful perusal of standard medical texts over the past fifty to one hundred years will yield any number of authoritative statements conveying the well known, and recently fully substantiated fact[1], that, in general and under normal circumstances, a new human life begins with the union of a human ovum and a human sperm.

In regard to point #2, the representatives of the AMA Board of Trustees are just that and nothing else. They represent, at best, the philosophical and socio-economic opinions of the 12 or so members of that board. They have no mandate from the total AMA membership nor even from the total membership of the AMA House of Delegates. In fact, to my knowledge, the question of presence or absence of a consensus on the scientific fact that each individual human life begins at conception was not even raised before the House of delegates of the AMA in their recent Chicago meeting.

For the AMA Board of Trustees, in a unilateral action, to take a position that is diametrically opposed to well established scientific facts is indefensible. For those individuals who are members of the board to attempt to assign, to every member of the AMA, that board's own lack of respect for a well established scientific truth can only be categorized as unbelievably arrogant.

Dr. Frank Simon, of Kentucky Drs. for Life, and I spoke with many, though not all, representatives of Pro-life physicians' organizations all over the country this past week-end and do have a mandate from hundreds of physicians, many of them members of the AMA, to state our opposition to the AMA Board of Trustees' stand and to reaffirm the traditional and scientifically accurate position of American Medicine that human life begins at conception and that each individual human life has intrinsic value from conception til natural death.

Thank you again,

Anne E. Bannon, M.D., F.A.A.P.
Chairman,
Missouri Doctors for Life
President of the national Doctors for Life
Former Head of the Department of Pediatrics
St. Louis City Hospital #1
11511 Tivoli Lane
St. Louis, Missouri 63141

---

1/ The work of Edwards and Steptoe, in England, who started Louise Brown's life in a petri dish.

LOYOLA UNIVERSITY STRITCH SCHOOL OF MEDICINE
2160 South First Avenue, Maywood, Illinois 60153 312 531-3000

June 10, 1981

Honorable John East
Chairman, Subcommitee on Separation
of Powers
U.S. Senate
Washington, D. C.

Dear Senator East:

I am writing on behalf of the American Association for Pro-Life Pediatricians. We are an organization composed of 250 members of the American Academy of Pediatrics. The American Academy of Pediatrics defines the responsibility of Fellows of that organization as being to a defined population. This population is defined as beginning at "conception" and extending to the 21st year of life. In so defining our patient responsibilities, the American Academy of Pediatrics is recognizing the virtually indisputable fact that biological life begins at conception.

In recent years, the American Academy of Pediatrics has extended its interest in so-called "perinatology" which recognizes that the care of our patients begins with intrauterine development.

All members of the American Association of Pro-Life Pediatricians are members of the American Academy of Pediatrics and all look to the protection of all human life from conception onward.

Sincerely,

E. Diamond

Eugene F. Diamond, M.D.
Prof. of Pediatrics
Secretary, American Assoc. of Pro-Life Pediatricians

JOSEPH P. DROZDA, JR. M.D.
12255 DEPAUL DR
BRIDGETON MO 63044

western union Mailgram

1-0485108166 06/15/81 ICS IPMBNGZ CSP WSMC PM 15 /11 11: 08
3142918824 MGM TDBN ST LOUIS MO 203 06-15 0331P EST

SR
SEP.
PWRS

SENATOR JOHN EAST
U.S. SENATE
WASHINGTON DC 20510

I'VE BEEN INFORMED THAT THE AMA BOARD OF TRUSTEES HAS VOTED TO TESTIFY AGAINST THE LEGISLATION PENDING IN YOUR COMMITTEE TO DEFINE THE BEGINNING OF LIFE AT CONCEPTION THEY APPARENTLY INTEND TO CONTEND THAT THERE IS NO SCIENTIFIC CONSENSUS ON WHEN LIFE BEGINS.
AS A MEMBER OF THE AMA, I AM OUTRAGED AT THE ACTION OF THE BOARD, COMING AS IT DOES AFTER THE MEETING OF THE HOUSE OF DELEGATES, IT IS OBVIOUSLY A POLITICAL PLOY OF A FEW CONFUSED PHYSICIANS WHO KNOW THAT THEY COULD NEVER GET APPROVAL FOR THIS ACTION FROM THE HOUSE OF DELEGATES.
IF REPRESENTATIVES OF THE BOARD TESTIFY BEFORE YOUR COMMITTEE, REMEBER THAT THEY REPRESENT ONLY THE BOARD AND NOT THE AMA.
IT HAS BEEN OBVIOUS TO THE SCIENTIFIC COMMUNITY SINCE THE BEGINNINGS OF MODERN EMBRYOLOGY THAT A NEW LIVING INDIVIDUAL IS CREATED AT THE MOMENT OF CONCEPTION. THE ALLEGATIONS OF A FEW POLITICALLY ORIENTED DOCTORS ON THE AMA BOARD CANNOT NEGATE WHAT HAS BEEN RECORDED IN MEDICAL WRITINGS LONG BEFORE JANUARY 22, 1973.
IF THE AMA PRESSES AHEAD WITH IT'S BOARDS PRESENT PLAN THEY WILL BE FACING MASS RESIGNATIONS FROM MORE SCIENTIFICALLY ORIENTED PHYSICIANS.
JOSEPH P. DROZDA, JR. M.D.

15:36 EST

MGMCOMP MGM

---

EDWIN RYAN
30-23 148 ST
FLUSHING NY 11354

western union Mailgram

4-0600698168 06/17/81 ICS IPMMTZZ CSP WSNB 1981 JUN 18 AM 11: 00
2125393023 MGM TDMT FLUSHING NY 70 06-17 0543P EST

SENATE SUB-COMMITTEE ON SEPARATION OF
POWERS ATTN SENATOR EAST
US SENATE
WASHINGTON DC 20510

DR JOSEPH BOYLE REPRESENTS THE OPINION OF THE BOARD OF TRUSTEES OF THE AMERICAN MEDICAL ASSOCIATION, HE DOES NOT REPRESENT THE DELEGATES. NO VOTE WAS TAKEN AS HE AGREED NOT TO TESTIFY ON WHEN LIFE BEGINS. PLEASE QUESTION HIM ON THIS MATTER.
ADA B RYAN MD PRESIDENT 6000 NEW YORK STATE DOCTORS AND NURSES VS ABORTION

17:45 EST

MGMCOMP

RICHARD M. BEAVEN, M. D.
1817 ASHLEY CIRCLE
BOWLING GREEN, KENTUCKY 42101
PHONE 842-0187

June 12, 1981

Senator John East
United States Senate
Washington, D.C. 20510

Dear Senator East:

This is to thank you for the hearings you are now holding regarding the question of "when life begins" and the human life ammendment. I also want to by this letter state that I have recently read in the Louisville Courier Journal where the AMA is coming to Washington some time this week apparently to voice the AMAs philosophy against the human life ammendment. I wish to state that the AMA is not speaking for the American physicians in this statement. This is apparently a Board of Trustees decision without polling the membership to see how we feel.

As a member of the AMA for twenty-three years, I bitterly oppose their position and philosophy on this and think they are totally wrong and have so written them and told them this fact. Because of their present stand, it is my intention to withdraw my membership from the AMA because I cannot tolerate being a member of an organization that opposes the preservation of human life from the beginning which is at the time of conception and fertilization of the ovum.

I think the AMA should be prevented from testifying as speaking for the American physician because they have not polled memberships' thoughts on this and for them to come to Washington and for a few people who are members of the Board of Trustees to decide to do this on their own, is merely a few people speaking for themselves rather than for the principles and thoughts of the entire membership. They are presenting only one view. They are not giving those of us in the AMA who bitterly oppose this stand an opportunity to speak contrary to some of the governing body's philosophy.

I hope my letter gets to you prior to the AMA's speaking because I do strongly protest their speaking on the subject as apparently inferring that they are speaking for the American physician.

Yours truly,

Richard M. Beaven, M.D.

RMB/bw

NORTHWEST OHIO PLASTIC SURGEONS, INC.

JOHN C. KELLEHER, M. D.
JAMES G. SULLIVAN, M. D.

GEORGE J. BAIBAK, M. D.
JOHN H. ROBINSON, M. D.

328 TWENTY-SECOND STREET
TOLEDO, OHIO 43624

TELEPHONE 698-9870 (419)

OFFICE HOURS BY APPOINTMENT

June 24, 1981

James H. Sammons, M.D.
Executive Vice President, AMA
535 N. Dearborn
Chicago, Illinois 60610

Dear Doctor Sammons:

I have been reading in the papers that you plan to testify, before Congress, that you find difficulty in determining when human life begins.

I am a bit surprised at this stance of the AMA, when most of the pro-abortionists that I have debated with agree that human life begins with conception, but they are not sure that it has enough humanity to be protected under the constitution. I also find it interesting that most biology teachers, even at the high school level, accept the fact that life begins with conception.

I really don't want to belabor the point, but I hope that you are speaking for yourself, not for the general membership of the AMA, as all of us do not agree with the concept that abortion is not the taking of human life. Some of us still respect the Hypocratic oath, which, of course, condemns abortion.

I am hoping merely to make you aware of the feelings of some of your membership.

Yours truly,

George J. Baibak, M.D.

GJB/cam

cc. Daniel T. Cloud, M.D., President, AMA
Senator John East
Senate Office Building
Washington, D.C. 20510

JOSEPH R. STANTON, M.D., F.A.C.P.
114 SHORNCLIFF ROAD
NEWTON, MASSACHUSETTS 02158
AREA CODE 617 - 244-4288

May 26, 1981

Senator John East
United States Senate
Washington, D. C. 20515

Dear Senator East:

I am in agreement with members of the medical and scientific community across America, that human life begins at conception or fertilization. This biologic fact is so universally held in the medical literature that its denial is a denial of all of our tediously acquired insights into the erstwhile mysterious darkness of the womb, c.f. quotations in "Life? When Did Your Life Begin?" appended, and the "Birth Exhibit" viewed by over a million visitors in the Museum of Science in Boston in recent years describing the moment of conception as "the birth of a new life". Additionally, the press refers to fertilization or conception, when carried on experimentally outside the human body, as "the creation of life", and "the test tube baby".

From antiquity, we have the definition of life - "He is a human being, who is to become one". No finding of modern microbiology has invalidated the remarkable prescience of Tertulian. Indeed, if one looks up the definition of life in the dictionary, he finds life defined as "the property or quality manifested in functions such as metabolism, growth, response to stimuli and reproduction of cells and species by which living organisms are distinguished from dead or inanimate matter". Human life, therefore, must meet this test and additionally be identifiably human in origin. What do genetics, biology, immunology, hematology and fetology and obstetrics teach us about the beginning of human life?

We know that the human ovum and human sperm are highly specialized (haploid) cells - each contain 1/2 of the species specific number of chromosomes. We know that as the genetic material in the sperm head unites with the genetic material in the nucleus of the human ovum, the fertilized ovum or zygote is formed with the diploid species specific number of chromosomes of homo sapiens. We know that to that moment is brought the genetic inheritance from both parents - the legacy of the past. Indeed, inherent in this same moment is also much of the potential for the future. This is the "genetic package" or blue print that marks the start of a new individual human life. As that life moves from zygote, to morula, to blastocyst, to embryo, to fetus, to newborn to toddler, to adolescent, to adult, to senior citizen - no stage of that unfolding life is biologically less-identifiably human than any other stage. Each stage marks simply a different distance from the starting point, the time of conception.

We know that within 6 hours from the time of fertilization, the first cell division has occurred. The individual life now in being will continue until death.

Differentiation of tissues occurs very early; indeed, among the earliest differentiations are the future sex organs which will in time produce the spermatocyte and oocyte from which the next generation of human life will be produced. This new life, therefore, is metabolizing, growing, reproducing cells, laying the essential substrate for reproduction of species and responding to stimuli. It is alive.

Before any chemical test of pregnancy becomes positive this new human is producing red blood cells hematologically distinct from its mother. We know that those blood cells never normally intermingle with the mother's blood. At 21 days, a beat is present in the blood vessels and the circulation of blood now in being will continue without interruption throughout the life of this individual. From Japanese experience, we know that as early as 43 days an electroencephalogram or brain wave can be recorded and of that brain wave Hamlin, from the Massachusetts General Hospital, has wirtten "it soon becomes personalized", i.e., that specific individual's. At least as early as 8 weeks of life in the womb all the organ systems of a complete human being are present and at an advanced state of development. Magnificent pictures are available of the clearly recognizable fingers and

toes of the human hands and feet at 8 weeks. If one shows pictures such as the Nilsson series to pre-school children, they will look at the 8-week human fetus and say, "it's a baby".

Before 10 weeks, the human heartbeat is recordable, and working with Doctor William O'Connell of Boston, I have recorded this and this tape of the unborn child's heartbeat at 10 weeks as recorded by Dopler ultrasound has been played over national television and before many New England audiences. I would be delighted to forward this tape for playing.

Due to the pioneering work of the Doctors Liley of New Zealand, we know a great deal about the child in the womb. We know, for instance, that about 8 weeks it begins to move by using its arms and legs, although quickening, or the mother's perception of that movement, is delayed yet for many weeks. We know that as early as 12 weeks the child sucks its thumb and often puts its hands above its head. The child responds to sound and even to changes in light intensity in the womb. We know it hears its mother's voice and heartbeat, the intestinal sounds, the hum of blood as it rushes through the placenta. The child also hears loud sounds outside the body and is capable of responding tothem by an increase in heartbeat or increased movement. We know, too, that the child swallows amniotic fluid, more - if it is artificially sweetened, less - if it is made sour. We know the child wakes and sleeps.

This, then, is one who has been described as the other patient in human pregnancy. In 1978, we have through the specialties of fetology and perinatal medicine made the child before birth's illnesses diagnosable and, in some instances, treatable.

All of my professional life I have followed, to the best of my ability, the medical literature. During the last decade, I have paid particular attention to the studies of the child in the womb. That what lives and grows in a mother's nurturing womb is in fact from the time of fertilization or conception a new and distinct individual human life is a conclusion I base on all of my reading and study and all of my experience as a physician. That experience has included caring for pregnant women with heart disease and, in at least one critical instance, has led to surgery on the mother's heart during the second trimester of pregnancy, that the safety of both mother and child might be assured and enhanced.

In the human species, the time that spans the interval from fertilization to death is a biologic continuum knowable only as an individual and unique human life. That individual and unique human life which begins at fertilization is continuous whether intra or extra uterine until death.

I am delighted to submit this statement to the Committee, and would appreciate receiving a copy of the proceedings of the hearing you are chairing on this subject.

Sincerely,

Joseph R. Stanton, M.D., F.A.C.P.
Associate Clinical Professor of
Medicine at Tufts University

JRS/mry
Enclosure

June 18, 1981

Senator John P. East
Chairman, Subcommittee on
the Separation of Powers
of the Senate Committee on
the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator East:

We are a group of law professors who believe that Congress does have constitutional authority to declare by statute that unborn children are human beings, and that all human beings are "persons" within the meaning of the Fourteenth Amendment to the Constitution. We also believe that Congress may constitutionally withdraw jurisdiction over certain types of abortion controversies from the lower federal courts so that state courts will become the original forum for such litigation, and the Supreme Court will exercise its ultimate power of appellate review only after having been informed of the views of the state courts.

I

In Roe v. Wade, 410 U.S. 113, 159-60 (1973), the Supreme Court declared that courts are not capable of resolving the question of when human life begins, and that unborn children are not "persons" within the meaning of the Fourteenth Amendment. The Court then held that states may not prohibit abortion until an unborn child becomes "viable" -- which the Court defined as having "the capability of meaningful life outside the mother's womb." The Court conceded, however, that if unborn children are persons, state laws prohibiting abortion would clearly be constitutional because the fetus' right to life would then be guaranteed by the Fourteenth Amendment. Id. at 156-57.

If unborn children are human beings -- the question the Court said it could not answer -- the Court's conclusion

that they are not "persons" would have to change. The Fourteenth Amendment was intended to protect all human beings. The amendment was added to the Constitution for the specific purpose of ensuring that never again in the United States would a class of human beings be declared to be "non-persons." Cf. Dred Scott v. Sandford, 19 How. (60 U.S.) 393, 404-05 (1856) (declaring that black people are "an inferior class of beings" who may claim none of the rights and privileges of citizens of the United States). The sponsors of the Fourteenth Amendment clearly believed that it would protect the life, liberty, and property of "every human being." See Cong. Globe, 39th Cong. 1st Sess. 1089, 2766 (1866).

Congress has the right and duty under the Constitution to fill the gap created by the Supreme Court's declared inability to determine whether unborn children are human beings. The Fourteenth Amendment expressly provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this [amendment]." Congress has exercised its power under this language to declare by statute that certain kinds of conduct violate the Fourteenth Amendment notwithstanding Supreme Court decisions to the contrary. The Supreme Court has expressly upheld the constitutional authority of Congress to pass such legislation. See Fullilove v. Klutznick, 100 S.Ct. 2758 (1980); City of Rome v. United States, 100 S.Ct. 1548 (1980); Oregon v. Mitchell, 400 U.S. 112 (1970); and Katzenbach v. Morgan, 384 U.S. 641 (1966).

We know of no opinion by any Justice of the Supreme Court, whether written for the majority or in dissent, that has declared that Congress does not have a constitutionally appropriate role to play in interpreting and enforcing the protections of the Fourteenth Amendment by legislation. The

only debate has been over the effect that should be given to Congressional statutes in this area. A majority of the Court has held that the findings of Congress are conclusive on the Court so long as there is any rational support for them. Dissenters, most notably Justice Harlan, have argued that the findings of Congress are entitled to due respect, but that the Court should make the ultimate determination. See Katzenbach v. Morgan, supra 384 U.S. at 668. Under either standard, however, the constitutional legitimacy of Congressional action is clear.

We therefore believe that Congress has the constitutional authority to pass legislation that defines unborn children as human beings, and declares that they are persons within the meaning of the Fourteenth Amendment. We recognize that no one can predict with confidence the likelihood of the Supreme Court's sustaining the constitutionality of such a statute. But the Constitution is more than what a majority of the Supreme Court from time to time may say it is. Congress also has the duty to uphold the Constitution. In this case, the Court's acknowledged inability to determine when human life begins can be taken as an invitation to Congress, the co-enforcer of the Fourteenth Amendment, to resolve the fundamental question presented by the abortion controversy.

II

The right of Congress to define the jurisdiction of the lower federal courts has been sustained in every Supreme Court decision in which the issue was presented. See, e.g., Palmore v. United States, 411 U.S. 389, 401 (1973) (Congress has the sole power of creating inferior federal courts and of "withholding jurisdiction from them in the exact degrees and character which to Congress may seem

proper to the public good."); and Sheldon v. Sill, 8 How. (40 U.S.) 440 (1850) ("Congress may withhold from any court of its creation any of the enumerated controversies.").

There is clear precedent for Congressional legislation to remove a particular class of controversies from the federal courts. The Norris La-Guardia Act, for example, withdrew jurisdiction from the federal courts to issue injunctions in labor disputes. The Supreme Court confirmed the constitutionality of the Act in Lauf v. E. G. Shinner & Co., 303 U.S. 323, 330 (1938).

We believe that it is clearly constitutional for Congress to withdraw jurisdiction from the lower federal courts over certain types of abortion controversies. The effect of such a jurisdictional limitation will be to make state courts the original forum for such disputes. Since most abortion controversies are likely to involve some form of challenged state action, it is clearly sensible to have state courts interpret, at least in the first instance, the significance of the challenged state action. Constitutional rights should not suffer because, under Article VI of the Constitution (the Supremacy Clause), state courts are bound by the Constitution just like federal courts.

The lower federal courts have no monopoly of the wisdom required to interpret the Constitution. This is particularly so when the controversy concerns the relationship between a woman, her unborn child, and (perhaps) the father of the unborn child. Family law matters of this kind have traditionally been resolved by the states, and not the federal government. The Supreme Court will retain its appellate jurisdiction over state courts. But even its deliberations may well benefit from the opportunity to consider the

views of some of the many able and distinguished judges who sit on state courts throughout the country.

Very truly yours,

John T. Noonan, Jr.
Professor of Law
University of California at Berkeley
Boalt Hall School of Law

Paul R. Dean
Professor of Law
Georgetown University Law Center
Washington, D.C.

Joseph W. Dellapenna
Professor of Law
Villanova University School of Law
Villanova, Pennsylvania

Richard Alan Gordon
Professor of Law
Georgetown University Law Center
Washington, D.C.

Charles P. Kindregan
Professor of Law
Suffolk University School of Law
Beacon Hill
Boston, Massachusetts

Thomas L. Shaffer
Professor of Law
Washington and Lee University
School of Law
Lexington, Virginia

William D. Valente
Professor of Law
Villanova University School of Law
Villanova, Pennsylvania

John S. Baker, Jr.
Associate Professor of Law
Louisiana State University Law Center
Baton Rouge, Louisiana

Basile J. Uddo
Associate Professor of Law
Loyola University Law School
New Orleans, Louisiana

Grover J. Rees III
Assistant Professor of Law, on leave
1981-1982
Texas University School of Law
Austin, Texas

Thomas P. Ruane
Assistant Professor of Law
Loyola University Law School
New Orleans, Louisiana

Robert A. Destro
Adjunct Professor of Law
Marquette University Law School
Milwaukee, Wisconsin

cc: Members Senate Judiciary Subcommittee on the Seperation of Powers

FILE CODE: AMA - RESOLUTION 1859

## REPORT ON CRIMINAL ABORTION

Submitted by American Medical Association Committee on Criminal Abortion at the Twelfth Annual Meeting of the AMA held in Louisville, Kentucky, in May, 1859

The Committee appointed in May, 1857, to investigate the subject of criminal abortion, with a view to its general suppression, have attended to the duty assigned them, and would present the following report:

The heinous guilt of criminal abortion, however viewed by the community, is everywhere acknowledged by medical men.

Its frequency--among all classes of society, rich and poor, single and married--most physicians have been led to suspect, very many, from their own experience of its deplorable results, have known. Were any doubt, however, entertained upon this point, it is at once removed by comparisons of the present with our past rates of increase in population, the size of our families, the statistics of our foetal deaths, by themselves considered, and relatively to the births and to the general mortality. The evidence from these sources is too constant and too overwhelming to be explained on the ground that pregnancies are merely prevented; or on any other supposition than that of fearfully extended crime.

The causes of this general demoralization are manifest. There are three of them, however, and they are the most important, with which the medical profession have especially to do.

The first of these causes is a widespread popular ignorance of the true character of the crime--a belief even among mothers themselves that the foetus is not alive till after the period of quickening.

The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life; not that its respectable members are ever knowingly or intentionally accessory to the unjustifiable commission of abortion, but that they are thought at times to omit precautions or measures that might prevent the occurrence of so unfortunate an event.

The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors which are sufficient in most instances to prevent conviction, are based, and only based upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights for civil purposes while personally and as criminally affected, it fails to recognize it and to its life and it denies all protection.

Abundant proof upon each of these points has been prepared by the Committee, and is elsewhere being published to the profession; but as the statements now made are almost axiomatic, such recapitulation would be here wearisome and unnecessary.

Our duty is plain. If, by any act, we can effect aught to wards the suppression of this crime, it must be done. In questions of abstract right, the medical profession do not acknowledge such words as expediency, time service (cowardice).

We are the physical guardians of women, we, alone, thus far, of their offspring. The case is here of life or death--the life or death of thousands--and it depends, almost wholly, upon ourselves.

As a profession we are unanimous in our condemnation of the crime. Mere resolutions to this effect, and nothing more, are therefore useless, evasive, cruel.

If to want of knowledge on a medical point, the slaughter of countless children now steadily perpetrated in our midst, is to be attributed, it is our duty as physicians, and as good and true men, both publicly and privately, and by every means in our power, to enlighten this ignorance.

If we have ever been thought negligent of the sanctity of foetal life, the means of correcting the error are before us. If we have ever been so in deed, there are materials, and there is good occasion for the establishment of an obstetric code; which, rigorously kept to the standard of our attainments in knowledge, and generally accepted by the profession, would tend to prevent such unnecessary and unjustifiable destruction of human life.

If the tenets of the law, here unscientific, unjust, inhuman, can be bettered--as citizens, and to the best of our ability we should seek this end. If the evidence upon this point is especially of a medical character, it is our duty to proffer our aid, and in so important a matter to urge it. But if, as it is also true, these great, fundamental and fatal faults of the laws are owing to doctrinal errors of the profession in a former age, it devolves upon us, by every bond we hold sacred, by our reverence for the fathers, in medicine, by our love for our race, and by our responsibility as accountable beings, to see these errors removed and their grievous results abated.

In accordance, therefore, with the facts in the case, the Committee would advise that this body, representing, as it does, the physicians of the land, publicly express its abhorrence of the unnatural and now rapidly increasing crime of abortion; that it avow its true nature, as no simple offence against public morality and decency, no mere misdemeanor, no attempt upon the life of the mother, but the wanton and murderous destruction of her child; and that while it would in no wise transcend its legitimate province or invade the precincts of the law, the Association recommend, by memorial, to the governors and legislatures of the several states, and, as representing the federal district, to the President and Congress, a careful examination and revision of the statutory and of so much of the common law, as relates to this crime. For we hold it to be "a thing deserving all hate and detestation, that a man in his very original, while he is framed, while he is enlived, should be put to death under the very hands and in the shop, of Nature."

In the belief that we have expressed the unanimous opinion of the Association, our report is respectfully submitted.

Horatio R. Storer, of Massachusetts
Hugh L. Hodge, of Pennsylvania
A. Lopez, of Alabama
William Henry Brisbane, of Wisconsin
Thomas W. Blatchford, of New York
Edward H. Barton, of South Carolina
Charles A. Pope, of Missouri
A. J. Semmes, of District of Columbia

Note: Pursuant to above report the American Medical Association on May 3, 1859, unanimously adopted the resolution prepared by the above committee, which resolution condemned "the act of producing abortion, at every period of gestation, except as necessary for preserving the life of either mother or child" and urged the legislatures of the various states to strengthen the laws against abortion and the various State Medical Societies to promote such changes in the law.

Senator EAST. I have happily been advised that we will not have to depart this room at 2. The word constantly changes around here, but it changed for the better this time. We can wind up our discussion here with you and turn to our final witness, the Honorable John Ashcroft, the attorney general of the State of Missouri.

Again, I wish to thank you panelists. I would like to pursue several points.

Dr. Boyle, I will confess as a layman in medicine that I am a little surprised that the American Medical Association, at least those who are involved in the statement you give, would take this position.

As a layman, I have always assumed that it is the responsibility of a doctor to care for the infirm and the sick. In other words, it is the role of healer and sustainer. I suppose that is why we have always respected doctors. As a profession, they are entrusted with the highest responsibility, namely to be the guardians of life, and invariably they are people of considerable talent and ability, and they are to bend their talents and abilities and professional skills to care for the sick and the infirm and to heal. It is that phrase, to heal, healing and life, that would most come to mind.

Am I wrong in that perception of the medical profession?

Dr. BOYLE. Certainly not, Senator. That has been the purpose of the professional lives of most physicians in this country and elsewhere in the world.

Senator EAST. Then I am troubled, doctor, when I think that you or some members of your professional organization are endorsing the idea of abortion upon demand as propounded in *Roe* v. *Wade* as a matter of convenience or perhaps stress.

I find under that rationale a heavy dilution of that very high standard of the promotion of healing and life. Correct?

Dr. BOYLE. No, sir. As a matter of fact, the position of the American Medical Association has never been for abortion on demand. The American Medical Association's policy adopted in 1970 reaffirmed in 1973 is that abortion is a medical procedure and it should be treated just as any other medical procedure, a decision made within the standards of good medical practice between the physician and patient. We do not condone an appendectomy on demand or any other such procedure.

That really was not the purpose of our testimony today. What we are concerned about is the impact of the adoption of this proposal, which would by legislative fiat create a person at the time of conception relying upon scientific evidence that this occurs, where in fact there is not that scientific evidence that one can cite. That is the purpose of the American Medical Association's position in being before you today.

Senator EAST. The AMA then, as I understand what you are saying, is opposed to abortion on demand. Hence, it would be supportive of a change in public policy regarding that point, and that your only quarrel is over this idea that life begins at the time of conception as a scientific matter. It is only on that narrow scientific point that you are objecting?

Dr. BOYLE. No, Senator. You are posing a number of questions that are not inherent in this legislation so far as I know it. We

have tried to point out to you some of the problems inherent in adopting such legislation.

The American Medical Association believes that the public policy that abortion is a medical procedure and should be treated as such within standards of medical practice is appropriate.

If there were some other parameters attached to this legislation or any other, we would be happy to consider those and come back, but we have tried to point out to you that what is contained in this legislation is one not supportable in scientific grounds and the genesis of future dilemmas of extraordinary magnitude.

Senator EAST. I see an inconsistency here, doctor. You do contend that your profession is committed to the idea of healing and life and marshalling all of your professional competence and ability to do that.

Yet the effect of your position here, unless you are offering us another remedy in terms of a constitutional amendment or some other approach, is to uphold a policy that has come by *Roe* v. *Wade*, which I am suggesting is inconsistent with a professional ethic of healing and life because the deliberate surgical technique of taking life after conception and prior to birth I find is a technique inconsistent with a professional ethic promoting healing and life. It is that inconsistency that I see in your position that I cannot reconcile.

Dr. BOYLE. Senator, first of all as far as the courts were concerned, we had nothing to do with that decision. That decision was made by the U.S. Supreme Court without the assistance of the American Medical Association.

In the decision it rendered, so far as we know, the Court did presuppose that the profession would exercise rational medical judgment.

There is another point to this. Prior to the time that there were any changes in State statutes with respect to abortion, prior to the time that the Supreme Court considered this matter and did render a decision, there were provisions in every State in the United States for medically induced abortion, called therapeutic abortions, under certain circumstances. These varied from one jurisdiction to another in their degree of narrowness or liberalness.

However, I do know in most States, in any instance in which there was serious threat to the life of the mother, a therapeutic abortion was legal. For example, in the State where I practice, at the time I went to practice there, abortion in a woman with even minimal to moderately advanced pulmonary tuberculosis was a therapeutically acceptable indication for abortion.

One cannot take any of these things out of context and start operating in a vacuum. As far as the medical profession is concerned, this is a medical procedure. That is the position that was taken by the American Medical Association not after just a few minutes of debate, but after a long discussion that goes back now nearly 20 years. That policy statement was adopted in 1970.

Senator EAST. Of course it is a medical procedure that results in the deliberate inflicting of harm and death. Again, to me it would seem to me to be inconsistent with that medical ethic of promoting life and healing.

If I might note Dr. Nathanson's observation here, I would think the abortion clinic as a facet of the medical profession would be an enormous embarrassment to it as a matter of professional ethics where it is certainly admitted without dispute that the purpose of the abortion clinic of the type and dimension that Dr. Nathanson describes is deliberately to inflict harm and death upon unborn life.

I do not wish to belabor the point. I am not suggesting you have not tried well. Maybe I am a little thick skulled on it, but I still see a profession that in effect is endorsing the abortion clinic as a legitimate dimension of its profession and in some way or other is losing that commitment to that great medical ethic to promote life and healing.

Dr. BOYLE. Senator, with all due respect, I do not know how you got from there to here. There is no way that the American medical——

Senator EAST. Let me explain again. I do not know how you got where you are.

Dr. BOYLE. I understand that.

Senator EAST. You are a medical doctor who has been trained and, I understand, accepted an oath to promote life and healing. Here you are commending a policy that deliberately promotes death and the infliction of death upon the unborn.

I will not ask for it, but I am sure I could get applause in this room on that statement, too.

I am simply saying you do not understand how I got where I am and I do not understand how you got where you are. That is what this debate is about.

Dr. BOYLE. What I was alluding to, Senator, is the American Medical Association has never condoned any abortion clinic. I do not know what Dr. Nathanson's problem was. I was not in that clinic. I do not know how they practiced medicine.

We do know that from time to time there are physicians who abuse their responsibilities and do abuse their commitments to their oaths and commitements to healing they have taken when they enter the profession. We do know that occurs.

However, we also know that in the vast majority of instances, physicians take their responsibilities very seriously, with good conscience, and the doctors who are engaged in the private practice of medicine in this country, who are counseling women who have serious problems and come to them, do try to reach what in their considered judgment are the best answers for those women and, in many instances, the best answer for the child or potential child the woman may be carrying.

Senator EAST. That sounds good, but as a practical matter is the AMA making an effort to show that the abortion clinics which are run by licensed gynecologists and obstetricians are outside the pale of your professional ethics? Are you working on that problem now?

It strikes me that there is a certain uneasiness about that and a certain glibness about it, suggesting, oh, well, of course we are not quite sure we like that either, but do not forget most physicians are not doing that.

I understand that, but these are licensed physicians, members of your profession, and members of your professional organization.

The effect, whether you want to admit it or not, of the policy position you are taking is to endorse that kind of activity, whether it is to fail to take up an ethical matter with them as a matter among professionals or whether it is to oppose some sort of response in terms of S. 158 or a constitutional amendment, or whatever sort of thing might be undertaken to regulate these abortion clinics.

I think the AMA, to the extent that you speak for its members as professionals, is in a very different position than I would have hoped to have found it in, and certainly one at odds with that which the organization was previously comfortable with.

Dr. BOYLE. Senator, with respect to the question you asked at the outset, is the American Medical Association doing anything about those practices which may be viewed as variant or outside what would be the norm of ordinary medical practice, I will respond to that.

First of all, the American Medical Association itself consists of a federation of component State societies. I can speak for what is going on in at least my State and I am quite confident in other States. Yes, we are engaged in active efforts to see to it that what could be considered practices outside the ordinary realm of good medical practice and medical ethics are scrutinized, and, where possible, something is done about it where it is within our jurisdiction.

Those practices where we identify them are reported to State boards of medical examiners, the people who have the licensing authority in various States, and to that jurisdiction where they have authority to prosecute what we consider practices to be beyond the law.

I can speak to that from personal experience being from California. The American Medical Association, through its federation, operates in that fashion.

Senator EAST. Am I not correct that a doctor who does run an abortion clinic, unless it were for reasons other than doing abortions, would not be subject to any sort of discipline from your profession? He would simply be doing what the law of *Roe* v. *Wade* allows him to do, and I gather the AMA is comfortable with that because you are here, in practical effect, upholding the policy of *Roe* v. *Wade*.

In the same breath, I gather you are not in any way going out and, as a matter of your own professional ethics, trying to change members of your profession who do run abortion clinics.

I sense a certain glibness about it, almost hoping this darn thing would blow away, but it seems to me there are some pretty hard questions here that physicians, of all people, ought to be answering for us with a little more clarity and precision than they are.

Again, as a layman, I am a little surprised to find them where they are on this one.

Dr. BOYLE. Senator, again, I do not know anything about a specific clinic, any other clinics than those that I have observed in our jurisdiction. I do not know what the problem is in a specific clinic you may be talking about.

Because a group of physicians may have as a matter of practice operated an outpatient department in which they are counseling

large numbers of women who have pregnancies at various stages, some in the course of normal deliveries or normal pregnancies, some in which abortion may become an issue or may be the determination within the law, does not necessarily make that bad medical practice.

There are instances in which it is bad medical practice for the manner in which such things are being conducted. Our association does encourage the State societies who have the authority to investigate these things to do so and to report them to the appropriate authorities. The State associations do that. If you would like, we could document that for you.

Senator EAST. I do not wish to pursue this beyond the point. I think we have both obviously communicated our points. Maybe each in his own way is not fully satisfied. I am obviously still in that category.

I would like to turn my attention here to Dr. Goldstein. Then I will let Senator Baucus come in.

Dr. Goldstein, I felt that Dr. Willke was persuasive. I am interested in getting your response. You are representing the American Psychiatric Association and it seems to me you are suggesting that life is dependent upon such vague things as stress.

Dr. Willke has pointed out that we hear there is the viability test that would determine whether life ought to be carried on. Then there is what I guess we might call the qualitative test here, whether the physicial or mental character of the unborn is up to a particular standard. Or one might look at the stress that the mother is enduring.

It is not to be insensitive to stress, but it is to query whether, or at least why, at this point in the continuum of life, life would be dependent upon a standard of that kind, yet at no other point in life would that be so. Aged parents cause great stress upon children. Retarded children and physically disabled children can cause stress, and indeed one might argue as someone was noting here a little while ago that perhaps normal teenagers create about as much stress as most people can handle from day to day.

I do not wish to exaggerate the point, but I wish to query. I personally feel, as I noted earlier, this may very well be the nub of the argument, as least as one person sees it, as I see it. That the right to life is dependent upon such vague, ephemeral things as that seems to me to do great violence to one of the great principles of the Western tradition, the centrality of the idea that the dignity of life, the sanctity of life is the cornerstone and other things have to yield to it.

In short, the dignity of life and the sanctity of life, that greatest thing we can have, is not subject to such vague elusive things as stress and unwantedness. You talk about unwantedness. Who does not want the child? God does not want it? Maybe there are adopting parents who would like to have it.

It seems to me it is an exception, but the exception simply becomes the rule. There is no longer any standard. It occurs to me that life is cheapened somewhat, Doctor. I known the intention is not to do that, but the very vagueness of the things you talk about, unwantedness, stress, is there not the possibility we cheapen life at its very conception?

As Mother Teresa has pointed out, if we cheapen it as that point, it is cheapened later when we kill one another. She was a parallel there. I am not suggesting you have to buy what she as done there. I though she made a rather telling and interesting point. I find it comfortable publicly to be on the same side with Mother Teresa on a number of issues, including this one.

Is there not a cheapening process that goes on there? Or are we off base on that one?

Dr. GOLDSTEIN. No one is off base in addressing the quality of life. I think psychiatry has a profound respect for life. I think that is what the profession is all about. We spend years and years trying to improve the quality of life, to respect life, the life of everybody to the extent that we can.

Psychiatrists are devoted to improving the quality of life. We try to treat people. We try to help them to function better, to feel better, to have an improved life style, and perhaps to make more mature decisions about themselves. Psychiatry has the deepest regard for the quality of life.

The question before us today is a very profound question. We are not talking about a little bit of stress. I am thinking of a woman who is raped. I think she should, for psychological as well as perhaps other reasons, have the right to choose whether she keeps the product of someone else's violence.

I respect the life of the fetus, but I also have respect for the woman against whom I think you would discriminate by depriving her of her right to choose. Then she becomes perhaps a patient for us, someone who needs our help, our guidance, or the counseling perhaps of other types of physicians or persons.

It is the respect for life that we are talking about today. I think I cannot say more than that, except that the psychiatrist respects it ultimately. That is what psychiatry is all about.

Senator EAST. I appreciate your remarks. Again, I shall cease and desist as I did with Dr. Boyle. It just occurs to me that there is an inherent problem here where you on the one hand say you have great respect for the dignity of life and the sanctity of life in one breath. Yet in the next breath, the life of the unborn is contingent upon such fleeting ephemeral things as the stress of others or whether they are perceived as being wanted.

I just query in my own mind—I do not mean to keep belaboring the point—whether one can have it both ways on that, whether one can say, yes, I believe life is sacred and fundamental and central and I am unequivocal about that, but in the next breath say at this point it will be dependent upon whether somebody else wants you to live and whether it is convenient, or they may feel stress and so on and so forth.

It seems to me you giveth with one hand and taketh away with the other. That is my trouble with my good brethen here from the AMA. One-half of the story is quite good and we shake hands on it. Then when I get the other half of the story, I see an inconsistency here.

Maybe my logic is faulty. There may be a good case for abortion. As I noted the other day, I just have not heard it yet in terms of abortion on demand as an acceptable practice in a society, as just another method of birth control. This law would allow the States to

take care of the many kinds of exceptions people have been talking about.

However, I want to get back to the fundamental problem. We can deal with the marginal problems. They are real. I am not minimizing them, but I am talking about the broad question of 1.5 million abortions in this country. One out of four pregnancies is aborted. That means an awful lot of well, alive, unborn children are destroyed in the name of convenience or stress or unwantedness, ad infinitum, ad nauseum.

I, for one person, as I said at the beginning of these hearings, find that morally repugnant. I am not suggesting I have an easy answer to it, but I find it morally repugnant and I am concerned that professional people who are most intimately involved with this do not share this uneasiness. You do in a sense, but yet ultimately in terms of the policy result you offer me, you do not. I am trying to get the two together.

We do agree that this is what is fundamental and important and we do agree that this policy position would achieve that end. I do not find *Roe* v. *Wade* achieving the policy end of upholding the sanctity and dignity of life at all levels in the continuum and not being subject or contingent to such casual things as stress, wantedness, whatever it might be.

The hour presses on. I am going to let my good friend and colleague come into the ring here.

Senator BAUCUS. Thank you, Mr. Chairman.

Unfortunately, I am late to another meeting, but I want to thank Dr. Boyle and Dr. Goldstein for coming and giving their statements, as well as Dr. Nathanson and Dr. Willke.

It is very helpful for members of the medical profession to give us their views. I know it has been difficult for some of you to come. I appreciate the statements very much.

I think to a large degree, Mr. Chairman, the questions I might ask would be going over old ground. I therefore will not take up the time of the committee. I simply wanted to thank the panel. They have been very helpful to us.

Senator EAST. Thank you, Senator.

I, too, wish to thank the witnesses. We do have one final witness today. We thank you folks for coming. I would appreciate it if our final witness, Mr. John Ashcroft, would come forward.

Mr. Ashcroft received his bachelor of arts degree from Yale University and his doctor of jurisprudence from the University of Chicago. He presently serves as the attorney general of the State of Missouri, having previously served as State auditor in that State.

Mr. Ashcroft, we appreciate your coming and welcome you here this afternoon.

## STATEMENT OF JOHN ASHCROFT, ATTORNEY GENERAL OF THE STATE OF MISSOURI

Mr. ASHCROFT. Thank you, Senator East.

I want to thank this committee for inviting me to share my views on this important issue. It should be clear that on this occasion I speak for myself and not for the National Association of Attorneys General for which I serve as president-elect.

Both now and in my first term as attorney general, I have devoted considerable time and significant resources to defending the right of the State to limit the dangerous impacts of *Roe* v. *Wade*, a case in which a handful of men on the Supreme Court arbitrarily amended the Constitution and overturned the laws of 50 States relating to abortions.

The views that I express here today are my own deeply held beliefs. Nevertheless, enactment of Senate bill 158, which is now being considered by this subcommittee, would obviate the need for much burdensome litigation in which the State is currently seeking to establish its ability to protect the health and well-being of its citizens.

CONSTITUTIONALITY OF S. 158

I have read with great interest a number of the transcripts of testimony of those who have preceded me in this forum. In my view, the legal testimony has been comprised largely of inordinately overconfident conclusions rather than objective analysis of legal probabilities.

It generally admits little or no uncertainty. In short, it has tended toward advocacy rather than advice. The presentations seem to be more suited to the Supreme Court than to the Senate.

The essential flaw in this sort of testimony reflects an analytic misperception of the function of the forum of the Congress. It in mates that a final decision regarding the suggested unconstitutio..ality of this bill should be determined here rather than in the courts.

I believe that such arguments themselves confuse the proper function. Whether *Katzenbach* v. *Morgan* is good law or bad, whether the human life bill would be required to clear the thresholds of its majority opinion or both the dissenting and majority opinions, or whether the 14th amendment alone is sufficient as an invitation of Congress to become active in this arena should be decided ultimately by the Court.

The only way we could impair legally the opportunity of the Court to rule on this issue would be for us to decide that the mere raising of questions about the constitutionality of this bill should result in its early demise. Whether this bill is healthy enough to survive constitutional challenge can only be determined by the courts in the proper discharge of its reponsibilities. I urge the Congress to pass the bill and allow the courts to make that decision.

I noted an additional dozen constitutional law professors' comments regarding the constitutionality of the bill were to be admitted to the record today. I think that is indicative of the fact that there is ample legal authority to support the constitutionality.

As the chief lawyer in a law office that maintains a steady open caseload of about 5,000 cases, I am prepared to say that there is more than ample precedential legal and policy support for the courts to uphold this bill. Certainly dozens of other issues have been resolved by the Supreme Court on legal grounds only fractionally as sound or as strong as the legal policy, reasoning, and precedent supporting this bill. *Roe* v. *Wade* is a prime example of

the courts' ability to make a decision with far less legal authority than exists in support of this item.

Maybe the ivory tower provides comfort of certainty more frequently than the law office. Suffice it to say that a court desirous of reversing the error-ridden decision of *Roe* v. *Wade* is accorded so many logical, well-established paths by the human life bill that certainty of this bill's alleged unconstitutionality is totally unwise.

Since 1973, the Missouri legislature has been active in enacting laws relating to abortions. I have been in Federal court regularly attempting to defend the State's efforts to require parental consent, to require that certain abortions take place in medical facilities, to limit State funding to abortions provided for in the Hyde amendment, and to establish the State's right to terminate the parental rights of individuals whose efforts to kill the unborn child resulted in a live child rather than a dead fetus.

Incidentally, George Will reports a graphic example of the live child versus dead fetus potential in this week's edition of Newsweek where he relates:

> A woman in her second trimester in Phoenix was injected with a saline solution and sent home. Three nights later she went into labor and was told to go to the hospital to deliver the fetus, dead of course. Instead, she delivered a live girl.

## LIKELY EFFECT OF S. 158

I think the important legal question for us to address today is what would happen in the event that Senate bill 158 was passed? I think it is important to strip away the hysteria which some people have attempted to drape around this bill.

It is my view that the human life bill would largely place States in a position of again being able to regulate abortions as they did prior to 1973 and the *Roe* v. *Wade* decision. Clearly, the bill would mandate that the unborn child is entitled to due process constitutional protection which would limit the ability of States to provide abortions.

However, in the private sector, I believe the bill would otherwise allow considerable latitude to the 50 States in their approaches. It is for this reason that I would regard this bill as an important but insufficient step in the protection of human life. I personally have an opinion and belief that the human life amendment would remain necessary to gain and to provide protection for unborn Americans.

A wide variety of State approaches to the question would result from the human life bill. Obviously, I do not believe that Senate bill 158 would mandate a substantially prolife statutory framework in each State. Rather, it would accord to the States the option of fashioning regulations, if they chose any, of dealing with the issue.

Prior to *Roe* v. *Wade* in 1973 in my State, there was a wide variety of State laws relating to abortion. We had a law which specified that aborting a child subjected a person to a manslaughter charge, but there was a clearly maintained exception for cases in which the mother's life was in danger. It is important to note that exception.

While the State viewed the unborn child as a person, it properly assigned greater value to the postnatal life than to the prenatal one in the unlikely but possible event that the two lives were

mutually inconsistent. Obviously, even equal protection considerations have long allowed this kind of rational preferential treatment for postnatal life.

It is essential to understand that the human life bill makes no reference whatever to the equal protection clause. While it is arguable that there might be court-imposed equal protection ramifications and considerations, it is clear that they would be solely the product of the judicial branch and not a result of the legislation. Indeed, currently we are urging the courts in any number of cases that they are considering to decide that equal protection does in fact belong to unborn children.

### ENFORCEMENT OF S. 158

This committee, as well as the public generally, has been subjected to a campaign of calculated hysteria, a parade of potential horrors regarding the possibility of improvident enforcement if S. 158 were to be passed, enforcement of either new laws or old laws which would be revived if the Supreme Court were to abate its decision of *Roe* v. *Wade*.

Improvident enforcement was simply not the case in the real life situation where the pre-1973 laws were enacted and enforced on the State level. Women who were themselves the covictims of the abortion process were not the targets of the law. They never have been. The abortionist was. In my judgment, the pre-1973 experience is the best evidence of the enforcement response which could be expected upon passage of the bill.

The Missouri law which outlawed abortions focused the criminal penalty on the abortionist for the death of "quick child." The phrase "quick child" had been legally defined by case law as a child that the woman felt or imagined she felt in her uterus. Thus, rather than target the woman for punishment, Missouri law required her cooperation for prosecution. Absent her testimony about the nature of the pregnancy, proof of an essential fact was difficult at best.

Similarly, the suggestion that routine unwarranted, illegal searches and seizures would take place to determine if there had been a pregnancy, and, second, if an illegal abortion had taken place is utterly foolhardy. The factual history of the rational, orderly enforcement of State laws prior to 1973 suggests absolutely nothing of the kind. There is no reason to believe that safeguards protecting personal integrity generally would be nonexistent relating to State laws regulating abortions.

As a matter of fact, I would expect the courts to be very careful to protect the individual rights of integrity of persons from irrational, illegal searches and seizures in this area with the same diligence they do in other areas of the law.

### PROBLEMS ADDRESSED BY S. 158

The cold, hard history currently unfolding in an abortion-prone America stands in contrast to the imagined and fabricated ills forecast by some opponents of this bill. In one case litigated in my office, a young woman testified to the tragic consequences of her encounter with the abortion industry.

Under oath, she related that she returned to a so-called clinic at which she had earlier undergone an abortion. This visit, she testified, was only to determine if she were again pregnant, convinced that she could never endure another abortion.

According to the clinic nurses, the tests were positive. When she resisted their immediate urging for an abortion, they called other officials from the clinic to urge the teenager to undergo a second abortion.

Only with the most courageous resistance was the young woman able to leave the clinic without undergoing surgery for a second time. The ironic conclusion of her testimony was that a subsequent visit to her doctor revealed no pregnancy at all.

In my view, the human life bill is a beginning. It is not something that will bring down upon the heads of the American population an onerous plague of unworkable legal problems or even of medical problems.

It shocked me this morning to hear the representative of the American Medical Association say that it would be impossible to use diagnostic techniques because there were predictable fatalities in the use of the diagnostic techniques. Almost every diagnostic technique I know of, especially those involving serious problems with the heart and brain, have predictable mortality tables and they are used by the medical profession readily on individuals who are deemed as persons by the U.S. Supreme Court.

The mere fact that we would add fetuses that they currently characterize as nonpersons to the class of individuals that is protected by the Constitution should not eliminate our ability to provide health and healing to those individuals.

The human life bill is a beginning. It is a step in the right direction of protecting unborn children. It carries few guarantees because it does not really purport to make the rules. It purports to authorize States to enact statutes and enforce them, regulating a wide variety of laws which would come into existence.

While the constitutionality of the human life bill has been questioned, it has with ample authority been supported. The history of abortion law enforcement law in America before 1973 belies any threat of improvident enforcement if authority and responsibility for regulating abortions is once again recognized in the States. The Congress should pass this bill promptly.

I was asked by my fellow attorney general from Utah, David Wilkinson, to submit an addendum to his testimony which he rendered earlier before this committee. I have made copies of that addendum available to the committee staff when I came.

I want to thank you for inviting me.

[The addendum, referred to above, submitted by Mr. Ashcroft follows:]

84-581 O—81——71

THE ATTORNEY GENERAL

STATE OF UTAH
STATE CAPITOL · SALT LAKE CITY 84114
(801) 533-5261

DAVID L. WILKINSON
ATTORNEY GENERAL
PAUL M. TINKER
DEPUTY ATTORNEY GENERAL

June 16, 1981

Members of the Separation of
Powers Subcommittee
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Attention: John P. East, Chairman

Honorable Senators:

On June 12, 1981, I testified before this distinguished subcommittee on the assigned subject of what the Legislature of my State would do if S. 158 were enacted.

My testimony was the subject of a UPI wire story written by Wesley Pippert, presumably of UPI's Washington office.[1] That wire story was picked up by three of Utah's four major newspapers. A copy of the Salt Lake Tribune article based on the wire story is attached hereto. I have compared the actual UPI wire story with the attached Tribune article and the Tribune article tracks almost verbatim that part of the wire story beginning with its thirteenth paragraph.

I submit this addendum to my previously submitted written testimony because the UPI story displays such an appalling misunderstanding of the basic thrust of what S. 158 would do as well as of the thrust of my testimony as to make me wonder if any media representative covering the hearing has grasped the most elementary concepts of the Bill.[2]

The UPI story labors under the misconception that S. 158 would prohibit at least most abortions. It reports me as saying the bill "should permit abortions for victims of rape or incest." Of course the Bill would not prohibit any abortions; it would merely allow states to do so if they should choose. My testimony was not that the states which chose to prohibit abortions pursuant to S. 158 should permit exceptions in the case of rape or incest; my testimony was only that if S. 158 passed each state would then be free to outlaw all abortions, or, if it chose, to prohibit all abortions except those necessary to save the mother's life, and, if the state also chose, except in the case of rape and/or incest. It is at this point that UPI, the Washington Star, and the subcommittee's ranking minority member betrayed their ignorance of two fundamental, and separate, concepts in the United States Constitution. Senator Baucus asked in effect how could a state law be upheld when it prohibited the taking of fetal life in one case (the garden variety abor-

---

[1] Salt Lake Tribune, Deseret News, Ogden Standard Examiner. The Provo Herald did not run the UPI wire story.

[2] Certain Judy Bachrach, reporter for the Washington Star, whose coverage of the June 12th hearing appeared in the June 15th Star, does not understand the basic concept embodied in the Equal Protection Clause.

tion for convenience) but allowed it in another (incest or rape). The simple answer--which I had already gone over in my formal testimony--is that the Equal Protection Clause allows the law to treat similar situations differently where there is a rational reason for the differing treatment. As stated clearly in my written submission, the Equal Protection Clause does not impose an absolute standard. Where the Due Process Clause comes in--and Senator Baucus was clearly confused on this point--is that given a state law which prohibits abortion on demand because a fetus is a person under the Fourteenth Amendment, yet allows abortion in the case of rape or incest, there must be procedural safeguards to ensure that abortion is justified by:

(1) a bona fide rape or incest with trauma to the mother; and

(2) an objective finding that the mother's interests outweigh the fetal interest in life under these particular circumstances.

Of course, the rape and incest area is one of the most difficult issues in the abortion controversy, and my point remains merely that under S. 158, states could make an exception consistent with the Fourteenth Amendment. I do not know whether states would do so, and I am not prepared to argue that they should do so.

The UPI story also reported that I lent "strong support" for S. 158. If Mr. Pippert was asleep when I said that I took no position on whether S. 158 or the Human Life Amendment was preferable to reverse Roe v. Wade, he could have found that in my prepared testimony.

The UPI story is also disturbing in that the first twelve paragraphs thereof cover the testimony of "four liberal theologians." It says nothing about the testimony of Robert A. Destro of the Catholic League for Religious and Civil Rights. Destro's testimony, of course, directly contradicted that of the four "theologians."

I realize that abortion is a highly complex and controversial issue. It is disillusioning to me as a lawyer that the only print media coverage of your June 12th hearing was either blatantly biased or intellectually dishonest, resulting in part, perhaps, from the distressingly confused questioning of Senator Baucus.[3]

Very truly yours,

David L. Wilkinson

DLW/bc

DAVID L. WILKINSON
Attorney General

encl.

---

3 In addition, Senator Baucus questioned the power of Congress to define when life begins in the absence of an express request of Congress by the Court in Roe v. Wade to do so. Roe v. Wade, of course, dealt with a Texas statute. It is absurd to suggest that the United States Supreme Court in interpreting a state statute should digress in the middle of its opinion to expressly ask Congress for guidance. As to the power of Congress to provide a definition, Congress' power to enforce the Fourteenth Amendment is ample.

[From the Salt Lake Tribune, Saturday, June 13, 1981]

WILKINSON CHALLENGED ON ABORTION STANCE

WASHINGTON (UPI).—Montana Sen. Max Baucus challenged Utah Attorney General David Wilkinson, a backer of a human life bill, by asking him during a Senate hearing Friday why he would save most fetuses—but not those resulting from rape or incest.

The dialogue was one of the sharpest of the Senate Judiciary Separation of Powers Subcommittee's lengthy hearings on the bill defining human life as beginning at conception.

ASKS REASON

Wilkinson expressed strong support for the bill, but said it should permit abortions for victims of rape or incest.

If a fetus is a person, why should unborn children resulting from rape or incest not have their lives protected? replied Baucus, the panel's ranking Democrat and a backer of free choice in the abortion issue.

"In fetal life, you have competing interests of the mother and the fetus. Both are human life," Wilkinson replied.

"Are some people's lives protected and other human lives are not?" Baucus asked, amid some laughter in the crowded hearing.

GREAT DIFFERENCE

"There's a great difference between fetal life and non-fetal life," Wilkinson said.

"Between people and people?" Baucus persisted.

Finally Chairman John East, R-N.C., came to Wilkinson's rescue.

"A state weights the relative value in terms of the uniqueness of a pregnancy arising out of rape or incest and makes the judgment that the nature of the pregnancy, the conception, is such a repulsive and revolting act that the whole process is tainted, and they would allow for an abortion," he said.

NOT ABSOLUTE RIGHT

"Life under the due process clause, under which the fetus would be protected, has never been an absolute right," East said.

Four liberal theologians expressed opposition to the bill, whose effect would be to outlaw most abortions by treating the unborn child as a person entitled to due process of law under the 14th Amendment.

"The passage of the bill now under consideration would result in writing into law the most extreme position of one group of religious persons and the denial of views held with equal force by other religious persons," said William P. Thompson, stated clerk of the United Presbyterian Church.

The bill under consideration would outflank the Supreme Court's 1973 landmark decision legalizing the procedure.

EMBRACE MEASURE

Anti-abortionists, who previously wanted a constitutional amendment, have embraced the measure as an easier way to outlaw abortion, which they liken to murder.

But those who maintain a woman should have the right to decide whether to continue a pregnancy argue the definition is ill-conceived and unsubstantiated.

The hearings on the human life bill began in April.

They will conclude next Thursday with testimony from pro choice witnesses, including Sarah Weddington, daughter of a Texas Methodist minister and the lawyer who successfully argued the 1973 case before the high court.

Senator EAST. Thank you, Mr. Ashcroft. I appreciate your testimony. Coming from an attorney general of a State, it is particularly valuable.

As we come to the end of these hearings, I would like to say that you have raised points that at least I, as one supporter of this measure, would like to underscore. We have had difficulty doing it throughout the hearings either because much of the reporting on the bill was done casually, or else it was done perhaps intentionally in some very limited and rare cases to obscure the issue.

However, it was not uncommon to hear it said in the media that this bill would make abortion murder and that a woman could be charged with murder, that the bill would in fact do that. I was several times introduced on television as supporting a bill that would do that. That simply is not true.

Either it is said in ignorance or it is said intentionally to confuse, but either way, the result is the same: To give the public out there the impression that something horrendous is being done.

It was also common to hear it said that it would forbid all birth-control devices and it would forbid IUD's. The chamber of horrors went on and on and on.

I find your testimony extremely valuable to underscore once again that none of that is true. This bill, and please correct me if you see it otherwise from your vantage point as an attorney general with a distinguished legal background, is simply designed to take advantage of an invitation offered by the majority opinion in *Roe* v. *Wade* as to when life begins. They said they could not determine that as a judicial body. Hence, they, out of wholly new cloth, developed this idea of the right of privacy, but they suggested in the majority opinion that if they knew when life began, they would have come to a different result.

We have accepted that invitation in S. 158 to determine when life begins. As one Senator would argue, the evidence is incontrovertible. Life begins at the time of conception. Some may say that ought not to dictate the abortion policy. So be it. However, to deny that life begins at that point is, as I noted earlier, like denying the Earth is round because you are troubled with the implications of admitting it is round.

I feel many people are troubled with the implication of admitting that life begins at conception. Therefore, they must deny, as I said, the Earth is round.

However, this bill is simply trying to accept that tacit invitation of *Roe* v. *Wade* to determine when life begins. Under its own majority opinion, the Court implied that if that were the case, the result would be changed. We are now allowing the Court to reconsider that initial determination. Under their own definition, if they so determine our finding was legitimate, they would change and reverse *Roe* v. *Wade*. That is a very modest thing that this bill does.

The second thing it would do as I understand it—and I would like for you to corroborate this—is it would then return the question of determining abortion law and policy to the States subject to the provision that State action would have to be consistent with the due process clause of the 14th amendment as is true for State action involving all other persons.

That would leave, as you have indicated, the various States considerable latitude in developing their own abortion policy. You indicated that prior to *Roe* v. *Wade* they had not done incredibly foolish things. There is no reason to believe that subsequent to *Roe* v. *Wade* or subsequent to S. 158 they would do reckless and foolish things.

Prior to 1973, a woman was never charged with murder. Neither was the abortionist. He was perhaps charged with some felony, low-

level felony or high-level misdemeanor, but not murder. So it would go.

The States could make what reasonable exceptions they might see fit in this area and develop their own abortion policy. However, what it would require them to do is, unless there were a compelling and overriding State interest, they could not take the life of the unborn as they cannot take the life of any other person within the meaning of the due process clause. They cannot now take your life and mine without a compelling State interest. They could not take the life of the unborn without a compelling State interest.

I would like to make it clear for the record, as I understand it—I have studied this thing, I like to think, as carefully as anybody on this subcommittee and I have been here for every minute of every session—that the notion it would do otherwise is untrue, again whether it is deliberately so stated or whether it is done out of rank ignorance, of which there is a considerable amount on this bill in the media generally, bless their hearts.

I think the value of your testimony is to establish that we could anticipate State action in this area based upon what they had previously done and what the good judgment of the legislatures of those States would now choose to do, again consistent with the due process clause of the 14th amendment as interpreted by the U.S. Supreme Court. Ultimately, there is always that cap left on.

Not to oversimplify, but is that where you see we are? If you see it otherwise or see flaws in it, perhaps something ought to be added to it. I am not trying to force you into a posture of saying, yes, that is exactly where we are.

As the chairman of this subcommittee and as the man who has been carrying a lot of water on this thing since day 1, I want the record to show that I understand the results of this bill are consistent with human reason and sanity. It is not rooted in lunacy, or fanaticism, or Ayatollah Khomeinism, and it has been said that I was a Cotton Mather by people who do not have the slightest idea who Cotton Mather was. I used to teach American political thought and he was not a half bad fellow, although he got off the deep end now and then.

This bill does not reflect that kind of approach. It seems to me as you have been saying, Mr. Attorney General, as far as responses go, this is a very modest response to the challenge offered by *Roe* v. *Wade*.

Appreciating the great difficulties they bear, I do regret the inability of some parts of the media to convey more accurately what the proponents of this measure say it will do and what it will not do. There is no question about it. If that kind of confusion and misconception is allowed to continue on unchecked—I cannot check it because I do not control the media—no wonder the American people would be deeply troubled about what in the world are their Senators doing up here?

I can assure them, if they are listening and if there is some way or other this can break through, that we are not doing that. You have been misinformed by people who meant well but who did not know what they were talking about.

I look upon you as being a valuable part of trying to break through that heavy crust. You said yourself that you have seen it

out there. You have been out there in Missouri and you have come in here now.

Yes, I have seen it, too. I have seen it from a unique position that no one else can fully appreciate. However, I have been able to sustain my own confidence in this because I felt I knew what I was doing. I felt I knew what the law was doing. I knew the people out there in this country who supported me knew that is what we were doing. We were not fools, knaves, lunatics. We were people genuinely concerned about a legitimate problem and trying to find some practical and reasonable solution to it.

This has been a great baptism of fire. I have learned the enormous power of the media to present the issue as they wished it to be presented. It has been an enormously difficult task to get the story out fairly and straight from all sides so that people might weigh it and look at it and decide and inform their Representatives and Senators what they think.

I had hoped and wished and believed erroneously at the beginning of this that that would be possible, but it has not been. We are dependent upon, I guess, the public generally, who have a disdain for looking into this matter and seeing whether maybe we are on to some practical solution here.

As you say, this may not be the answer ultimately. It might be that a constitutional amendment would have to be considered, but I would like to feel the purpose of this effort has been to begin. We now have a forum here to begin a serious and responsible and intelligent national dialog on this issue. We will do it, I feel, if we continue to press ahead.

I would hope at some point the media would find a way to present the pros and cons in a rational way and not so becloud this thing that people dismiss it out of hand as the work of people who have not the slightest idea of what they are doing.

They have not destroyed my confidence in myself or in the process. They have simply told me we have an infinitely greater job than I thought because we have not had the opportunity, except here, to get our case out. Beyond this room, it has been very difficult.

I appreciate your coming. I have talked too long, but as the chairman of this subcommittee who has traveled full road from the first day to now, I did want to put in that final comment.

I would like for you to add any additional thoughts you would like to make in terms of the impact and import of this bill because finally it will rise or fall on an accurate understanding of what the bill would or would not do.

Mr. ASHCROFT. Thank you very much.

Just to sum up, I believe we do not need to go into the world of speculation to find out what would happen in the event the bill were passed. I think we have a hundred years or so of solid history. That history tells us that we are not really opening a box of horror. We are opening to the American people the same potential which they exercised in a very rational, restrained, and thoughtful way for a hundred years. I do not believe the people have changed sufficiently to belie that experience.

I believe the bill ought to be passed and its passage would result in a very reasoned approach by the American public. Perhaps I go

further than you do. I do not believe the bill to be adequate because I think we would, if we are to protect human life, have to pass the human life amendment. That is a side issue. This bill would not go to that extent.

Senator EAST. You look upon this bill, as least to the extent that it goes as far as it does, as a reasonable, prudent, and responsible measure?

Mr. ASHCROFT. An appropriate first step, yes.

Senator EAST. As a first step, an interim step.

Mr. ASHCROFT. Yes, sir.

Senator EAST. You are simply saying that you would want to reserve the right to look at other options and consider the need to go beyond this interim step. Is that where you feel we are on this measure?

Mr. ASHCROFT. That is exactly correct.

Senator EAST. I thank you very much, Mr. Ashcroft.

I thank everyone for their attention.

We will stand adjourned.

[The subcommittee adjourned at 2:55 p.m.]

[A printed copy of S. 158 in original form and a revised version follow:]

97TH CONGRESS
1ST SESSION

# S. 158

To provide that human life shall be deemed to exist from conception.

---

IN THE SENATE OF THE UNITED STATES

JANUARY 19 (legislative day, JANUARY 5), 1981

Mr. HELMS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

# A BILL

To provide that human life shall be deemed to exist from conception.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That title 42 of the United States Code shall be amended at the end thereof by adding the following new chapter:

"CHAPTER 101

"SECTION 1. The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception.

"The Congress further finds that the fourteenth amendment to the Constitution of the United States was intended to protect all human beings.

"Upon the basis of these findings, and in the exercise of the powers of the Congress, including its power under section 5 of the fourteenth amendment to the Constitution of the United States, the Congress hereby declares that for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, human life shall be deemed to exist from conception, without regard to race, sex, age, health, defect, or condition of dependency; and for this purpose 'person' shall include all human life as defined herein.

"SEC. 2. Notwithstanding any other provision of law, no inferior Federal court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in any case involving or arising from any State law or municipal ordinance that (1) protects the rights of human persons between conception and birth, or (2) prohibits, limits, or regulates (a) the performance of abortions or (b) the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions.

"SEC. 3. If any provision of this Act or the application thereof to any person or circumstance is judicially determined to be invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected by such determination.".

# [COMMITTEE PRINT]

JULY 15, 1981

97TH CONGRESS
1ST SESSION

# S. 158

To provide that human life shall be deemed to exist from conception.

---

IN THE SENATE OF THE UNITED STATES

JANUARY 19 (legislative day, JANUARY 5), 1981

Mr. HELMS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

[Strike out all after the title and insert the part printed in italic]

---

# A BILL

To provide that human life shall be deemed to exist from conception.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

~~That title 42 of the United States Code shall be amended at the end thereof by adding the following new chapter:~~

~~"CHAPTER 101~~

~~"SECTION 1. The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception.~~

"The Congress further finds that the fourteenth amendment to the Constitution of the United States was intended to protect all human beings.

"Upon the basis of these findings, and in the exercise of the powers of the Congress, including its power under section 5 of the fourteenth amendment to the Constitution of the United States, the Congress hereby declares that for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, human life shall be deemed to exist from conception, without regard to race, sex, age, health, defect, or condition of dependency; and for this purpose 'person' shall include all human life as defined herein.

"SEC. 2. Notwithstanding any other provision of law, no inferior Federal court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in any case involving or arising from any State law or municipal ordinance that (1) protects the rights of human persons between conception and birth, or (2) prohibits, limits, or regulates (a) the performance of abortions or (b) the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions.

~~"SEC. 3. If any provision of this Act or the application thereof to any person or circumstance is judicially determined to be invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected by such determination.".~~

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 42 of the United States Code shall be amended at the end thereof by adding the following new chapter:*

***"CHAPTER 101***

*"SECTION 1. (a) The Congress finds that the life of each human being begins at conception.*

*(b) The Congress further finds that the fourteenth amendment to the Constitution of the United States protects all human beings.*

*"SEC. 2. Upon the basis of these findings, and in the exercise of the powers of Congress, including its power under section 5 of the fourteenth amendment to the Constitution of the United States, the Congress hereby recognizes that for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, each human life exists from conception, without regard to race, sex, age, health, defect, or condition of dependency, and for this purpose 'person' includes all human beings.*

*"SEC. 3. Congress further recognizes that each State has a compelling interest, independent of the status of unborn children under the fourteenth amendment, in protecting the lives of those within the State's jurisdiction whom the State rationally regards as human beings.*

*"SEC. 4. Notwithstanding any other provision of law, no inferior Federal court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in any case involving or arising from any State law or municipal ordinance that (1) protects the rights of human persons between conception and birth, or (2) prohibits, limits, or regulates (a) the performance of abortions or (b) the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions: Provided, That nothing in this section shall deprive the Supreme Court of the United States of the authority to render appropriate relief in any case.*

*"SEC. 5. Any party may appeal to the Supreme Court of the United States from an interlocutory or final judgment, decree, or order of any court of the United States regarding the enforcement of this Act, or of any State law or municipal ordinance that protects the rights of human beings between conception and birth, or which adjudicates the constitutional-*

*ity of this Act, or of any such law or ordinance. The Supreme Court shall advance on its docket and expedite the disposition of any such appeal.*

*"SEC. 6. If any provision of this Act or the application thereof to any person or circumstance is judicially determined to be invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected by such determination.".*

○